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The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co.

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INTERNATIONAL DECISIONS

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KIOBEL V. ROYAL DUTCH PETROLEUM CO.: THE SUPREME COURT AND THE ALIEN TORT STATUTE

The U.S. Supreme Court has finally decided *Kiobel v. Royal Dutch Petroleum Co.*[1] It is the Court's second modern decision applying the cryptic Alien Tort Statute (ATS), which was enacted in 1789.[2] Since the 1980 court of appeals decision in *Filartiga v. Pena-Irala*[3] permitting a wide of range human rights cases to go forward under the statute's auspices, the ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the United States.[4] The statute itself and the decisions that it generates also serve as state practice that might contribute to the developing customary international law of civil universal jurisdiction, immunity for defendants in human rights cases, the duties of corporations, and the right to a remedy for violations of fundamental human rights.[5] During the 1990s, the ATS became the focal point for academic disputes about the status of customary international law as federal common law.[6] Indeed, to the extent that the "culture wars" have played out in U.S. foreign relations law, the ATS has been their center of gravity.[7]

The *Kiobel* decision was slow to arrive, in part because the Court took the unusual step of putting the case over from one Term to the next so that it could order supplemental briefing and a second oral argument on the statute's extraterritorial application.[8] Certiorari had been

[1] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

[2] The statute reads: "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." 28 U.S.C. §1350 (2006).

[3] 630 F.2d 876 (2d Cir. 1980).

[4] *See* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008).

[5] *See* Jones v. Saudi Arabia [2006] UKHL 26, [13]–[14] (appeal taken from Eng.) (Lord Bingham); *id.* at [38]–[39] (Lord Hoffmann); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AJIL 142, 146–49, 153–54 (2006); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 802–09 (2002); Jane Wright, *Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit*, 30 OXFORD J. LEGAL STUD. 143, 160–62 (2010); *cf.* Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, para. 30, UN Doc. A/HRC/4/35 (Feb. 19, 2007).

[6] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

[7] *See, e.g.*, David J. Bederman, *International Law Advocacy and Its Discontents*, 2 CHI. J. INT'L L. 475 (2001).

[8] Kiobel v. Royal Dutch Petroleum Co., 132 S.Ct. 1738 (2012) (mem.) (restoring case to active docket).

granted in 2011 to consider whether corporations could be liable under the ATS. The initial round of briefing focused on that issue, which had generated a split among circuit courts.[9]

But the decision seemed overdue for another reason as well. After more than thirty years of extensive high-profile litigation along with sustained academic commentary, a large and seemingly ever-growing number of basic questions about the statute still remained unanswered. These questions included not only the amenability of corporations to suit and the statute's extraterritorial application, but also the potential immunity of individual defendants,[10] the appropriate deference to afford the U.S. government as to the statute's interpretation and case-by-case application,[11] the existence and scope of an exhaustion requirement,[12] the application of the *forum non conveniens* doctrine,[13] the viability of aiding and abetting claims,[14] the source of applicable law,[15] and the statute's purpose and substantive scope.[16] The Court's first modern ATS case, *Sosa v. Alvarez-Machain*,[17] clarified that the ATS permitted federal common law claims based on contemporary customary international law norms of requisite specificity and universality, but this standard itself generated uncertainty,[18] and the opinion explicitly left open issues of deference and exhaustion.[19] As lower courts and litigants hacked their way through a thickening jungle of unresolved ATS issues, clarification from Congress or the Supreme Court felt long overdue.[20]

[9] Kiobel v. Royal Dutch Petroleum Co., 132 S.Ct. 472 (2011) (mem.) (granting certiorari); *see also* Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated,* 133 S.Ct. 1995 (2013) (mem.); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011).

[10] *See, e.g.*, Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012), *petition for certiorari filed*, 81 USLW 3503 (Mar. 04, 2013) (NO. 12-1078, 12A707).

[11] *See Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1193–94, 1196–99 (2009).

[12] Sarei v. Rio Tinto, *supra* note 9; Sarei v. Rio Tinto, PLC, 550 F.3d 822, 825–26 (9th Cir. 2008) (en banc). In the 2013 memorandum decision in *Rio Tinto*, 133 S.Ct. 1995, the Supreme Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of its decision in *Kiobel.*

[13] *Compare* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103–06 (2d Cir. 2000) (*forum non conveniens* disfavored in ATS cases), *with* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Petroleum (No. 10-1491), *supra* note 1, at 25 n.13 (explicitly disagreeing with the Second Circuit's analysis in *Wiwa*).

[14] *See* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 21 (arguing that some aiding and abetting liability claims should not go forward under the ATS).

[15] *Compare* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 284–92 (2d Cir. 2007) (Hall, J.), *aff'd sub nom due to lack of a quorum*, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (mens rea for aiding and abetting supplied by federal common law), *with* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (mens rea supplied by customary international law). *See also* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008).

[16] *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 641–42 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AJIL 461 (1989); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

[17] 542 U.S. 692 (2004).

[18] *Compare* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (holding that claims of cruel, inhuman, and degrading treatment do not meet the *Sosa* test), *with In re* S. African Apartheid Litig., 617 F.Supp.2d 228, 253–55 (S.D.N.Y. 2009) (holding to the contrary). *See also* Aldana v. Del Monte Fresh Produce, N.A., Inc., 452 F.3d 1284, 1284 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc).

[19] Sosa v. Alvarez-Machain, 542 U.S. at 724–25, 733 n.21; *see also id.* at 761 (Breyer, J., concurring in part and concurring in the judgment); Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004); *cf. id.* at 714 (Scalia, J., concurring). *But see id.* at 733–38 (Kennedy, J., dissenting).

[20] The Court appeared poised to consider the ATS in a 2008 case raising issues of deference to the executive branch and of aiding and abetting liability, but it lacked a quorum. Khulumani v. Barclay Nat'l Bank Ltd., *supra* note 15. Congress codified some claims that had been brought under the ATS by creating a federal cause of action

The Court's *Kiobel* decision definitively resolved one important question: the presumption against extraterritoriality applies to the ATS.[21] On the facts of the case—the relevant conduct took place within the territory of a foreign sovereign, the claims did not "touch and concern" U.S. territory, and the foreign defendants had no more than a "corporate presence" in the United States—the Court held that the presumption was not overcome.[22] Although four justices disagreed about the invocation of the presumption, the Court was unanimous in deciding that the claims lacked sufficient connection with the United States. The plaintiffs lost 9 to 0.

Going forward, if courts apply a strong version of the presumption and only permit claims based on conduct in the United States allegedly in violation of a norm of international law that meets the *Sosa* standard, then ATS litigation as we know it today is effectively dead, as some commentators have already predicted.[23] Other commentators assert, however, that the *Kiobel* presumption is not that robust.[24] In particular, it is unclear whether conduct in the United States that aids and abets an egregious violation of international law elsewhere is actionable after *Kiobel*, and whether the aiding and abetting conduct itself would have to meet the *Sosa* standard for specificity and universality. As such issues are litigated in the lower courts, ATS cases will become even less certain, at least in the short term. Some of the unresolved ATS questions may take a back seat as the courts interpret *Kiobel*, but other questions, such as those concerning the purpose of the statute and appropriate level of deference to the executive branch, may assume even greater significance.

The first part of this International Decision discusses the *Kiobel* case and analyzes its potential significance for ATS litigation. Parts II and III analyze the *Kiobel* opinion in terms of separation of powers and the development and enforcement of customary international law.

I. WHAT REMAINS OF THE ALIEN TORT STATUTE?

Background: ATS Litigation and Kiobel

Kiobel arose out of conduct that took place in Ogoniland, Nigeria, an oil-rich region of the Niger delta. During the early 1990s, residents of Ogoniland protested the environmental effects of oil extraction, including gas flares and the construction of pipelines. The Nigerian government attempted to quell the unrest, sometimes violently, and in 1994, several Ogoni leaders were murdered. Nine Ogoni were sentenced to death for the murders in a 1995 trial that was widely viewed as lacking basic procedural protections. Among those sentenced to

for torture and extrajudicial killing. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, sec. 2, 106 Stat. 73 (1992). The statute does not apply to corporations. Mohamad v. Palestinian Auth.,132 S.Ct. 1702 (2012).

[21] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1668–69.

[22] *Id.* at 1669.

[23] *See* Roger Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS, Apr. 17, 2013, *at* http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/; *see also* Curtis A. Bradley, *Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries*, ASIL INSIGHTS (Apr. 18, 2013), *at* http://www.asil.org/insights130418.cfm. Several commentators have predicted that future ATS-type claims will be brought in state courts or under state law. *See* Christopher A. Whytock, Trey E. Childress & Mike Ramsey, *After* Kiobel*: Human Rights Litigation in State Courts and Under State Law*, U.C. IRVINE L. REV. (forthcoming 2013) (evaluating the viability of such claims).

[24] *See* Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013), *at* http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/.

death and subsequently executed was Ken Saro-Wiwa, an author and outspoken leader of the Ogoni. His quickly became a cause célèbre.

Events in Ogoniland provided the basis for several lawsuits filed in the United States against an individual and entities related to the corporation now known as Royal Dutch Shell.[25] These cases include *Kiobel.* The complaint alleged that Royal Dutch Petroleum Company (incorporated in the Netherlands), Shell Transport and Trading Company (incorporated in England), and Shell Petroleum Development Company of Nigeria (incorporated in Nigeria) aided and abetted the Nigerian military in committing extrajudicial killing, torture, crimes against humanity, and other human rights violations. The plaintiffs, including Esther Kiobel, whose husband was one of the men sentenced to death and executed in 1995, now live in the United States, where they have been granted political asylum.[26]

When it was filed in 2002, the *Kiobel* case reflected broad changes in ATS litigation. Early cases, like *Filartiga* itself, were generally brought by public interest organizations against individual defendants, frequently former government officials with few resources. Beginning in the mid-1990s, however, ATS litigation focused increasingly on corporate defendants such as Barclay National Bank, Chevron, Del Monte, Ford, IBM, Rio Tinto, Talisman Energy, and Unocal, all of whom allegedly aided and abetted foreign governments' human rights violations such as slave labor, extraordinary rendition, apartheid, war crimes, and torture.[27] Major law firms represented these deep-pocket defendants, and plaintiffs were sometimes represented by private, for-profit lawyers working on a contingency fee. The cases increased dramatically in their scope and complexity. Suits against corporate defendants also caused concern about ATS litigation within the U.S. Department of State, especially under the George W. Bush administration. The government began to advocate for the dismissal of many suits (including some against individuals)[28] based on the presumption against extraterritoriality, foreign policy considerations, and the rejection of aiding and abetting liability.[29]

The Supreme Court itself limited the scope of the ATS in the 2004 *Sosa* decision.[30] That case was brought by a Mexican doctor against a Mexican citizen based on an abduction that took place in Mexico at the instigation of the U.S. Drug Enforcement Agency.[31] In *Sosa*, the

[25] *See generally 1980s to the New Millennium, at* http://www.shell.com/global/aboutshell/who-we-are/our-history/1980s-to-new-century.html. Other lawsuits included *Wiwa v. Shell Petroleum, Wiwa v. Anderson,* and *Wiwa v. Shell Petroleum Dev. Co. of Nigeria.* These cases settled in 2009. *See* Settlement Agreement and Mutual Release, *available at* http://ccrjustice.org/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf.

[26] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1662–63.

[27] *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., *supra* note 15; Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, *supra* note 18; *Settlement in Principle Reached in Unocal Case,* EARTHRIGHTS INT'L, Dec. 13, 2004, *at* http://www.earthrights.org/content/view/104/62/; Peter Spiro, *Chevron Wins ATS Case. Will Corporations Fight, Not Settle?,* OPINIO JURIS (Dec. 2, 2008), *at* http://opiniojuris.org/2008/12/02/chevron-wins-ats-case-will-corporations-fight-not-settle/. Occasional cases are brought against corporations based on primary rather than secondary liability. *See* Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

[28] *See, e.g.*, Brief of United States as Respondent Supporting Petitioner at 46–50, Sosa v. Alvarez-Machain (No. 03-339), *supra* note 17.

[29] *See, e.g., id.*; Brief for the United States as Amicus Curiae at 5–12, Presbyterian Church v. Talisman Energy Inc., 582 F.3d 244 (2d Cir. 2009) (No. 07-0016); Brief for the United States as Amicus Curiae at 2–3, Khulumani v. Barclay Nat'l Bank Ltd. (Nos. 05-2141, 05-2326), *supra* note 15; Brief for the United States as Amicus Curiae at 4, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); *see generally* Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration,* 33 BROOK. J. INT'L L. 773 (2008).

[30] Sosa v. Alvarez-Machain, *supra* note 17.

[31] *Id.* at 697–99.

Court held that a contemporary ATS claim must "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" of piracy, safe conducts, and assaults against ambassadors.[32] The *Sosa* opinion urged "judicial caution" in recognizing ATS causes of action, in part based on concerns about their potential impact on U.S. foreign relations.[33] Alvarez-Machain's claims of arbitrary arrest and detention were rejected because the Court was not convinced that they violated sufficiently specific binding norms of customary international law.[34]

The district court in *Kiobel* dismissed some claims, such as forced exile, because they did not meet the *Sosa* test.[35] It also dismissed the Nigerian corporation from the case for lack of personal jurisdiction.[36] Although the Dutch and UK defendants had also raised personal jurisdiction defenses in their answers to the complaint, they did not pursue these arguments, probably because the Court of Appeals for the Second Circuit had previously held (in a different ATS case) that the federal courts in New York had general jurisdiction over them based on their offices in New York City.[37] In its *Kiobel* decision a three-judge panel of the Second Circuit reasoned that corporations could not be held liable under the ATS, and it accordingly dismissed the case over a strong dissent from Judge Leval.[38] The Second Circuit then denied the petition for rehearing en banc by a 5-5 vote.[39]

The 2011 grant of certiorari by the Supreme Court was not surprising in light of this division within the Second Circuit itself and the split between that circuit and other circuits on the question of corporate liability under the ATS.[40] Moreover, although the Supreme Court had lacked a quorum in the South African apartheid cases,[41] in *Kiobel* none of the justices recused themselves, perhaps making it an attractive case in which to consider the ATS. On the same day as the *Kiobel* grant of certiorari, the Court also granted certiorari in a Torture Victim Protection Act[42] (TVPA) case raising questions of corporate liability, affording the Court the opportunity to consider this issue under both statutes in the same Term.[43]

[32] *Id.* at 725, 731–32.

[33] *Id.* at 727–28.

[34] *Id.* at 736–37.

[35] 456 F.Supp.2d 457, 464 (2006), *aff'd in part, rev'd in part*, 621 F.3d 111 (2nd Cir. 2010), *aff'd*, 133 S.Ct. 1659 (2013).

[36] Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618 (KMW) (HBP), 2010 WL 2507025 (S.D.N.Y. June 21, 2010).

[37] *See* Wiwa v. Royal Dutch Petroleum Co., *supra* note 13. Some justices in *Kiobel* appeared to question whether the personal jurisdiction by the New York courts over the Dutch and UK defendants would pass constitutional muster. *See* Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1678 (Breyer, J., concurring in the judgment). The Court has subsequently granted certiorari in another ATS case based on general personal jurisdiction, but this time the defendant has the preserved the argument. DaimlerChrysler, A.G. v. Bauman, 133 S.Ct. 1995 (2013) (mem.) (granting certiorari).

[38] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S.Ct. 1659 (2013).

[39] Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 379 (2d Cir. 2011).

[40] This split intensified after the plaintiffs petitioned for a writ of certiorari. *See* Flomo v. Firestone Natural Rubber Co., *supra* note 9; Sarei v. Rio Tinto, *supra* note 9; Doe v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011)

[41] *See* Linda Greenhouse, *Conflicts for Justices Halt Apartheid Appeal*, N.Y. TIMES, May 13, 2008, at A14.

[42] *See supra* note 20.

[43] Mohamad v. Palestinian Auth., *supra* note 20. The questions of corporate liability in *Kiobel* and *Mohamad* reached the Court at a time when many observers described its decisions as favoring corporations. *See Corporations and the Court*, ECONOMIST, June 25, 2011, at 75.

The first round of *Kiobel* briefing in the Supreme Court focused on corporate liability. At the first oral argument in February 2012, however, the statute's application to conduct outside the United States was discussed extensively.[44] The Court thereafter directed supplemental briefing on "[w]hether and under what circumstances the [ATS] 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."[45] The briefing attracted the input of many amici, including the governments of Argentina, Germany, the Netherlands, the United Kingdom, and the United States, as well as the European Commission, scholars, nonprofit organizations, and corporations.

The Majority Opinion and Justice Alito's Concurrence

Chief Justice Roberts wrote the Court's opinion for a five-justice majority, holding that the presumption against extraterritoriality applied to the ATS and that it mandated dismissal of the case. Based on the "perception that Congress ordinarily legislates with respect to domestic, not foreign matters,"[46] the presumption prevents conflicts between the United States and foreign sovereigns that might result from the application of U.S. statutes to conduct abroad.[47] It applies to statutes that "give[] no clear indication of an extraterritorial application."[48]

Most recently, in the 2010 case *Morrison v. National Australia Bank, Ltd.*,[49] the Court had applied the presumption to the Securities Exchange Act. Some of the alleged fraud in that case took place in the United States, and the U.S. government argued that the presumption should not apply. The Court ordered dismissal, however, because the securities had been bought and sold on foreign securities exchanges.

The Securities Exchange Act and other statutes to which the presumption applies differ from the ATS in some potentially relevant respects, as both the petitioners and Justice Breyer's concurrence point out.[50] Most of the majority's opinion is spent explaining why the presumption nevertheless applies. First, the Supreme Court held in *Sosa* and reaffirmed in *Kiobel* that the ATS is a "purely jurisdictional" statute that does not directly regulate conduct. Instead, it delegates to federal courts the power to recognize causes of action based on customary international law.[51] The *Kiobel* majority also acknowledged that the presumption against extraterritoriality is not jurisdictional but is, instead, a substantive or "merits" determination that heretofore has been applied to statutes that prohibit specific conduct without language indicating extraterritorial application.[52] Petitioners therefore maintained that, since the language

[44] Transcript of Oral Argument at 6–13, Kiobel v. Royal Dutch Petroleum Co. (No. 10-1491), *supra* note 1 (oral argument of Paul Hoffman on behalf of the petitioners on February 28, 2012).

[45] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1663 (quoting Kiobel v. Royal Dutch Petroleum Co., *supra* note 8).

[46] *Id.* at 1672 (Breyer, J., concurring in the judgment) (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869, 2877 (2010)).

[47] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[48] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1664 (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. at 2878).

[49] 130 S.Ct. 2869.

[50] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1672 (Breyer, J., concurring in the judgment).

[51] Sosa v. Alvarez-Machain, *supra* note 17, at 714, 724–25; Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1664.

[52] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1664.

of the ATS is jurisdictional and does not directly regulate conduct, the presumption did not apply.[53] The *Kiobel* majority rejected this argument, however, reasoning that "danger of unwarranted judicial interference in the conduct of foreign policy" is heightened, not diminished, in the ATS context "because the question is not what Congress has done but instead what courts may do."[54]

Second, Justice Breyer emphasized that since the ATS is explicitly designed to provide redress to aliens for violations of international law, it arguably does govern foreign matters.[55] The *Kiobel* majority disagreed as a textual matter, however, because tortious conduct against aliens in violation of international law can occur within U.S. territory.[56] Indeed, the historical basis for the statute (as understood in *Sosa*) includes some "notorious episodes" that took place in the United States.[57]

Third, *Sosa* had apparently interpreted the ATS as providing redress for piracy, an application of the statute to conduct outside the United States, which suggests that the presumption does not apply because, as the majority acknowledged, the "Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application."[58] In response, the majority focused again on the potential foreign policy consequences of the ATS, which are less pronounced for piracy because, it reasoned, this offense occurs on the high seas rather than "within the territorial jurisdiction of another sovereign."[59]

The majority opinion concluded its discussion of the presumption by pointing out that, if the Court interpreted the ATS as providing a "cause of action for conduct occurring in the territory of another sovereign," the decision could result in "diplomatic strife" and open up the possibility that foreign nations might "hale our citizens" into their courts for conduct occurring in the United States.[60] The presumption ensures that such risks are taken by the political branches, not the courts—a recurring theme of the majority opinion—and one that is discussed at more length in part II, below.

Finally, in a short paragraph the Court applied the presumption to the facts in *Kiobel.* Following *Morrison*, all the Court *needed* to say was that the conduct that generates the cause of action (and thus was the focus of congressional concern) took place neither in the United States nor on the high seas (like piracy, which the Court seemed to accept as an ATS violation).[61] Indeed, Justice Alito (joined by Justice Thomas) wrote separately to underscore this point: relying on *Morrison*, he argued that unless the conduct that violates international law and gives rise to the cause of action under the *Sosa* standard took place in the United States, the presumption bars the suit.[62] Full stop. But Chief Justice Roberts added two additional considerations—

[53] Petitioners' Supplemental Opening Brief at 34, 2012 WL 2096960, Kiobel v. Royal Dutch Petroleum Co. (No. 10–1491), *supra* note 1.

[54] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1664.

[55] *Id.* at 1671–72 (Breyer, J., concurring in the judgment).

[56] *Id.* at 1665 (majority opinion).

[57] *Id.* at 1666–67.

[58] *Id.* at 1667.

[59] *Id.* Justice Breyer disagreed with this conclusion, reasoning that piracy takes place aboard vessels that are equivalent to the sovereign territory of their home country. *Id.* at 1672 (Breyer, J., concurring in the judgment).

[60] *Id.* at 1668–69 (majority opinion).

[61] *Id.* at 1667.

[62] *Id.* at 1669–70 (Alito, J., concurring).

prompting the Alito/Thomas concurrence to lament that the majority "obviously leaves much unanswered."[63]

This closing paragraph of the majority opinion reasoned that if the "claims" "touch and concern the territory of the United States," they must do so with "sufficient force" to displace the presumption, language that may suggest "touch and concern" with "sufficient force" means something *less* than domestic conduct that violates international law under the *Sosa* test. Otherwise, why not just write the latter and avoid the Alito/Thomas concurrence? Examples of claims involving conduct within the United States that might satisfy Chief Justice Robert's language but not the Alito/Thomas concurrence could include the design, manufacture, or testing of products;[64] supervision or management;[65] financing;[66] or providing a "safe harbor" within the United States to alleged perpetrators of acts abroad.[67] Other possibilities might include conduct elsewhere that was intended to have an impact in the United States,[68] conduct in territory under the control of the United States, or conduct in a "failed state" that may not qualify as a foreign sovereign.[69] The last example involves conduct outside the United States but not necessarily within the territory of a foreign sovereign, making it arguably akin to piracy. Although the Court appeared to accept piracy-based ATS claims, the Chief Justice also reasoned that the "pirates may well be a category unto themselves,"[70] perhaps suggesting that the ATS would not reach other violations of international law occurring outside the territory of any foreign sovereign.[71]

The Court's next sentence added a second consideration. It reasoned that corporations are often "present" in many countries, so this "presence" alone is not enough to displace the presumption. Again, this language appears unnecessary unless some other kind of presence might suffice, such as the physical presence of individual defendants or the incorporation of legal entities under domestic state law.[72] To be sure, the Court did not decide that such cases *could* go

[63] *Id.* at 1669.

[64] *See, e.g., In re* S. African Apartheid Litig., 346 F.Supp.2d 538, 545 (2004) ("the South African police shot demonstrators 'from cars driven by Daimler–Benz engines,' [and] the regime tracked the whereabouts of African individuals on IBM computers") (citation omitted).

[65] *See, e.g.*, Sosa v. Alvarez-Machain, *supra* note 17, at 698 ("[T]he [Drug Enforcement Agency] approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.")

[66] *See, e.g., In re* S. African Apartheid Litig., 346 F.Supp.2d at 545 (alleging that the apartheid-era government of South Africa "received needed capital and favorable terms of repayment of loans from defendant banks").

[67] *See* Roger Alford, Kiobel *Insta-Symposium: Degrees of Territoriality*, OPINIO JURIS (Apr. 22, 2013), *at* http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality/(listing examples); *In re* S. African Apartheid Litig., *supra* note 18.

[68] *See, e.g.*, Magnifico v. Villanueva, 783 F.Supp.2d 1217 (S.D. Fla. 2011) (alleging fraud and human trafficking in the Philippines designed to bring forced laborers to the United States).

[69] *See, e.g.*, Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) (alleging that human rights abuses took place in Abu Ghraib prison, Iraq, when it was under the complete control of the United States); Yousuf v. Samantar, *supra* note 10 (alleging conduct that took place in Somalia, which is sometimes described as a "failed state").

[70] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1667.

[71] The majority opinion later reasons that the ATS should not interpreted to "provide a cause of action for conduct occurring in the territory of another sovereign." *Id.* at 1669.

[72] *See* William S. Dodge, Kiobel *Insta-Symposium: The Pyrrhic Victory of the Bush Administration Position in* Kiobel, OPINIO JURIS, Apr. 23, 2013, *at* http://opiniojuris.org/2013/04/23/kiobel-insta-symposiumthe-pyrrhic-

forward; it merely left the possibility open, perhaps because the Court could not agree or did not wish to resolve more than it had to in this case. The Court did not directly address the question on which it originally granted certiorari—corporate liability under the ATS—but the opinions arguably assume the viability of ATS suits against corporations.

Not surprisingly, these ambiguities in the majority opinion have already generated spirited commentary on what *Kiobel* will mean for future ATS cases. The blogospheric spin is well under way.[73]

Justice Kennedy's Concurrence

Justice Kennedy's short concurrence in *Kiobel* may establish him as the "swing vote" in future ATS cases, as he is in so many other profoundly contested areas of law. Justices Alito and Thomas lamented the Court's "narrow approach," but Justice Kennedy celebrated it: "The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition."[74] The last paragraph of the chief justice's opinion seems specifically written to keep Justice Kennedy's vote and thereby ensure a majority.

Justice Kennedy's opinion goes on to note that with the TVPA, Congress has created a "detailed statutory scheme" to address some human rights abuses committed abroad.[75] His fourth and final sentence says that other cases "with allegations of serious violations of international law principles protecting persons" may arise that are not covered by the TVPA or by the "reasoning or holding of today's case."[76] Those disputes may require "some further elaboration and explanation" as to the "proper implementation of the presumption."[77]

The last sentence of Justice Kennedy's opinion, like the first, suggests that the ambiguity in the last paragraph of the majority opinion was not accidental, nor was it manufactured through wishful thinking by the plaintiffs' bar. Although it seems clear that Justice Kennedy would not go as far as Justices Alito and Thomas in foreclosing future ATS cases, on its face Justice Kennedy's opinion merely states that issues are left open—not that he would ultimately resolve them in one way or another. The opinion seems carefully crafted to reveal little more than the author's openness to persuasion from either side in future cases.

Justice Kennedy's reference to the TVPA as a "detailed statutory scheme" is interesting because the ATS most certainly is not. It is, instead, an open-ended delegation of common law–making power to the federal courts, although the history of the statute and concerns about federal common law led the *Sosa* Court to construe the delegation narrowly. Even the Court's narrowing in *Sosa* had unavoidable elements of common law reasoning, for it interpreted the 1789

victory-of-the-bush-administration-position-in-kiobel/ (noting that the Court's language on corporate presence "should send chills down the spines of corporations domiciled in the United States (and their general counsels)").

[73] *Compare* Hathaway, *supra* note 24, *with* Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (and What That Can Tell Us About How to Read* Kiobel*)*, SCOTUSBLOG (Apr. 19, 2013), *at* http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/.

[74] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1669 (Kennedy, J., concurring).

[75] *Id.*

[76] *Id.*

[77] *Id.*

statute in light of *Erie*,[78] the modern reluctance to infer private rights of action, and contemporary developments in customary international law.

If there is a statutory analog to the ATS, perhaps it is the Sherman Act, which delegates broad discretion to the federal courts to develop the substantive rules of antitrust.[79] The presumption against extraterritoriality applies to the Sherman Act, too, or at least it did at one time. Indeed, the most famous U.S. case applying the presumption is an antitrust case: *American Banana v. United Fruit Co.*, which dismissed a suit between two U.S. companies based on anticompetitive conduct abroad.[80] Moreover, one of the reasons for the presumption is to prevent international strife,[81] and in "almost no other area has the extraterritorial application of U.S. law sparked as much protest from other nations as it has in the area of antitrust."[82] Yet the presumption is not applied today to the Sherman Act, based apparently on the Court's understanding that the purpose of the statute could not be realized if it applied only to conduct in the United States.[83] Because the presumption goes to the substantive reach of the statute, it follows that a significant delegation of substantive lawmaking power by Congress to the courts (an unusual feature of both the Sherman Act and the ATS) also includes a delegation with respect to the "proper implementation of the presumption" (to use Justice Kennedy's language), thereby enabling courts to ensure that the statute's goals are achieved. The Sherman Act analogy supports this claim, and nothing in the Court's opinion in *Kiobel* is explicitly to the contrary.

The purpose of the ATS is contested, however, as already noted. One academic view, consistent with much of the majority's opinion, holds that the statute provided a remedy for violations of international law for which the United States could otherwise be held responsible, including injury to foreign officials that occurred in the United States.[84] In light of the historical record, this view is plausible, but the text of the ATS itself is not limited in this way. Justice Breyer understands the statute as an effort to avoid a "safe harbor" for those who violate international law and to provide redress for those injured by "today's pirates"—in part because international law imposed a duty on states not to give pirates safe harbor.[85] Interestingly, the majority opinion does not explicitly reject Justice Breyer's historical understanding, but it does emphasize that the historical context is not enough to displace the general application of the presumption.

[78] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[79] *See* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 429–30 (2008).

[80] Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[81] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1669; *see generally* John Knox, *A Presumption Against Extrajurisdictionality*, 104 AJIL 35, 379–88 (2010) (discussing the purposes of the presumption).

[82] William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 99 (1998).

[83] In *Hartford Fire Ins. Co. v. California*, Justice Souter noted the *American Banana* cases but then said without explanation that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. 764, 795–96 (1993); *see also id.* at 814 (Scalia, J., dissenting) (stating that the presumption has been "overcome" in Sherman Act litigation and citing earlier decisions of the Court and the Second Circuit). Even when the Court declines to apply the Sherman Act to conduct abroad, it does not do so based on the presumption. *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004). Today, amendments to the Sherman Act may make its extraterritorial application clear, but the Court had already ruled that the statute applied extraterritorially in *Hartford Fire Ins. Co.*

[84] *See supra* text accompanying notes 56–57.

[85] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1672–74 (Breyer, J., concurring in the judgment).

There is an even broader historical narrative, however—one that was suggested by *Sosa*'s reference to prize litigation.[86] As a weak nation at the end of the eighteenth century, the United States not only sought to avoid violating international law (although it certainly did that)[87] but also affirmatively benefited from a strong *overall* system of international law with robust enforcement mechanisms, including the law of neutrality as implemented by prize courts.[88] To put the point in the context of piracy, as a weak naval power that profited greatly from commercial shipping, the United States had a strong interest in the judicial enforcement of laws against piracy in courts around the world,[89] as it also did with regard to other norms of international law. Unfortunately, the text and history of the ATS do not give much guidance in selecting among plausible accounts of its purpose. Thus, implementing the presumption to effectuate the purposes of the statute will not resolve all uncertainty around the statute's application, but it might convince some justices not to apply the presumption as broadly as Justice Alito's opinion and the *Morrison* precedent suggest.

Justice Breyer's Concurrence

Justice Breyer, writing for himself and Justices Ginsburg, Sotomayor, and Kagan, concurred in the Court's judgment but disagreed with its reasoning. Justice Breyer thought the presumption inapplicable, citing the text of the statute and its application to piracy, as discussed above.[90] Instead of the presumption, Justice Breyer would look to "international jurisdictional norms" to determine the jurisdictional reach of the ATS, in combination with *Sosa*'s concern about generating friction.[91] According to Justice Breyer, this analysis entails that the statute applies when the alleged tort occurred "on American soil," when the defendant is an American national, or when "the defendant's conduct substantially and adversely affects an important American national interest." American interests include preventing torturers and other "common enem[ies] of mankind" from finding a "safe harbor" in the United States.[92]

The interpretation of the ATS endorsed by Justice Breyer would allow cases like *Filartiga* and *Marcos*, in which the defendants had taken up residence in the United States, to go forward.[93] The *Sosa* opinion cited these two cases with approval,[94] a consideration that might

[86] The historical record suggests that the ATS covered neither prize nor piracy, *see* Lee, *supra* note 16, at 866–68, but the point here is that for the same reason that prize and piracy were actionable in federal courts, the United States as a weak nation generally had a strong interest in the creation and enforcement of international law, as it could not depend on force alone to achieve its foreign policy objectives.

[87] *Cf.* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1668 (citing Bradley, *supra* note 16, at 641–42).

[88] JOHN FABIAN WITT, LINCOLN'S CODE (2012).

[89] *See* FRANK LAMBERT, THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD 6–7 (2005).

[90] *See supra* text accompanying note 59.

[91] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1673 (Breyer, J., concurring in the judgment).

[92] *Id.* at 1671.

[93] Filartiga v. Pena-Irala, *supra* note 3, at 878–79 (2nd Cir. 1980) (noting that Pena-Irala had sold his house Paraguay and came to the United States with his partner; the couple resided in the Brooklyn until their tourist visa expired and they were deported); *In re* Marcos Litigation, 25 F.3d 1467, 1469 (9th Cir. 1994) (noting that Marcos had fled the Philippines for Hawaii in 1986, where he was subsequently sued).

[94] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1675 (Breyer, J., concurring in the judgment) (citing Sosa v. Alvarez-Machain, *supra* note 17, at 732).

matter for justices especially concerned with stability and consistency from the Court.[95] Although the TVPA now provides a cause of action for the precise conduct at issue in *Filartiga*, some justices (including Kennedy) hinted at oral argument that they might be unwilling to rule inconsistently with that case.[96] The facts of *Kiobel* did not satisfy Justice Breyer's test, however, as the defendants' only connection to the United States was a New York office owned by an affiliated company that helped attract capital investors.[97] Justice Breyer did not embrace universal civil jurisdiction, despite his concurring opinion in *Sosa*, which appeared to adopt that doctrine. This issue is addressed in more detail in part III.

II. *KIOBEL* AND SEPARATION OF POWERS

The *Kiobel* decision's ultimate impact on ATS litigation may be determined in part by the views of the executive branch.[98] The Court stressed that the "political branches" and not the courts should make the foreign policy judgment involved in applying the statute to "conduct occurring in the territory of another sovereign."[99] It is unclear, however, whether the Court was referring only to Congress and its legislative capacity or meant to include the executive branch's use of amicus briefs and statements of interest. In future litigation the issue is most likely to arise (at least in the short term) by the government arguing that a particular case or class of cases should go forward under the ATS despite the presumption. If the upshot of *Kiobel* is a desire to shift decision making to a politically accountable actor with greater expertise in foreign affairs, then deferring to the executive branch is consistent with the presumption. However, if the point of the presumption is to leave decision making with Congress, as some language in *Kiobel* suggests,[100] then there is little basis for deferring to the executive. The Court has suggested in *Sosa* and *Altmann* that the executive might receive case-by-case deference,[101] and Justice Breyer mentioned this possibility more than once in his concurring opinion in *Kiobel*.[102] The issue of deference to the executive came up at oral argument in *Kiobel*, and in the end the

[95] *Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55, 142 (2005). Fealty to *Sosa* probably explains why the Court persisted in the view that the ATS applies to piracy, even while conceding that piracy made application of the presumption less clear. The respondents had argued that piracy does not come within the ATS, *see* Transcript of Oral Argument, *supra* note 44, at 23–26 (oral argument of Kathleen Sullivan on behalf of respondents on October 1, 2012), and there is historical support for that position. *See* Lee, *supra* note 16, at 866–68.

[96] Transcript of Oral Argument, *supra* note 44, at 23–24, 37 (oral argument of Kathleen M. Sullivan on behalf of respondents on October 1, 2012).

[97] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1667 (Breyer, J., concurring in the judgment).

[98] The issue can arise in two postures. First, there might be a direct conflict between the presumption (no extraterritorial application) and the views of the executive (apply the statute extraterritorially); this kind of conflict has been discussed extensively by academics but has not been resolved by courts. Second, the executive may submit its views on whether the presumption applies at all or is overcome on the facts of the case.

[99] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1668–69 (2013).

[100] *Id.* at 1664, 1666, 1668 (referring to the views of Congress).

[101] Sosa v. Alvarez-Machain, *supra* note 17, at 733 n.21 (2004) (noting a "strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *id.* at 761 (Breyer, J., concurring in part and concurring in the judgment); Republic of Austria v. Altmann, *supra* note 19, at 701–02 (similar). *But see id.* at 735–36 (Breyer, J., dissenting).

[102] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1671, 1674, 1677 (Breyer, J. concurring in the judgment).

Court did not defer to the government's argument opposing the application of the presumption to the ATS.[103]

The following subsections analyze the deference due to the executive branch on a case-by-case basis and on the general principles governing the application and scope of the presumption.[104] It considers doctrine and theory, as well as the significance of the government's change in position from administration to administration.

Doctrine

The U.S. government argued that the presumption against extraterritoriality should not apply to the ATS.[105] This interpretation is not entitled to *Chevron* deference[106] because the ATS does not delegate any sort of authority to the executive branch, nor is this interpretation binding on the courts as a result of the president's constitutionally based lawmaking power.[107] At the oral argument in *Kiobel*, the solicitor general said the executive branch's position was entitled only to "persuasiveness" deference.[108] This low level of deference to the executive's views on general interpretive principles for the ATS is in keeping with the Court's recent cases on the presumption against extraterritoriality.[109] It is also consistent with the Court's refusal to defer to the executive's views on the general interpretation of statutes and common law doctrines dealing with foreign relations.[110] More broadly, empirical evidence shows that "persuasiveness" or "consultative deference"—in which the Court does not invoke one of the doctrinal

[103] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 3 (arguing that "canons of statutory construction, such as the presumption against extraterritorial application of an Act of Congress" are "not directly applicable" in ATS cases).

[104] To illustrate this distinction, courts might defer on a case-specific basis (for example, "this case against IBM based on its conduct in South Africa does not threaten U.S. foreign relations or foreign policy"), or they might defer on more general principles (for example, "cases against U.S. nationals should go forward, even if based on conduct abroad"). *See* Republic of Austria v. Altmann, 541 U.S. at 701–03 (giving the government's views on statutory interpretation "no special deference" but suggesting that deference might be afforded to the State Department's "opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct"). Deference on more general principles is like the deference sought by the executive branch on the applicability of the presumption. Notice that general principles advocated by the executive in one case might be inconsistent with case-specific deference in another.

[105] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 3, 15–22.

[106] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *cf.* Republic of Austria v. Altmann, 541 U.S. at 701–02.

[107] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420–21 (2003); *see also* Lewis S. Yelin, *Head of State Immunity as Sole Executive Branch Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911 (2011).

[108] *See* Transcript of Oral Argument, *supra* note 44, at 44 (oral argument by General Donald B. Verrilli for the United States as amicus curiae, supporting respondents on October 1, 2012); *see also* Republic of Austria v. Altmann, 541 U.S. at 701–02 (views of the U.S. government as to the interpretation of Foreign Sovereign Immunities Act, *see infra* note 126, are "of considerable interest to the Court," but "they merit no special deference"); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680 (2000) (suggesting that "persuasiveness deference" is appropriate in ATS cases).

[109] The government also opposed the presumption and lost in *Morrison v. Nat'l Austl. Bank Ltd.*, *supra* note 46, *see* Paul B. Stephan, Morrison v. Nat'l Australia Bank, Ltd.: *The Supreme Court Rejects Extraterritoriality*, ASIL INSIGHTS (Aug. 2, 2010), and in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). It unsuccessfully advocated for the presumption in *Sosa*, *supra* note 19, and in *Rasul v. Bush*, 542 U.S. 466 (2004). Cases in which the Court has agreed with the executive include *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), *Smith v. United States*, 507 U.S. 197 (1993), and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).

[110] Republic of Austria v. Altmann, 541 U.S. at 701–03; W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400 (1990).

deference regimes but still seems to at least consider the views of the agency in question—is a common form of deference.[111] Apparently even more common, however, are cases in which the agency makes some sort of finding or submission that the Court effectively ignores.[112] That is what happened in *Kiobel.*

The "case-by-case" deference mentioned favorably in *Altmann* and *Sosa* apparently refers to something stronger than persuasiveness deference, but it has no obvious doctrinal home.[113] As other scholars have put it, the law is "peculiarly" unsettled about the basis for deference to the executive branch in foreign relations cases.[114] Again, neither *Chevron* nor executive lawmaking deference applies, and some scholars emphasize that deference is inconsistent with the judiciary's constitutional function of resolving cases. Moreover, in the act-of-state context—another area of federal common law pertaining to foreign affairs and international law—the Court has rejected various balancing tests and forms of case-by-case deference in favor of across-the-board determinations about the applicability of the doctrine.[115] The act-of-state decisions would generally suggest that the Court should apply the presumption against extraterritoriality without affording the government any particular deference. Also worth noting is that Justice Kennedy's dissenting opinion in *Altmann* strongly disagreed with the majority's reference to case-by-case deference in the immunity context,[116] which suggests that his (potentially dispositive) vote in ATS cases may afford little deference of any sort to the government. In lower courts, review of ATS cases over the past decades suggests that they are applying something like persuasiveness deference to case-by-case submissions about the foreign relations impact of particular cases.[117] The Court's language in *Altmann* and *Sosa*, however, may have led to greater deference to the executive branch in more recent litigation.[118] Finally, in other contexts, scholars have noted the diminishing utility of doctrines involving multiple deference categories.[119]

In short, it is a doctrinal mess.

[111] *See* William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1111–15 (2008).

[112] *Id.* at 1117, 1119 (noting that in 53.6 percent of cases surveyed, "the Court invoked no deference regime at all," and asking "why the Court so often opts not to invoke a deference regime, especially given the range of deference regimes available and the Court's strong rhetorical support for them").

[113] The political question and international comity doctrines might apply, but that is uncertain, as is the relationship between those doctrines and deference to the executive branch.

[114] Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1198 (2007) (noting that "the law has—peculiarly—not settled on a general principle of deference when an executive agency advances an interpretation of a statute that has foreign relations implications").

[115] In *First National City Bank v. Banco Nacional de Cuba*, a three-justice plurality accepted the so-called "Bernstein exception," pursuant to which courts will not apply the act of state doctrine if the State Department says that they should not. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 764–70 (1972). Six justices explicitly rejected the exception, however. *Id.* at 772–73 (Douglas, J., concurring in result); *id.* at 773 (Powell, J., concurring in the judgment); *id.* at 785–93 (Brennan, J., dissenting); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964) (expressing skepticism about a reverse-Bernstein exception); W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 408 (rejecting an expansion of the act of state doctrine for cases that the State Department determines would embarrass foreign sovereigns).

[116] Republic of Austria v. Altmann, *supra* note 19, at 735–36 (2004) (Kennedy, J., dissenting).

[117] *See* Stephens, *supra* note 29, at 787–88 (surveying lower court cases).

[118] *Developments in the Law—Access to Courts*, *supra* note 11, at 1193–99.

[119] *See* Peter Strauss, *"Deference" Is Too Confusing: Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012).

Theory

As a matter of theory, there is a facially appealing argument that courts should give very strong, *Chevron*-level deference to executive branch interpretations of the ATS, including questions of extraterritoriality, based on both democratic accountability and expertise.[120] This argument relies on a simple calculus that compares the executive branch to the courts or that compares the rationales for deference in foreign relations cases to *Chevron* cases.[121] For a variety of familiar reasons, it is argued, the executive branch is better positioned than courts to predict how a class of cases or a specific case will affect U.S. foreign policy and interests, including the potential for negative consequences that the presumption against extraterritoriality is designed to prevent.[122] If mistakes occur, the president can be held politically accountable; courts cannot. Accordingly, in interpreting the ATS generally and in evaluating its foreign policy implications in particular cases, the executive branch easily wins over courts, and deference (even in the absence of any delegation) is better justified in the foreign relations cases than even in *Chevron* cases.[123]

This reasoning is flawed, however, even on its own terms, at least with respect to case-by-case deference.[124] Courts did employ a very strong form of deference to the executive in one particular type of foreign relations case, and this approach impeded rather than advanced U.S. foreign policy interests. For decades, the courts gave broad deference to the executive branch both for case-by-case determinations of foreign state immunity and for the general principles that should guide immunity determinations when the executive branch made no submission. The result: foreign countries lobbied the State Department aggressively, and over time the department's decisions became inconsistent and unsatisfactory both to the department itself and to foreign sovereigns.[125] Eventually, at the request of the State Department, a statute was passed to vest courts, not the executive, with the power to make foreign sovereign immunity determinations.[126]

Affording the government a high level of deference in ATS cases could have the same effect because it will frequently create the same incentives for foreign sovereigns: rather than submit amicus briefs to the courts, they will send their diplomats to the State

[120] Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181–98 (2004) (defending judicial deference to the executive branch in ATS cases based on democratic accountability and expertise); Posner & Sunstein, *supra* note 114.

[121] *See* Posner & Sunstein, *supra* note 114, at 1204–07; Ku & Yoo, *supra* note 120, at 188–99. Most of the academic response to the pro-deference position has focused on national security cases and statutes that constrain or empower the executive. *See, e.g.*, Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations* Law, 116 YALE L.J. 1230 (2007). Neither is at issue here.

[122] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1699.

[123] *See* Posner & Sunstein, *supra* note 114; Ku and Yoo, *supra* note 120.

[124] There are also doctrinal and potential constitutional problems with these arguments, *see infra* text accompanying notes 105–19.

[125] *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations, H. Judiciary Comm.*, 94th Cong. 34–35 (1976) (testimony of Monroe Leigh, legal adviser, Department of State) (testifying that case-by-case deference means that "the State Department becomes involved in a great many cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something," and adding that "in practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures").

[126] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.); Republic of Austria v. Altmann, *supra* note 19, at 715–38 (2004) (Kennedy, J., dissenting).

Department.[127] The State Department makes more submissions on general principles than on a case-by-case basis in ATS litigation and is well-aware of the dangers of pressure from foreign sovereigns.[128] In this context,the reaction of foreign sovereigns to an adverse court decision is less harmful to U.S. foreign policy than the reaction to an adverse decision of the State Department.[129] In other words, the theorists have incorrectly assumed that the foreign policy costs of the decision do not depend on whether the decision is made by the courts or the executive.[130] The problem of foreign sovereigns pressuring the State Department has led Congress to legislate concerning immunity, and it has been a factor in the Supreme Court's refusal to accord broad deference to the government in developing and applying the act of state doctrine.[131] These considerations suggest that if courts do afford deference on a case-by-case basis in ATS cases, that level of deference should be low—that is, an ill-defined level of deference that looks something like "persuasiveness" or an analogy to *Skidmore* deference.[132] A low-level of deference diminishes the accountability-based rationale, however, because domestic interest groups, like foreign sovereigns, will have difficulty allocating responsibility for decisions to the executive branch. At the same, time this kind of deference leaves open the possibility that a persuasive submission from the government might warrant expertise-based dismissal in unusual cases.

Inconsistent Positions

The executive branch has taken inconsistent positions over time on the extraterritorial application and other general aspects of the ATS. As the government's brief in *Kiobel* noted,[133] its argument against the presumption in that case was a change of position from the Bush administration, which had explicitly argued that the presumption should apply.[134] The Carter and

[127] The effect might be less in ATS litigation because the cases are not brought against foreign sovereigns themselves. ATS cases brought against foreign corporations and individuals, however, have generated significant opposition from foreign governments. *See, e.g.*, briefing in Sosa v. Alvarez-Machain, *supra* note 17; Yousuf v. Samantar, *supra* note 10, *petition for certiorari filed*; Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009). Cases against U.S. nationals based on conduct abroad might not generate similar pressure from foreign sovereigns. *But see In re* S. African Apartheid Litig., *supra* note 18. In any event, most ATS cases are brought against foreign defendants.

[128] *See* John Bellinger, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Beyond*, 42 VAND. J. TRANSNAT'L L. 1, 11 (2009) (focusing specifically on the difficulties that case-by-case submissions create for the executive).

[129] Decisions of courts might also generate adverse reactions from foreign sovereigns, of course, *see* Zschernig v. Miller, 389 U.S. 429 (1968), but the immunity example suggests that they are not as damaging over the long-term as State Department decisions made on a case-by-case basis. Indeed, in *Zschernig*, the U.S. government disagreed with the Court: it did not believe that the state court statute and the court decisions applying it harmed U.S. foreign relations. *Id.* at 460–61 (Harlan, J., concurring in the result).

[130] *See* Ku & Yoo, *supra* note 120, at 192.

[131] The Court has rejected the claim that the act of state doctrine should not apply to purported violations of international law unless the executive branch affirmatively states that the doctrine is applicable. The Court reasoned, in part, that "[o]ften the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically." Banco Nacional de Cuba v. Sabbatino, *supra* note 115, at 436. In the immunity context, Congress did not just shift authority from the executive to the courts; it also enacted a federal statute guiding the court's decision making. In that sense it is not analogous to the question of deference in the ATS context.

[132] *Cf.* Kevin M. Stack, *The President's Statutory Power to Administer the Law*, 106 COLUM. L. REV. 263 (2006) (arguing that, at a minimum, *Skidmore* requires the reviewing court to consider the agency's position and the basis for its view).

[133] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 21 & n.11, 22.

[134] Brief of United States as Respondent Supporting Petitioner at 46–50, *supra* note 28.

Clinton administrations had supported ATS litigation based on conduct abroad in cases like *Filartiga* and *Doe v. Unocal*, but without explicitly addressing the presumption against extraterritoriality.[135] The Reagan administration took a narrow view of ATS litigation, arguing that the statute was intended to apply only when the United States could be held accountable for the tortious conduct—a rationale that did not extend to conduct committed by aliens abroad.[136] At oral argument in *Kiobel*, Chief Justice Roberts and Justice Scalia grilled Solicitor General Verrilli on the flip-flop point, asking why the Court should defer to his view and not that of the "solicitors general who took the opposite position."[137] The chief justice ended the exchange by stating that "whatever deference you are entitled to is compromised by the fact that your predecessors took a different position."[138]

The relevance of a prior inconsistent position depends on the reason for deferring to the executive in the first place. If the executive branch merits deference because it is a politically accountable actor,[139] then positions that change from one administration to the next serve the purposes of deferring.[140] But deference based on expertise—and lower levels of deference are difficult to justify on political accountability grounds—can be undermined by changes in agency interpretations from administration to administration.[141] Inconsistent positions receive less expertise-based deference, which is appropriate here. The application of the statute to extraterritorial conduct as a general matter should be seen as a question of policy rather than expertise. Some argue that U.S. interests are best served by restricting the ATS to avoid entanglement with foreign governments and to encourage foreign investment, whereas others argue that U.S. interests are better served by enforcing international human rights law.[142] Different administrations have adopted one or the other of these policies; picking between them is not an expertise-based decision. It is possible that some broader principles about the ATS might be expertise based. For example, the executive might want customary international law to develop in a particular direction with respect to aiding and abetting liability, universal jurisdiction, or corporate liability, and for that direction to remain constant over administrations;

[135] *See* Memorandum for the United States as Amicus Curiae at 1, Filartiga v. Pena-Irala (No. 79-6090), *supra* note 3; Statement of Interest of the United States, Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112).

[136] Brief for the United States of America as Amicus Curiae, Trajano v. Marcos, 878 F.2d 1438 (9th Cir. July 10, 1989) (Nos. 86-2448, 86-15039, 86-2449, 86-2496, 87-1706, 87-1707).

[137] Transcript of Oral Argument, *supra* note 44, at 43–44 (oral argument of General Donald B. Verrilli Jr. for the United States as amicus curiae, supporting the respondents).

[138] *Id.*; *see also* Trajano v. Marcos, 978 F.2d 493, 498–500 (9th Cir. 1992) (noting the Justice Department's change of position and concluding that the court was not bound by its submission). The Court did not mention the government's opposition to the presumption in the *Kiobel* opinion. It did refer to the flip-flop issue in a backhanded way. A sentence discussing the 1795 opinion of Attorney General Bradford noted that the solicitor general, "having once read the opinion" in one way, "now suggests" that the opinion could mean the opposite. In the next sentence the Court says that the "opinion defies a definitive reading and we need not adopt one here." Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1668. Although the specific reference is to the Bradford Opinion, it is hard not to see this as a veiled reference to the government's other (more substantial) changes of position.

[139] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., *supra* note 106, at 865–66.

[140] Bradley, *supra* note 108, at 701.

[141] *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51 (discussing the tension between democratic accountability and protecting agency decision making from politics); *cf.* Medellín v. Texas, 552 U.S. 491, 528 n.14 (2008) (describing earlier statements from the solicitor general's office that contradicted its position in this case).

[142] *See supra* note 159.

the executive's capacity to do so may have important consequences for U.S. treaty negotiations and for the application of customary international law in forums around the world.[143]

In summary, the government should receive, at best, persuasiveness deference on general interpretive questions, consistent with the Court's approach in *Kiobel*. This conclusion is bolstered by the changes in government position from administration to administration, which undercut any expertise-based rationale for deferring. Some of the Court's language in *Sosa* and *Altmann*, however, points toward greater case-by-case deference to the government. These statements are in tension with the Court's approach in the act-of-state context, and they should also generate significant concerns about pressure on the State Department from foreign governments.

III. *KIOBEL* AND CUSTOMARY INTERNATIONAL LAW

ATS litigation has the potential to play an important role in the development and enforcement of customary international law. Decisions of national courts can constitute state practice and evidence of *opinio juris*, the two requirements of customary international law.[144] Thus, ATS cases are sometimes cited to show a customary international law norm of "civil universal jurisdiction"—which purportedly gives nations the power to apply their own law (known as "prescriptive jurisdiction") to extraterritorial conduct of "universal concern" such as piracy and the slave trade.[145] The *Kiobel* case serves as an example. Torture is widely viewed as a universal jurisdiction offense, so arguably the United States could apply its laws to criminalize torture occurring in Nigeria that involved neither a U.S. victim nor a U.S. perpetrator. Application of the ATS to conduct occurring within the territory of a foreign sovereign could be defended on these terms, and the *Kiobel* causes of action based on universal jurisdiction could go forward. Had the Court taken this approach, the decision would have had significant implications for customary international law.

Not a single justice, however, adopted universal civil jurisdiction in *Kiobel*. Even Justice Breyer, who had advanced this argument in a concurring opinion in *Sosa*,[146] did not explicitly rely on it here. Instead, Justice Breyer's *Kiobel* concurrence interpreted the statute as providing jurisdiction only "where distinct American interests are at issue"—a position based, in part, on the history of the statute and, in part, on an effort to "minimize international friction."[147] The *Kiobel* opinions themselves thus provided no state practice or *opinio juris* evidencing a customary international law norm of universal civil jurisdiction, but they also did not provide evidence

[143] See Ingrid B. Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931 (2010) (developing this argument); *see also* Banco Nacional de Cuba v. Sabbatino, *supra* note 115, at 432–33 ("When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.").

[144] *See* Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), para. 55 (Int'l Ct. Justice Feb. 3, 2012).

[145] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §404 (1987); *see also* Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735 (2004). Universal jurisdiction is widely accepted for some criminal offenses—which may provide the basis for its application in civil cases. *See* Sosa v. Alvarez-Machain, *supra* note 17, at 761–62 (Breyer, J., concurring in part and concurring in the judgment); *see also* Carlos Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AJIL 531, 542–43 (2012).

[146] Sosa v. Alvarez-Machain, 542 U.S. at 761–62 (Breyer, J., concurring in part and concurring in the judgment).

[147] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1674 (Breyer, J., concurring in the judgment).

against such jurisdiction. That is, none of the justices reasoned that international law does not permit universal civil jurisdiction. Instead, they did not reach this question, because they unanimously decided that *Congress* did not intend for this statute to extend that far. Indeed, although Justice Breyer declined to rely on universal civil jurisdiction in this case, he cited extensive authority in support of universal criminal jurisdiction and noted (as he had in *Sosa*) that in many countries criminal jurisdiction also supports civil remedies.[148]

Justice Breyer did explicitly urge consideration of "international jurisdictional norms" to help construe the scope of the ATS. The relationship between his opinion and customary international law of prescriptive jurisdiction, however, is ultimately unclear. As described above, Justice Breyer did not argue for the application of universal jurisdiction in *Kiobel*. Instead, in his view, jurisdiction would lie when the tort occurs on "American soil" (corresponding to the territoriality basis for jurisdiction in customary international law) or at the hands of a U.S. national (corresponding to nationality), or when important American interests are at stake (arguably corresponding to some form of protective jurisdiction).[149] This last basis includes, in Justice Breyer's analysis, an interest in not serving as a "safe harbor" for modern-day pirates, which extends to non-U.S. nationals who take up residence in the United States.[150] This application of the ATS goes beyond the traditional understanding of protective jurisdiction.[151] It could be defended as an exercise of universal jurisdiction, but universal jurisdiction (unlike Justice Breyer's approach) is not based on (or limited by) an important or distinct interest of the forum state.

In the end, Justice Breyer might be best understood as endorsing civil universal jurisdiction with a kind of subsidiarity requirement, pursuant to which there must be some connection between the forum state and defendant, such as the defendant's residence there.[152] The favorable reference to "comity, exhaustion, and *forum non-conveniens*" doctrines[153] could similarly accord preference to forums with a strong connection to the defendant or to the conduct at issue in the lawsuit, also consistent with universal jurisdiction tempered by subsidiarity.

In addition to arguing for universal jurisdiction, the *Kiobel* petitioners took the position that prescriptive jurisdiction limitations do not reach the ATS in the first place because the statute applies international law, not the law of the United States.[154] Under this view, extraterritoriality should pose no prescriptive jurisdiction concerns because the applicable law is customary international law, not domestic U.S. law. The problem with such an argument is that the ATS cause of action *is* U.S. law—federal common law—and the *Sosa* test for permissible causes of action is a uniquely American one.[155] Justice Breyer implicitly rejected the petitioners'

[148] *Id.* at 1675–76.

[149] *Id.* at 1673–74.

[150] *Id.* at 1674–75.

[151] *Id.*; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 cmt. f (listing espionage, counterfeiting, and other examples).

[152] *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AJIL 1, 40 (2011) (describing amended Spanish universal jurisdiction legislation as providing that "Spanish courts cannot assert universal jurisdiction unless the accused is on Spanish territory, or there is another relevant link between Spain and the case"); *cf.* Harmen van der Wilt, *Universal Jurisdiction Under Attack*, 9 J. INT'L CRIM. JUST. 1043, 1047–50 (2011) (discussing whether universal jurisdiction includes a preference for criminal prosecution by the state of nationality or the state on whose territory the conduct occurred).

[153] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1677 (Breyer, J., concurring in the judgment).

[154] Petitioners' Supplemental Opening Brief, *supra* note 53, at 38–40.

[155] *See* Wuerth, *supra* note 143. *But see* Anthony J. Colangelo, Kiobel: *Muddying the Distinction Between Prescriptive and Adjudicatory Jurisdiction*, MARY. J. INT'L L. (forthcoming 2013).

argument by discussing the prescriptive jurisdiction limitations on the application of federal common law in ATS cases.[156] Indeed, none of the opinions identified the applicable law in ATS cases as customary international law.[157] After *Kiobel*, it is clear that in ATS cases, courts are applying federal common law, some of which is derived, in part, from customary international law.[158]

IV. CONCLUSION

The ATS, in general, and *Kiobel*, in particular, have engendered much handwringing, some of it shrill. Those who favor the decision lament the lower court opinions and law professors who ignored the presumption against extraterritoriality for so long, thereby permitting this unique and pernicious form of American exceptionalism. Those opposed to the decision lament the corporate and individual human rights abuses that may go entirely unaddressed. And then there is the seemingly unending lack of certainty about the statute, which now focuses on detailed parsing of the opinions in *Kiobel*.

In truth, however, the statute is difficult, and not just because it is a 200-year-old textual cipher. The real difficulty is the policy conflict behind the ATS. Both sides of the debate capture important and deeply held views: on one side, the need to redress horrific violations of the most fundamental human rights, and on the other, the view that many of these cases have little to do with the United States, may impose foreign policy costs, and may not enhance net social welfare for those most harmed.[159] At a high level of abstraction, there is a parallel to the now-pressing question of what the United States and other countries should or should not do in Syria to enforce international human rights and humanitarian law. From the perspective of international law, this division tracks in some respects the differences between "modern" customary international law with its normative impetus and "traditional" custom with its basis on the sovereign equality of states, predictability, and stability.[160] Many individuals identify strongly with one side of this debate or the other, which is part of what makes the debate difficult to resolve collectively.

The division of authority and the interplay among Congress, the Court, and the executive branch also make the ATS difficult to interpret. Domestic lawyers refer to this division as separation of powers, whereas international lawyers see it as fragmentation or, perhaps more charitably, pluralism. As with the ATS, the doctrinal areas of foreign state immunity and prescriptive jurisdiction are developed in large part through national legal systems and their courts.[161] In both doctrinal areas, separation of powers has complicated the application and

[156] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1673–74 (Breyer, J., concurring in the judgment).

[157] *Id.* at 1667 (majority opinion) (referring to the ATS as "applying U.S. law").

[158] *See* Wuerth, *supra* note 143 (discussing choice of law in ATS cases and arguing that all of the applicable law is judge-made federal common law, the development of which is authorized by the statute).

[159] *Compare* Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Social Responsibility*, 56 RUTGERS L. REV. 971 (2004), *and* Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, FOREIGN AFF., Mar./Apr. 2013, at 16, *with* Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 279 (2009), *and* Robert H. Bork, Op-Ed, *Judicial Imperialism*, WALL ST. J., June 17, 2003, at A16.

[160] *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001).

[161] *See* H. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 1929 BRIT. Y.B. INT'L L. 65, 69–70; CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 4 (2008).

development of customary international law in domestic systems around the world. The ability of courts, legislatures, and executive branches to act at least somewhat independently of each other has led to uncertainty,[162] doctrinal innovation,[163] competition among the branches,[164] violations of international law,[165] "passing the buck" as one domestic actor pushes decision making and the implementation of international law to another domestic actor,[166] and a decidedly political slant to worldwide efforts to enforce human rights norms in domestic courts.[167] The ATS may be exceptional in various respects, but the underlying conflict in values that makes its application difficult are not. Nor are the power dynamics that shape the course of its development.[168]

For all the downsides of fragmentation, the resulting tumult provides an opportunity for human rights activists to achieve in one forum what they could not in another. Universal civil jurisdiction and limitations on official immunity are unlikely to garner widespread support if undertaken as across-the-board treaty commitments, but domestic actors have created state practice that supports both. These initiatives succeed because the social conflict underlying the doctrinal uncertainty is resolved differently by different state organs acting at different times: hence the change in ATS policy from one administration to the next; the willingness of Congress to act—sometimes—to limit immunity and create human rights causes of action; and the Court's decisions to limit, but not (yet) entirely foreclose, ATS litigation. Universal criminal jurisdiction has been similarly pulled in different directions through the domestic legal orders in Europe.[169] In the words of Nico Krisch, pluralism provides a "chance to contest, destabilize, delegitimize entrenched power positions," but it also brings into the open that "[a]mongst the many laws in a pluralist order, law can no longer decide; recourse must be had to other, often political means."[170] Viewed also from this perspective, the *Kiobel* decision and the arc of ATS litigation as a whole are entirely unexceptional.

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[162] The resolution of particular issues within one branch may, for example, depend upon the context in which they arise—for example, litigation versus state-to-state negotiations. *See* Ingrid Wuerth, *International Law in Domestic Courts and the* Jurisdictional Immunities of the State *Case*, 13 MELB. J. INT'L L. 819, 833–34 (2012); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decision-Making*, 38 YALE J. INT'L L. (forthcoming 2013).

[163] *See, e.g.*, van der Wilt, *supra* note 152 (discussing the development of a subsidiarity requirement for universal jurisdiction based on state practice in Europe).

[164] *See* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

[165] *See, e.g.*, Ferrini v. Federal Republic of Germany, Cass., sez. un., 11 marzo 2004, n.5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 539 (2004), 128 ILR 658 (reported by Andrea Bianchi at 99 AJIL 242 (2005)).

[166] *See, e.g.*, Medellín v. Texas, *supra* note 141; Giuseppe Cataldi, *The Implementation of the ICJ's Decision in the* Jurisdictional Immunities of the State *case in the Italian Domestic Order: What Balance Should be Made Between Fundamental Human Rights and International Obligations?*, ESIL REFLECTIONS (Jan. 24, 2013), *at* http://www.esil-sedi.eu/node/281.

[167] *See* Langer, *supra* note 152.

[168] *See* NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 23 (2010).

[169] *See* Langer, *supra* note 152; van der Wilt, *supra* note 152; *see also* Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AJIL 888, 889 (2003).

[170] KRISCH, *supra* note 168, at 306–07.

their works, whether published or not" (para. 1(a)) and "authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries" (para. 1(b)).

The case reported here—one of the so-called *North Korean Copyright* cases[5]—arose because of the accession to the Berne Convention in 2003 of the Democratic People's Republic of Korea (DPRK or North Korea), which the government of Japan has not recognized as a state.[6] Before the Berne Convention entered into force on April 28, 2003, with respect to North Korea, the Japanese Agency for Cultural Affairs issued a statement maintaining that, because Japan had not recognized North Korea as a state, its accession would not create a legal relationship under the Convention between Japan and North Korea, and that Japan was therefore not obligated under the Convention to protect North Korean works.[7]

In 2002, prior to North Korea's deposit of its instrument of accession, Korean Film Export and Import Corp. (Korean Film), an administrative organ established under the Ministry of Culture of North Korea, and Kanario Kikaku Ltd. (Kanario), a Japanese company, had concluded a contract that granted Kanario the exclusive right in Japan to present, reproduce, and distribute North Korean films whose copyrights are owned by Korean Film. Later, on December 15, 2003, Fuji Television Network, Inc. (Fuji Television) broadcast part of a North Korean film on its news program without obtaining permission from Korean Film and Kanario. Claiming that this conduct of Fuji Television violated their rights, including Korean Film's copyright, Korean Film and Kanario initiated proceedings against Fuji Television in the courts of Japan in March 2006.

In response to an inquiry from the Tokyo District Court, the Ministry of Foreign Affairs of Japan replied as follows:

> Because Japan has not recognized North Korea as a state, North Korea cannot be equated with other contracting parties of the Berne Convention . . . . Japan does not consider that it has an obligation under the Berne Convention to protect the works of the "nationals" of North Korea. However, this does not mean that North Korea has neither rights nor obligations in accordance with a provision, in a multilateral treaty, which deals with a matter concerning rights and obligations towards an international community composed of the contracting parties . . . as a whole.[8]

The lower courts dismissed the claims of Korean Film and Kanario that related to the Berne Convention. The Tokyo District Court and the Intellectual Property High Court essentially

[5] In the other case, *Korean Film Import & Export Corp. v. Nippon Television Network Corp.*, the plaintiffs brought similar proceedings against a different defendant and the courts issued similar judgments. Tokyo Dist. Ct. Dec. 14, 2007, Hei 18 (wa) no. 5640, *available in* 2007WLJPCA12149002, *translated in* 52 JAPANESE Y.B. INT'L L. 665 (2009); Intellectual Prop. High Ct. Dec. 24, 2008, Hei 20 (ne) no. 10012, *available in* 2008WLJPCA12249016, *translated in* 53 JAPANESE Y.B. INT'L L. 580 (2010); Sup. Ct. Dec. 8, 2011, Hei 21 (Ju) nos. 604, 605, *at* http://www.tkclex.ne.jp/ (LEX/DB (TKC) 25482125).

[6] Accession by the Democratic People's Republic of Korea, Berne Notification No. 224 (Jan. 28, 2003), *at* http://www.wipo.int/treaties/en/ip/berne/.

[7] Agency for Cultural Affairs, Statement of Apr. 22, 2003, *reprinted in* District Court judgment, *supra* note 1, at 3346.

[8] Ministry of Foreign Affairs, Statement of Aug. 31, 2006, *reprinted in* District Court judgment, *supra* note 1, at 3348.

did not differ on the questions of international law. They mostly followed the approach of the Japanese government[9] and ruled, in summary, as follows.

Even if a state that is not recognized by another state accedes to a multilateral treaty like the Berne Convention, in principle that state has no rights or obligations under the treaty in relation to the state that does not recognize it. Some multilateral treaties, however, contain provisions that go beyond providing for the reciprocal exchange of benefits among contracting parties and aim at realizing universal international public interests, such as the prevention of torture under the Convention Against Torture.[10] Such provisions, which provide for obligations towards the international community as a whole, are exceptionally applicable even in relation to an unrecognized state. Any subject of international law, whether or not it is recognized as a state, must comply with such provisions and protect universal values. Although the protection of copyrights is important and should be respected by the international community, it is difficult to maintain that the value of copyright protection extends beyond a framework composed of states—countries that belong to the Berne Union—and is to be respected universally. Since Article 3, paragraph 1(a) of the Berne Convention cannot be considered to be a provision concerning rights and obligations towards the international community as a whole, it does not apply as between Japan and North Korea and Japan has no obligation under it to protect North Korean works.[11]

On appeal, the Supreme Court of Japan reasoned as follows regarding whether Japan has an obligation under the Berne Convention to protect the works of nationals of North Korea:

> In general, when a country not recognized as a state accedes to a multilateral treaty that has already entered into force with respect to Japan, the unrecognized state's accession cannot be considered to give rise to a relationship of rights and obligations under the treaty between that state and Japan unless the obligation a contracting state has under the treaty is an obligation of universal value under general international law. It is therefore appropriate to consider that Japan has the option of whether or not to bring about a relationship of rights and obligations under the treaty with that state.
>
> The Berne Convention, under Article 3, on the one hand, protects works of authors who are nationals of a country of the Union, but on the other hand, protects works of authors who are not such nationals only when their works were first published in a country of the Union. Therefore, the Convention intends to protect copyrights within the framework of those states which are countries of the Union and does not require those states to assume any obligation of universal value under general international law. (Pp. 3280–81)

The Supreme Court continued by recalling that when North Korea acceded to the Berne Convention, the Japanese government did not give notice that the Convention would enter into force between Japan and North Korea and expressed the view that Japan is not obligated under the Convention to protect works of North Korean authors as those of nationals of a

[9] The North Korean Ministry of Culture responded to the view of the Japanese government in a critical manner. *See* District Court judgment, *supra* note 1, at 3349–50 ("The DPRK intends to protect copyrights of nationals of Japan . . . in accordance with the Berne Convention. However, if . . . no reciprocal compliance is guaranteed, . . . the DPRK is afraid that it no longer has an obligation to protect Japanese copyrights. If an illegal act like this continues, the DPRK cannot help but take measures in response to that [illegal act]. The DPRK demands that Japan comply with [its] obligations under international law.").

[10] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 20-100 (1988), 1465 UNTS 85 [hereinafter Convention Against Torture].

[11] *See* District Court judgment, *supra* note 1, at 3352–55; High Court judgment, *supra* note 1, at 3370–75.

country of the Union. Thus, the Court held that the film at issue does not fall within the category of works under Article 6 of the Copyright Act that Japan must protect under an international treaty and accordingly dismissed the appeal of Korean Film and Kanario.

* * * *

Among the observations that will be made in this report about the Japanese Supreme Court's judgment in the *North Korean Copyright* case, the first concerns the legal effect of the recognition of states, and in particular the relevance of the constitutive theory—which requires recognition as such by other states—as opposed to the declaratory theory—which depends on the exclusive control of its territory by the entity claiming to be a state. The Court's judgment is based on the constitutive theory as a matter of principle, though it is not as clear as those of the lower courts in this respect. But as most of today's international lawyers do not support the constitutive theory, it appears odd that the Japanese courts stated that, in principle, an unrecognized state's accession to a multilateral treaty does not give rise to a relationship of rights and obligations under the treaty. The decision whether to recognize a state is a political decision by the government, whereas the *North Korean Copyright* case concerns the judicial settlement of a dispute of a private law character between private persons. It is doubtful whether the outcome of a case of this character should be made dependent on the political will of the government, that is, its decision whether or not to recognize a state.

The Supreme Court's additional statement that, in circumstances like those in this case, "Japan has the option of whether or not to bring about a relationship of rights and obligations under the treaty" seems equally problematic, or confusing at the least. Whatever action a state opts to take to effectuate a relationship of rights and obligations under a treaty must surely be considered to imply at least a measure of recognition. The Supreme Court thus seems to have simply stated the obvious, that by entering into a treaty relationship, a state may recognize an entity it has not hitherto recognized as a state.

Of course, any principle should be analyzed together with the exception to it. But the exception that the courts mentioned in this case is equally difficult to accept from the viewpoint of international law. As pointed out above, the lower courts referred to "obligations towards the international community as a whole" as an exception to the principle that no relationship of rights and obligations arises between a state and a state it does not recognize. This expression reminds international lawyers of a well-known passage from the judgment of the International Court of Justice (ICJ) in the *Barcelona Traction* case: "the obligations of a State towards the international community as a whole" or "obligations *erga omnes*."[12]

Nevertheless, the reference by the lower courts to obligations towards the international community as a whole is misplaced. The ICJ's purpose in distinguishing between obligations *erga omnes* and those arising vis-à-vis another state in the field of diplomatic protection does not directly concern the issue of recognition of states. The ICJ stated that in the case of obligations *erga omnes*, "all States can be held to have a legal interest in their protection," but that, to bring a claim with respect to the breach of other obligations, "a State must first establish its right to do so."[13] By no means did the ICJ suggest that the term "all States" in the former sense includes

[12] Barcelona Traction, Light & Power Co. (Belg. v. Spain), Second Phase, 1970 ICJ REP. 3, 32, para. 33 (Feb. 5). ICJ judgments are available at http://www.icj-cij.org.

[13] 1970 ICJ REP. at 32, paras. 33, 35.

an unrecognized state; nor did it suggest that the term "a State" in the latter sense excludes such a state.

Even if the lower courts did not have obligations *erga omnes* in mind—indeed, the courts did not use this expression as such—that makes little difference inasmuch as the courts did not substantiate their holding that a provision specifying obligations towards the international community as a whole is exceptionally applicable between a state and an unrecognized state. A similar argument applies to the concept of "an obligation of universal value under general international law," used by the Supreme Court. The relationship, or any difference, between this concept as invoked by the Supreme Court and the concept of obligations towards the international community as a whole as invoked by the lower courts is not clear. In any event, the Supreme Court did not explain why such an obligation would be exceptionally applicable in relation to an unrecognized state, whereas other obligations are not.

Finally, even if one could accept the proposition by these courts of the principle and the exception with respect to the application of a multilateral treaty to an unrecognized state, an objection can still be raised to their judgments. The Supreme Court did not consider that the obligation under the Berne Convention to protect copyrights qualifies as an obligation of universal value under general international law, because the Convention protects works of authors who are not nationals of a country of the Union only when their works were first published in a country of the Union. Although the Court did not point to any example of obligations of universal value, the lower courts mentioned the obligation to prevent torture under the Convention Against Torture as an example of an obligation towards the international community as a whole. Yet the lower courts seem to have overlooked the way the obligation to prevent torture is formulated in the Convention Against Torture. Under Article 2, "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction.*"[14] Thus, the Supreme Court's approach could lead one to conclude that the prevention of torture is *not* an obligation of universal value under general international law. If this should be the case, what type of obligation does fall into this category under today's international law?[15] On the other hand, if the above formulation of the Convention Against Torture is not an obstacle to considering the prevention of torture to be an obligation of universal value under general international law, then the same can be said about the protection of copyrights under the Berne Convention, and there is no obstacle to considering that copyright protection is also such an obligation and that it is therefore exceptionally applicable even in relation to an unrecognized state.

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[14] Convention Against Torture, *supra* note 10, Art. 2(1) (emphasis added).

[15] Subsequently, with regard to the obligations of a state party to the Convention Against Torture to conduct a preliminary inquiry into the facts of a case and to submit the case to its competent authorities for prosecution, the ICJ stated as follows:

> All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed . . . to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved . . . . These obligations may be defined as "obligations *erga omnes partes*" . . . .

Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), para. 68 (Int'l Ct. Justice July 20, 2012) (citation omitted).

Italian Court of Cassation—war crimes—sovereign immunity—acta jure imperii—application of decisions of the International Court of Justice

CRIMINAL PROCEEDINGS AGAINST ALBERS. No. 32139. 95 Rivista di diritto internazionale 1196 (2012).
Corte di cassazione, August 9, 2012.

In August 2012, the First Criminal Division of the Court of Cassation (Supreme Court or Court), the highest Italian domestic court, issued a judgment upholding Germany's sovereign immunity from civil claims brought by Italian war crime victims against Paul Albers and eight others in the Italian courts (*Albers*).[1] In so doing, the Court overruled its own earlier decisions and also reversed the judgment of April 20, 2011, by the Italian Military Court of Appeal (Military Court), which had upheld such claims relating to war crimes committed by German forces in Italy during World War II. With this ruling, the Court of Cassation put an end to its decade-long effort to find an exception to the well-known rule of customary international law providing for sovereign immunity from foreign civil jurisdiction for acts *jure imperii*. This *revirement* resulted from the Court's decision to give effect to the judgment of the International Court of Justice (ICJ) in *Germany v. Italy*.[2]

In *Albers*, the Court reviewed the Military Court's 2011 decision upholding a first-instance conviction of five of the accused—German citizens who were former members of the Schutzstaffel (SS)—for war crimes and crimes against humanity perpetrated in Italy during the final months of World War II. Germany had challenged the damages-related section of the *dispositif* of that decision (the reparation order). The Military Court dismissed Germany's objection to the exercise of civil jurisdiction, relying on the reasoning of the Supreme Court's 2004 judgment in the *Ferrini* case.[3]

In that earlier case, the Court of Cassation had decided that the principle of state immunity for acts *jure imperii* did not apply to claims for damages arising from war crimes. It had concluded that the *jus cogens* nature of the prohibition of international crimes prevailed over the customary international law rule of sovereign immunity. According to the Court, the paramount interest in preventing the most atrocious crimes necessarily trumps the concern of preserving state sovereignty through immunity. Moreover, since most of the crimes in question had taken place in Italy, the domestic tort exception applied. Under that doctrine, the non-contractual tortious or delictual conduct of a state occurring in another state's territory is subject to the jurisdiction of the latter's domestic courts.[4] As later recalled in *Albers*, this judgment was based on a fortunate (and alleged) "convergence of the criteria based on the nonderogable nature of *jus cogens* and on the so-called *tort exception* principle" (p. 1198).

[1] Criminal Proceedings Against Albers, Cass., sez. un. pen., 9 agosto 2012, n. 32139, 95 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 1196 (2012), INT'L L. DOMESTIC CTS. [ILDC] 1921 (in Ital.). All citations to the judgment in this report are to the version in *RDI*. Translations of this and other Italian cases herein are by the author unless otherwise noted.

[2] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening) (Int'l Ct. Justice Feb. 3. 2012), *at* http://icj-cij.org [hereinafter Germany v. Italy] (reported by Alexander Orakhelashvili at 106 AJIL 609 (2012)).

[3] Ferrini v. Repubblica federale di Germania, Cass., sez. un., 11 marzo 2004, n. 5044, 87 RDI 539 (2004), *translated in* 128 ILR 658 (reported by Andrea Bianchi at 99 AJIL 242 (2005)).

[4] *See, e.g.*, United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, annex, Art. 12 (Dec. 2, 2004).

Ferrini was followed and applied by the Court of Cassation in several subsequent decisions. In 2008, for example, it confirmed the power of lower Italian courts to exercise civil jurisdiction against Germany in similar cases,[5] on the grounds that it would be unreasonable to disallow jurisdiction over the commission of those crimes which "mark the breaking point of the tolerable exercise of state sovereignty" (p. 1202).[6] It noted "that [its decision] would contribute to the *emergence* of a rule shaping the immunity of foreign states. Such a rule, in any event, is *already* embedded in the international legal order" (*id.*).[7] In a subsequent decision, *Milde*, the Court went so far as to deviate expressly from the traditional method of inferring custom from a record of widespread state practice.[8] It held that a "qualitative" assessment is at times preferable to an "arithmetical calculation,"[9] in light of the difficulty inherent in verifying both the existence of certain customs and their hierarchical position within the system of principles generally accepted by the international community.

Finally, in 2011, the Court of Cassation upheld the Florence Court of Appeal's decision authorizing the enforcement of a Greek tribunal's ruling against Germany.[10] In the judgment submitted to the Court of Appeal for *exequatur*, the Tribunal of Leivadia had ordered Germany to pay compensation for war crimes to private individuals. Germany argued that the enforcement of this judgment was precluded under the relevant safeguards in Italian and European Union private international law prohibiting recognition of foreign judgments contrary to *ordre public*.[11] Germany also noted that foreign jurisdictions had not endorsed the *Ferrini* approach. The Court of Cassation responded that foreign decisions did not contravene *Ferrini*, at least inasmuch as the territorial link (*locus commissi delicti*) was used to assert jurisdiction. It then offered a lofty panegyric on how international law had evolved since World War II, strenuously supporting the rule in *Ferrini* with a handful of diverse precedents, and rejected Germany's appeal: "Such a rule is *already implicit* in the international legal system, which elevates the protection of inviolable human rights—on account of its axiological nature as a 'meta-value'—to the level of a fundamental principle, *to whose emergence* the *Ferrini* judgment makes a self-conscious contribution."[12]

In its 2011 *Albers* decision, the Military Court adhered to the core arguments of the Court of Cassation's earlier decisions. Additionally, it expanded on the assumptions that customary

[5] Cass., sez. un., 29 maggio 2008, n. 14199 (judgment); Cass., sez. un., 29 maggio 2008, nn. 14200–12 (13 orders).

[6] Quoting Repubblica federale di Germania v. Mantelli, Cass., sez. un., 29 maggio 2008, n. 14201, ILDC 1037, para. 11 (emphasis added) (in Ital.), *quoted in* Carlo Focarelli, Case Report: Federal Republic of Germany v. Giovanni Mantelli and Others, 103 AJIL 122, 125 (2009).

[7] Quoting *Mantelli*, ILDC 1037, para. 11, *quoted in* Focarelli at 125.

[8] Criminal Proceedings Against Milde, Cass., I sez. pen., 13 gennaio 2009, n. 1072, 92 RDI 618 (2009), ILDC 1224 (in Ital.); *cf.* United States v. Tissino, Cass., sez. un., 25 febbraio 2009, n. 4461, ILDC 1262 (in Ital.); Lozano v. Italy, Cass., I sez. pen., 24 luglio 2008, n. 31171, para. 7, ILDC 1085 (in Ital.; partial Eng. trans.); Tigri Tamil, Trib. Napoli, 29 gennaio 2012, *at* http://www.penalecontemporaneo.it/upload/Sentenza%20Guardiano%20Tigri%20Tamil.pdf (all excluding application of *Ferrini* principle to acts that do not amount to international crimes or crimes against humanity).

[9] Milde, para. 4.

[10] Repubblica federale di Germania v. Prefettura Autonoma di Vojotia, Cass., I sez. civ., 20 maggio 2011, n. 11163, *translated in* ILDC 1815.

[11] Legge 31 maggio 1995, n. 218, Art. 64(1)(g); EC Regulation No. 44/2001, Art. 34(1), 2001 O.J. (L 12) 1, 10.

[12] *Prefettura Autonoma di Vojotia*, ILDC 1815, para. 30 (emphasis added).

international law is evolutionary and that a balance must be struck between sovereign immunity and the need to indemnify the victims of the gravest crimes. Giving preference to the prohibition against international crimes (as *lex superior*) also furthered the progressive development of customary international law, shaping a new exception (as *lex specialis*).

In February 2012, however, shortly before the Court of Cassation issued its *Albers* decision, the ICJ delivered its judgment in *Germany v. Italy*. In that case, Italy had based its arguments on the reasoning of the *Ferrini*-inspired case law: implementation of the peremptory rules against international crimes cannot be frustrated by state immunity, especially when the crimes took place within the territory of the forum state. The ICJ rejected this defense and found Italy in breach of international law for retaining claims against Germany in national courts and for authorizing enforcement of Greek judgments violating Germany's immunity. The ICJ held, in short, that no territorial exception grants derogation from immunity on the basis of *locus commissi delicti*; no evidence derived from general state practice and *opinio juris* indicates that a new exception to customary law has emerged in that regard; the grant of immunity is independent of the gravity of the wrongful act, even when *jus cogens* is breached; and because immunity operates at a procedural level and the prohibition of international crimes is a substantive rule, a normative conflict between them cannot occur and all attempts to wield the *lex superior* argument are misplaced.

Faced with the ICJ's ruling, the Court of Cassation in *Albers* took due note of the dismissal of Italy's defense, which in effect demolished the pillars of the *Ferrini* case law. Nevertheless, it contested some points of the ruling, in obiter dicta (p. 1204). Among them was the ICJ's statement that, in invoking *jus cogens*, Italy had allegedly overlooked that

> [t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[13]

But according to the Italian Court, "It appears unduly restrictive to confine *jus cogens* rules within their substantive scope, disregarding the fact that their practical *effectiveness* depends precisely on the legal consequences of the violation of peremptory norms" (*id.*).

The Court also noted that the distinction between substantive rules of *jus cogens* and procedural rules on immunity as on two different levels promotes impunity, and fitting international crimes in the *jure imperii* category provides them with undeserved protection. Nonetheless, the *Albers* Court acknowledged the binding force of the ICJ's decisions and the lack of international support for its own conclusions. It accepted the ICJ's clear message that no wrongdoing by a state—no matter how grave—can erode its immunity. All the same, the Court observed that the ICJ's ruling, rather than representing a "highly plausible legal solution," commanded compliance because of its inherent authority as a "*dictum* of the international Judge" (pp. 1204–05). This remark, implicitly equating the ICJ's judgment to a legal source, formed the premise of a predictable distinction: the World Court's decision must be respected because it shapes the law (*jus*), even if it does not reflect what is just (*justum*): "[I]t is not possible to find in the ICJ's decision any arguments capable of refuting the persuasiveness

[13] Germany v. Italy, *supra* note 2, para. 93.

and legal solidity of the principles thus far affirmed by this Court" (p. 1205). The only acceptable reason to surrender the *Ferrini* case law was, thus, the lack of "'validation' by the international Community of which the ICJ is the highest judicial body" (*id.*). Ultimately, the Court acknowledged that its position was not ("yet") shared by other states to a sufficient degree, "and this ineluctable conclusion prevent[ed] further application [of the *Ferrini* principles]" (*id.*).

The Court of Cassation further observed that Italy had incurred international responsibility for acts of its judiciary (the assertion of jurisdiction and concession of *exequatur*) and had been ordered to restore the status quo ante. That order demanded compliance irrespective of the means chosen to implement it and notwithstanding the legal finality of the domestic judgments already delivered. Formally, the ICJ's decision did not impose obligations directly on the Italian Court, which, it argued, as a matter of domestic law enjoyed "total autonomy of the jurisdictional function" (p. 1205). However, to avoid undermining Italy's international position, it resolved to implement the ICJ's ruling and to issue a judgment reflecting the current state of international law.

Therefore, the Court of Cassation overturned the Military Court's decision for lack of jurisdiction, and barred its remand. It also added a cursory remark excluding the possibility that such a ruling would create an issue of constitutionality. This last passage is discussed below.

* * * *

In *Albers*, the Italian Court conceded defeat, recognizing that the ICJ's judgment commanded respect and that the courts of other countries had not followed its lead, which strengthens the ICJ's conclusion that no new custom had crystallized, before or after *Ferrini*. Nonetheless, the Court took pains to claim (a symbolic) victory in terms of justice, casting itself as the unappreciated genius. It is fair to say that this exercise of rationalization, slightly pathetic at first glance, was necessary to make a strategic point: that the new rule of customary international law it favors has not yet emerged but could do so in the future. In asserting the validity of the values of justice informing the supposed custom, the Court carefully kept that hope alive and denied that the evolutive process leading to the new rule had failed.

Even before the Court's ruling in *Albers*, the ripples caused in the Italian judiciary's pond by the stone of the ICJ's judgment had reached some lower courts. Specifically, proceedings pending before the Tribunal of Florence and the Turin Court of Appeal had required them to determine the impact of the ICJ's decision in situations similar to those in *Ferrini* and *Albers*.[14] In both proceedings, a preliminary order had been obtained from the Court of Cassation en banc, precisely on the possibility of exercising jurisdiction over Germany, as had been authorized by the Court. This order posed a problem. On the one hand, issues settled by the Court's preliminary orders cannot be further disputed in the main proceedings. On the other, Article 94(1) of the United Nations Charter enjoins all UN members to comply with the ICJ's judgments, and that obligation enjoys quasi-constitutional status under Article 11 of the Italian Constitution. The Florence tribunal acknowledged the superior rank of the Charter article and accordingly set aside the norms on the finality of the Supreme Court's rulings and asserted its lack of jurisdiction. The Turin Court of Appeal reached a similar conclusion by different reasoning. It noted that the ICJ's decision could not overrule the Court of Cassation's preliminary

[14] Manfredi v. Repubblica federale di Germania, Trib. Firenze, 28 marzo 2012, 95 RDI 583 (2012); Repubblica federale di Germania v. De Guglielmo, App. Torino, 3 maggio 2012, *id.* at 916.

pronouncement on jurisdiction, which was final and binding in the instant proceedings. Yet the ICJ's ruling had to be taken into account when "assessing *the merits* of the dispute."[15] Hence, it dismissed the claim on grounds of admissibility.

Both judgments illustrate how internal *res judicata* might be creatively overruled to give effect to the ICJ's decisions. But the need for such creative arguments was recently removed by the legislature, which introduced a new norm into the Code of Civil Procedure that envisages conflicts with an ICJ decision as a permissible ground for revocation of final judgments.[16] Incidentally, a similar legislative solution had been adopted in the criminal field, after the European Court of Human Rights repeatedly condemned Italy for not allowing the reopening of criminal trials conducted in violation of due process standards. Initially, the Court of Cassation was forced to stretch analogic interpretation so as to apply the existing rules on revision if a judgment from Strasbourg ruled that the trial had been conducted in violation of the European Convention on Human Rights.[17] The legislature later introduced a new ground for reopening such a case when it had concluded with a sentence by the Court of Cassation.[18]

Moreover, the combined effect of the international rule—as identified by the ICJ—and Article 10 of the Constitution, which calls for the automatic conformity of the Italian legal order with international custom, requires judges to refuse recognition of foreign judgments violating state immunity. The cooperative stance displayed in *Albers* and by the Italian legislator does justice to the ICJ's rejection of Germany's request for a nonrepetition order against Italy.[19]

At least on the surface, the Court of Cassation appeared to take the ICJ's judgment seriously. Alexander Orakhelashvili concluded his critique of the ICJ's decision in this *Journal* by observing that "[w]hether Italian authorities comply is for them to choose, but whether they are obligated to do so is questionable."[20] They have in fact complied, and the Court seemingly felt an obligation to do so—though it may have derived from a sense of Italy's treaty obligations rather than from any notion of judicial duties owed to the World Court as a superior body. The Italian Court did not attempt to shield itself behind the doctrine according to which states are unitary subjects ("black-boxes")[21] whose inner components are irrelevant to (and immune from) the obligations owed by the state under international law.

After all, the ICJ itself ordered Italy as a state to "ensure that the decisions of its courts and those of other judicial authorities infringing [Germany's immunity] cease to have effect,"[22] and to redress all violations that had already occurred. This passage must be read in conjunction with the statement that Italy would not escape its obligation simply because "some of the

[15] *De Guglielmo* at 921 (emphasis added).

[16] Legge 14 gennaio 2013, n. 5, Art. 3(2) (ratifying United Nations Convention on the Jurisdictional Immunities of States and Their Property, *supra* note 4).

[17] *See* Somogyi, Cass., I sez. pen., 3 ottobre 2006, n. 32678; Cat Berro, Cass., V sez. pen., 2 febbraio 2007, n. 4395; Somogyi v. Italy, 2004-IV Eur. Ct. H.R. 77.

[18] *See* Art. 625 *bis* CODICE DI PROCEDURA PENALE. It will be applicable to those criminal proceedings, like *Albers* and *Milde*, where the victims were admitted to bring a civil claim.

[19] Germany v. Italy, *supra* note 2, para. 138.

[20] Orakhelashvili, *supra* note 2, at 616.

[21] Ward Ferdinandusse, *Out of the Black-Box? The International Obligation of State Organs*, 29 BROOK. J. INT'L L. 45 (2003).

[22] Germany v. Italy, para. 139(4).

violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law."[23] In other words, Italy must ensure that domestic courts reverse and discontinue, respectively, past and pending violations.[24]

Quite apart from the question whether all ICJ judgments can be considered directly applicable in domestic courts (that is, are "self-executing"), this particular one clearly is because of its clarity and completeness. Of course, Italy enjoys a certain "margin" in choosing the specific means to implement its international obligations. But in *Albers*, the Court of Cassation accepted its responsibility and declared its intent to contribute to Italy's record as a law-abiding citizen of the international community even before the legislator's intervention. Granted, insofar as the Court decided to follow the ICJ out of a sense of "comity" rather than obligation, the moderate monism emanating from *Albers* might easily revert to dualism, without notice.[25] But it is more likely that the *Albers* Court used the comity language to save face, not to reserve a right to rebel. Furthermore, the legislator's move dispelled all doubts about the genuineness of Italy's surrender.

A certain parallel can be drawn with the *Avena* saga in the United States. The reluctance of the U.S. Supreme Court to accept the decisions of the ICJ as binding despite the willingness of the executive branch pushed the ICJ to address the U.S. courts directly, to avoid any doubts as to which organs, *within the state*, were responsible for implementation. As Steve Charnovitz showed, however, neither the federal nor the state courts accepted an obligation to ensure compliance with the ICJ's decisions in the absence of revision of state or federal legislation, and neither the U.S. Congress nor the federal executive has acted purposefully to implement the ICJ's decisions.[26] Charnovitz's view of the U.S. Supreme Court in this regard highlights the gulf between it and the Italian Court of Cassation: "Instead of assuring that U.S. treaty commitments are adhered to, the U.S. Supreme Court has glorified the supremacy of state laws vis-à-vis international obligations of the United States."[27]

In the *Russel* case of 1979, the Italian Constitutional Court rejected a challenge to the constitutionality of the statute giving effect to Article 31(1) and (3) of the Vienna Convention on Diplomatic Relations.[28] It noted the customary nature of the rules on diplomatic immunity, which had taken effect before the Constitution, and thus dispelled any doubts about their constitutionality. The Constitutional Court also argued that these customs were necessary "to ensure the fulfillment of the diplomatic mission, an essential institution of international law," but warned that, "as regards international norms enjoying general recognition that entered into force after the Constitution, the mechanism of automatic incorporation . . . cannot in any way permit breach of the fundamental principles of our constitutional order."[29] This passage clarifies that post-1948 customs cannot conflict with the so-called counterlimits, which function

[23] *Id.*, para. 137.

[24] *See* Mirko Sossai, *Are Italian Courts Directly Bound to Give Effect to the* Jurisdictional Immunities *Judgment?*, 21 IT. Y.B. INT'L L. 175, 178–79 (2011).

[25] *See* Francesco Francioni, *From Utopia to Disenchantment: The Ill Fate of 'Moderate Monism' in the ICJ Judgment on the Jurisdictional Immunities of the State*, 23 EUR. J. INT'L L. 1125, 1129 (2012).

[26] *See* Steve Charnovitz, *Correcting America's Continuing Failure to Comply with the* Avena *Judgment*, 106 AJIL 572, 574 (2012).

[27] *Id.* at 573.

[28] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95.

[29] Corte cost., 18 giugno 1979, n. 48 (final para.), Gazzetta Ufficiale 1979, n. 175, *available at* http://www.cortecostituzionale.it.

as a barrier to the surrender of sovereign powers to (or their exercise by) supranational and international bodies.

In *Albers*, the Court of Cassation opined that, since the custom envisaged in *Ferrini* does not in fact exist, no issue of constitutionality can arise (pp. 1205–06). This passage is elliptical, as it fails to specify which statutory act was suspected of breaching the alleged custom. Perhaps it refers to a conflict between the statutes enjoining Italian courts to decline jurisdiction[30] and the *Ferrini* principle, elevated to a constitutional standard under Article 10 of the Constitution. Perhaps the Court was referring to another—more radical—conflict adumbrated by the plaintiffs, between immunity and constitutional counterlimits. If international *jus cogens* cannot trump sovereign immunity, one could try to invoke *domestic* peremptory safeguards to escape compliance with detestable international obligations, as in the *Kadi* case.[31] As seen above in *Russel*, however, pre-Constitution customs—including those on immunity—are seemingly grandfathered into the Italian system and cannot undergo constitutional scrutiny, not even for breach of the counterlimits. Cases are pending before the Court of Cassation that deal exactly with this issue, which will grant an extra day (or year) in court to the *Ferrini* saga.[32]

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Sovereign immunity—provisional attachment of noncommercial property of a state—2004 UN Convention on Jurisdictional Immunities of States and Their Property—customary international law

NML CAPITAL LTD. v. REPUBLIC OF ARGENTINA. Nos. 11-10.450, 11-13.323, 10-25.938. *At* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/.
French Cour de cassation, March 28, 2013.

In three cases decided on the same day, the French Court of Cassation held that the provisional attachments of funds belonging to the Republic of Argentina by NML Capital Ltd. (NML) were void on the ground of sovereign immunity from enforcement because the funds were intended to finance state noncommercial activities and had not been subject to an express waiver of immunity by Argentina.[1] These cases are the first judicial application by the Court of Cassation of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (2004 UN Convention), which France signed on January 17, 2007, and ratified on June 28, 2011.[2]

[30] *See* L. n. 218/1995, *supra* note 11, Art. 11.

[31] Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 ECR I-6351 (reported by Miša Zgorec-Rožej at 103 AJIL 305 (2009)).

[32] Nn. 17962/2011 (L. Ferrini and heirs) and 12021/12 (O. Ferrini and heirs), *cited in* Giuseppe Cataldi, *The Implementation of* Germany v. Italy, 2 ESIL REFLECTIONS, Jan. 24, 2013, *at* http://www.esil-sedi.eu/node/281.

[1] NML Capital Ltd. v. Republic of Arg., Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 28, 2013, *at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/ (to be reported in the *Bulletin d'information de la Cour de cassation).* Translations from the French are by the authors.

[2] Loi 2011-734 du 28 juin 2011 autorisant la ratification de la convention des Nations unies sur les immunités juridictionnelles des États et de leurs biens, J.O., June 29, 2011, p. 10953. For the 2004 UN Convention, see GA Res. 59/38, annex (Dec. 2, 2004) (not yet in force).

The cases arose from Argentina's default on payment of certain bonds issued under a 1994 agreement entered with Bankers Trust Co., the Fiscal Agency Agreement (FAA).[3] In December 2006, NML had obtained a judgment from the District Court for the Southern District of New York ordering Argentina to pay NML damages in the amount of US$284,184,632.30.[4] In 2009, in an effort to collect on this debt, NML arranged for the provisional garnishment of either labor and corporate taxes (case Nos. 11-10.450 and 11-13.323) or oil royalties debts (case No. 10-25.938) owed to Argentina by the Argentine branches of three French companies.

Upon receipt of the bailiff's notification of the garnishments, Argentina moved to lift them before the juge de l'exécution (special judge for enforcement measures) of the Tribunal de Grande Instance of the cities of Nanterre, Bobigny, and Paris, the seats of the three targeted garnishees' registered offices. Argentina contended, in particular, that the garnished assets enjoyed state immunity. In response, NML argued that as commercial debts the oil royalties were not subject to such immunity, and that in any event Argentina had expressly waived its state immunity in the governing bond indenture agreements. In three separate proceedings,[5] the judges lifted the garnishments (with the minor exception of a commercial debt of about US$2000 related to case No. 10-25.938).[6] These judgments were later appealed to the Court of Appeal of Paris (Nos. 11-13.323 and 11-10.450) and the Court of Appeal of Versailles (No. 10-25.938).

In two nearly identical decisions, the Paris Court of Appeal characterized the labor and corporate taxes owed by the taxpayer as "resources necessarily connected to the exercise by this state of powers linked to its sovereignty and not [as] property intended for commercial use."[7] The court noted that the waiver contained in the bond indenture agreements applied " 'to the fullest extent permitted by the laws of the jurisdiction' in which it was invoked."[8] Since French case law permits a waiver of sovereign immunity on taxes owed to the debtor state only if the waiver was expressly made, and since the waiver provision in the FAA did not expressly cover such debts, the Paris Court of Appeal concluded that Argentina had not waived its enforcement immunity as regards these particular assets.

The Versailles Court of Appeal was called upon to characterize the garnished oil royalties in its decision. NML relied on a decision of the Federal Supreme Court of Argentina for the proposition that the oil royalties were contractual rather than fiscal in nature, so that they were commercial and subject to attachment. The Versailles court rejected this argument on the

[3] Fiscal Agency Agreement Between the Republic of Argentina and Bankers Trust Company, Fiscal Agent (Oct. 19, 1994), *at* http://www.shearman.com/files/upload/Fiscal-Agency-Agreement.pdf [hereinafter FAA].

[4] NML Capital, Ltd. v. Republic of Arg., No. 1:03-cv-08845-TPG (S.D.N.Y. Dec. 18, 2006) (unreported).

[5] Decisions of courts of original jurisdiction reviewed in the following *NML Capital Ltd. v. Republic of Argentina* judgments: Cour d'appel [CA] Paris, 4e pôle, 8e ch., Jan. 27, 2011, No. 10/03378 (unreported) [hereinafter CA Paris Jan. 27, 2011]; CA Paris, 4e pôle, 8e ch., Dec. 9, 2010, No. 10/00390, *at* http://www.dalloz.fr/Recherche?famille-id=JURISPRUDENCES&fromFonds=1 (by subscription) [hereinafter CA Paris Dec. 9, 2010]; CA Versailles, 16e ch., Sept. 9, 2010, No. 09/09640.

[6] CA Versailles, *supra* note 5.

[7] CA Paris, Jan. 27, 2011, *supra* note 5; CA Paris, Dec. 9, 2010, *supra* note 5.

[8] CA Paris, Jan. 27, 2011, CA Paris, Dec. 9, 2010 (both quoting FAA, *supra* note 3, Exhibit A, Form of Registered Security, at A-18).

ground that the Federal Supreme Court of Argentina had never expressly decided that this type of asset is clearly commercial. In particular, the Versailles court characterized the oil royalties as tax or "taxlike debts" because of the way the royalty rates were determined, the rules applicable to their collection, and the penalties assessed in the event of nonpayment. With regard to the waiver, the court found that the reservation in the FAA pursuant to which "[t]he waiver of immunities referred to herein constitutes only a limited and specific waiver for the purpose of the Securities of this Series and the Fiscal Agency Agreement and under no circumstances shall it be interpreted as a general waiver of the Republic"[9] had to be interpreted in light of Article 131 of the Argentine Permanent Complementary Law on the National Budget, No. 11,672. Under that statute, funds that are allocated for the payment of the expenses of the general budget of the state cannot be attached. According to the court, as the oil royalties are "necessarily connected to the exercise by the Argentine state of powers linked to its sovereignty," any waiver with respect to those assets had to be "express and unequivocal." Consequently, Argentina's waiver in the FAA did not cover the oil royalties that NML had garnished in France.[10]

NML appealed all three appellate decisions to the Court of Cassation. In a concise decision, the Court rejected the appeal, ruling that pursuant to

> customary international law, as reflected in the United Nations Convention on Jurisdictional Immunities of States and Their Property of December 2, 2004, if states may waive, in a written contract, their immunity from enforcement on property or categories of property used or intended to be used for governmental purposes, such a waiver must be express and specific, mentioning the property or category of property for which the waiver is granted.

The Court of Cassation then considered each of the particular asset classes that had been attached by NML: the Court agreed with both lower courts that the labor, tax, and oil royalty debts were "necessarily connected to the exercise by the Argentine state of powers linked to its sovereignty." In the case of the oil royalties, the Court further held that the very purpose of such royalties is to "finance other sovereign activities." Finally, having noted that the waiver clauses did not specifically mention labor, tax, and taxlike debts owed by taxpayers, the Court upheld the decisions of those courts that the Republic of Argentina had not waived its immunity from enforcement on the assets in dispute.

In two of the cases, the Court of Cassation also balanced Argentina's invocation of state immunity with France's obligation under Article 6 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms to provide a right of access to a court, which necessarily entails the right to obtain the enforcement of any court decision. The Court of Cassation found that the European Court of Human Rights has consistently held that the deprivation of a claimant's right of access to court is no obstacle to a sovereign defense of

[9] FAA, *supra* note 3, Exhibit A, at A-18–19.

[10] CA Versailles, *supra* note 5.

jurisdictional immunity, so long as the immunity falls within the generally accepted scope of immunity under international law.[11]

* * * *

Unlike various other countries, France has not enacted a comprehensive statute on sovereign immunity. Accordingly, the applicable principles are mainly found in decisional law.[12] The rationales given by the Court of Cassation to support the application of sovereign immunity from enforcement have varied through the years. In earlier decisions, the Court had variously referred to the "principles of private international law governing immunities of foreign states," "the principle of immunity from jurisdiction of foreign states," and "principles of international law related to immunity from jurisdiction of foreign states."[13] The somewhat awkward references in the submissions of the advocate general to immunity as a "rule of international courtesy, having its origin in public international law"[14] reflect this rather uncertain position. But in holding that state immunity is rooted in customary international law as reflected in the 2004 UN Convention, the Court of Cassation appears to have taken the formal position that, at least for purposes of French law, state immunity is in fact a matter of customary international law, and its rules are expressed in the 2004 UN Convention.[15]

That position remains somewhat controversial. While the International Court of Justice also recently concluded that state immunities are a matter of customary international law,[16] the proposition has been challenged by scholars and before international jurisdictions. In particular, in the 2012 case *Mahamdia v. People's Democratic Republic of Algeria*, Attorney General Mengozzi of the Court of Justice of the European Union stated that "national differences [about the immunity of foreign states from jurisdiction] are so pronounced that any codification at international level is very difficult and may even cast doubt on the actual existence of a rule of customary international law in this regard."[17] Most importantly, the International Court of Justice itself tackled the issue of whether the 2004 UN Convention reflects customary international law regarding immunity from enforcement in the *Germany v. Italy* case. Having

[11] Sabeh el Leil v. France, App. No. 34869/05 (Eur. Ct. H.R. June 29, 2011); Cudak v. Lithuania, App. No. 15869/02 (Eur. Ct. H.R. Mar. 23, 2010); Kalogeropoulou v. Greece, 2002-X Eur. Ct. H.R. 415; McElhinney v. Ireland, 2001-XI Eur. Ct. H.R. 37; Fogarty v. United Kingdom, 2001-XI Eur. Ct. H.R. 157; Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79. Judgments and decisions of the European Court of Human Rights are available online at http://hudoc.echr.coe.int.

[12] NML Capital Ltd v Argentina—Conclusions of the Avocat général 21 (Mar. 20, 2013), *at* http://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=9351 (by subscription) [hereinafter AG Conclusions].

[13] Société Eurodif v. Islamic Republic of Iran, Cass. 1e civ., Mar. 14, 1984, Bull. civ. I, No. 98; Société Nationale Iranienne du Gaz (NIGC) v. Pipeline Serv., Cass. 1e civ., May 2, 1990, Bull. civ. I, No. 92, p. 69; Mrs. Soliman v. Embassy of Saudi Arabia, Cass. ch. mixte, June 20, 2003, Bull. MIXT, No. 4, p. 9, respectively.

[14] AG Conclusions, *supra* note 12, at 21.

[15] It is unclear from the ruling of the Court of Cassation whether it considers the whole 2004 UN Convention or only the principles about immunity from enforcement to reflect customary law. The advocate general, however, tends to refer to the whole Convention. *Id.* at 24–26.

[16] Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), paras. 56–57 (Int'l Ct. Justice Feb. 3, 2012), *at* http://www.icj-cij.org [hereinafter Germany v. Italy].

[17] Case C-154/11, Mahamdia v. People's Democratic Republic of Alg., Opinion of Attorney General Mengozzi, para. 24 (May 24, 2012) (footnote omitted), *at* http://curia.europa.eu. But the Court decided, quite to the contrary, that sovereign immunity from jurisdiction is a principle of customary international law. *Id.*, judgment, para. 56 (July 19, 2012).

noted that determining the content of Article 19 of the Convention gave rise to difficult negotiations on this issue, it stated that the "Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law."[18] On the other hand, the Court of Cassation's position was taken by the German government in connection with the World Court's consideration of enforcement immunity, as well as the European Court of Human Rights in two decisions on jurisdictional immunity.[19] Still, a more reasonable ruling by the Court of Cassation would have been that the 2004 UN Convention reflects "the French practice in this area."[20]

As for whether the Court of Cassation correctly applied Article 19 of the 2004 UN Convention, three comments may be made. First, the Court was correct in applying Article 19 rather than Article 18 of the Convention, which prohibits prejudgment measures of constraint. While NML's garnishments were clearly a form of provisional attachment, they did not constitute prejudgment measures under French law. The garnishments were provisional only because at the time they were made the 2006 U.S. judgment had not yet been granted recognition in France. Yet French courts have long held on the basis of Article L.511-2 of the French Code of Civil Procedures of Enforcement that any creditor benefiting from either a foreign judicial decision or an international award that is not yet enforceable in France may seek provisional measures regarding the debtor's assets without the court's prior authorization.

Second, the Court of Cassation had some difficulty applying Article 19 to the garnishment of assets representing various tax revenues payable to the state when those assets had not yet been allocated for any express purpose. Under Article 19, the dividing line between assets subject to attachment (Article 19(c)) and those not subject to attachment unless otherwise agreed (Article 19(a)) is whether the assets at issue are dedicated to government noncommercial purposes. State revenue is problematic precisely because it may not have been allocated for any specific purpose, or may be mixed purpose, that is, in part allocated for governmental purposes and in part for commercial activities. Instead of attempting to identify the purpose for which the debts were allotted under Article 19(c)—which was impossible—the Court of Cassation seems to have partially followed the advocate general's argument, which relied on the presumption contained in Article 21 of the 2004 UN Convention.[21] That article specifies a nonexhaustive list of property that is considered to be used for government noncommercial purposes.

To characterize these assets as falling within the scope of Article 21, the Court of Cassation reviewed Argentina's manner of assessing the tax liabilities, and especially the authority pursuant to which Argentina had become a creditor of the garnishees. The Court found that the imposition of the labor and fiscal taxes against the debtors had resulted from the use by Argentina of its sovereign powers. Clearly, the Court of Cassation applied the criterion of the nature of the assets rather than their purpose. This criterion is not entirely unknown under the 2004 UN Convention. Indeed, in its 1991 report on the negotiation of the Convention, the International Law Commission (ILC) referred to the existence of property that by "its very nature"

[18] Germany v. Italy, para. 117.

[19] *See id.*, para. 115; *Sabeh el Leil*, *supra* note 11, para. 18; *Cudak*, *supra* note 11, para. 67.

[20] *See* Robert del Picchia, *Rapport fait au nom de la commission des affaires étrangères, de la défense et des forces armées sur le projet de loi autorisant la ratification de la convention des Nations unies sur les immunités juridictionnelles des États et de leurs biens* at 19, Rapport du Sénat No. 73 (Oct. 27, 2010), *at* http://www.senat.fr/rap/l10-073/l10-0731.pdf.

[21] AG Conclusions, *supra* note 12, at 26.

must be understood as used or intended to be used for governmental purposes.[22] Consequently, it appears that for the Court of Cassation, labor and tax or taxlike levies fall within the nonexhaustive list in Article 21 of specific categories of property.

A similar rationale—based on the nature of a state act rather than its purpose—applies with equal force to issues concerning the jurisdictional immunities of foreign states. In a landmark 2003 case, the Court of Cassation held that foreign states and entities, including agencies and instrumentalities, established by them enjoy immunity from jurisdiction "inasmuch as the act giving rise to the dispute involved, by its *nature* or purpose, the exercise of the sovereignty of these states."[23] In principle, a state enjoys immunity from jurisdiction under Article 5 of the 2004 UN Convention except, inter alia, if it was engaged in a commercial transaction within the meaning of Article 10. To determine whether a given transaction is "commercial" in such cases, courts should primarily assess the *nature* of the transaction, even though consideration may also be given to its *purpose* (Article 2(2)). In holding that the debts were linked to the exercise by Argentina of its sovereign powers, that is, *acta jure imperii*, the Court of Cassation was satisfied that they could not be attached unless otherwise agreed by the parties.

Requiring a state in this situation to demonstrate the sovereign purpose underlying tax assessments not only would impose a significant burden on the state, but also would effectively constitute a violation of its sovereignty. In particular, while Article 19(c) states that it must be established that the property is used for commercial purposes, the 2004 UN Convention does not identify which party has the burden of proof. The solution reached by the Court of Cassation is also in line with the case law on mixed accounts identified by the ILC in its 1991 report, which states that a bank account opened in the name of a diplomatic mission but occasionally used for nondiplomatic purposes is not typically subject to attachment given its noncommercial character.[24] The reasoning for mixed accounts is fully applicable to state revenues that do not yet have a defined purpose or that potentially can be used for several different purposes, including commercial and other purposes.

Third, as regards its application of the 2004 UN Convention, the Court of Cassation appears to have added an implied condition to the Convention. While Article 19(a) provides that a state's waiver is valid if "the State has expressly consented to the taking of such measures," the Court held that the waiver must be both express and "specific": that is, it will not suffice for the state expressly to waive its immunity in general terms; it must also clearly identify the assets that are subject to the waiver.[25]

Since imposing the condition that the waiver be specific would not accord with the ILC commentary on Article 19(a)—"express consent can be given *generally* with regard to . . . property"[26]—the Court of Cassation seems to have relied on the commentary on Article 21, which notes that a "general waiver . . . without mention of any of the *specific* categories, would not be sufficient to allow measures of constraint" against categories of property listed in that

[22] Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries at 59, para. 2, *in* Report of the International Law Commission on the Work of Its Forty-Third Session, [1991] 2 Y.B. Int'l L. Comm'n, pt. 2, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), UN Sales No. E.93.V.9 (Part 2) [hereinafter ILC Commentaries].

[23] *Mrs. Soliman*, *supra* note 13 (emphasis added).

[24] ILC Commentaries, *supra* note 22, at 59, para. 3.

[25] Argentina raised a similar argument in litigation stemming from NML's attempt to enforce the judgment in Ghana. *See* James Kraska, Case Report: The "ARA Libertad" (Argentina v. Ghana), *in* 107 AJIL 404 (2013).

[26] As it is now (originally draft Article 18, ILC Commentaries, *supra* note 22, at 58, para. 8).

article.[27] One can only wonder whether the Court intentionally characterized state labor and tax revenues as specific categories of property falling within Article 21 of the 2004 UN Convention to shelter them under this ILC comment. In short, one may suspect that the Court granted Argentina's assets protection that would not be available under a strict application of Article 19. As pointed out by at least one commentator, it will not take long for practitioners to draw the necessary consequences from this overprotective case and to adjust the drafting of financing and debt instrument waiver clauses to identify the specific classes of assets, including state labor and tax revenues, that will be subject to attachment.[28]

These cases were not NML's first unsuccessful attempt to enforce the 2006 U.S. decision in France.[29] Nor is the *NML Capital Ltd. v. Republic of Argentina* saga likely to be closed soon in France. At the time of this writing, an appeal before the Court of Cassation of the decision of the Paris Court of Appeal of October 9, 2012, granting recognition to the 2006 U.S. judgment, was pending.[30]

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Piracy on the high seas—customary international law—UN Convention on the Law of the Sea—international law in U.S. courts—international criminal law

UNITED STATES v. DIRE. 680 F.3d 446.
United States Court of Appeals for the Fourth Circuit, May 23, 2012.

In the first criminal piracy decision by a United States court in nearly a century, the U.S. Court of Appeals for the Fourth Circuit ruled that the federal piracy statute's reference to the "law of nations" explicitly ties the scope of the offense to evolving customary international law definitions of the crime.[1] The court went on to find that under current customary and treaty law, *attempted* piracy falls within the scope of the international crime. In doing so, it joined several courts in nations around the world that have confronted the issue as a result of the outbreak of Somali piracy that began in 2008.

In early April 2010, two different groups of pirates made the same mistake: they attacked U.S. Navy warships in the Indian Ocean, apparently under the misapprehension that the warships were civilian vessels. The attacks did not go well for either group. Both were captured and brought for trial to Virginia (p. 449). The defendants faced numerous charges, in particular under the piracy statute, which provides, "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."[2] The statute has remained substantially unchanged since 1819, but had not been applied in any case for nearly one hundred years.

[27] As it is now (emphasis added) (originally draft Article 19, *id.* at 59, para. 8), *noted in* AG Conclusions, *supra* note 12, at 26 & n. 28.

[28] See the comment by Gilles Cuniberti on an earlier decision in the case, *NML Capital Ltd. v. Republic of Arg.*, Cass. 1e civ., Sept. 28, 2011, 139 JOURNAL DU DROIT INTERNATIONAL 668, 676, note Cuniberti.

[29] For the earlier decision of Sept. 28, 2011, see also Bull. civ. I, No. 153.

[30] Republic of Arg. v. NML Capital Ltd., CA Paris, 1e pôle, 1e ch., Oct. 9, 2012, No. 11/15467, *at* http://www.dalloz.fr/Recherche?famille-id=JURISPRUDENCES&fromFonds=1 (by subscription).

[1] United States v. Dire, 680 F.3d 446 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 982 (2013).

[2] 18 U.S.C. §1651 (2011).

The two groups of accused pirates were tried separately before two different judges in the Eastern District of Virginia, and those judges reached sharply different conclusions about whether the conduct in question met the definition of piracy. The defendants contended that because they had boarded the U.S. warships only as captives and had in fact taken no property, they had not committed "piracy" within the meaning of the statute. In the first case, *United States v. Said*, Judge Raymond Jackson dismissed the piracy charges, ruling that under the law of nations the crime consists only of "robbery on the sea."[3] In the case before him, there had been no robbery, only an attempt, which accordingly fell outside the international law definition.

In the second case, *United States v. Hasan*, Judge Mark Davis reached the opposite conclusion—that piracy under the law of nations includes attempts.[4] These divergent conclusions stemmed from a more fundamental disagreement—whether the statute's reference to the "law of nations" locks in the definition to the conception of piracy as it existed at the time of the statute's enactment, or whether it allows for the definition to evolve and expand to track international law.

In *Said*, the court began its analysis with the U.S. Supreme Court's principal inquiry into the definition of piracy, *United States v. Smith*.[5] In that seminal decision, the Supreme Court noted that the Constitution gives Congress the specific power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[6] While Congress had provided for the punishment of piracy since the first criminal statute in 1790, it had never "defined" the crime—in the sense of expounding its elements. Smith's lawyers had argued that the failure of Congress to "define" the crime precluded the exercise of the "Define and Punish" power. Indeed, "define" was inserted into the provision at the Constitutional Convention because the customary international law was generally thought to be "too vague and deficient" to delineate criminal norms.[7] Yet in *Smith*, the Supreme Court set aside this objection. Whatever could be said about the need to define other offenses against the law of nations, piracy itself required no definition: everyone knows what it means. Simply using the name of the offense was enough to convey the requisite details. Justice Story's opinion surveyed countless sources, foreign and domestic, on the meaning of piracy, and concluded that the offense needed no further statutory definition: all agreed that it consisted of "robbery . . . on the high seas."

In *Said*, the district court took *Smith* to mean that in 1820, when the last substantive revision of the piracy statute was passed, it encompassed only actual robbery on the high seas—to the exclusion of attempts.[8] Moreover, Judge Jackson concluded that there was no evidence that the definition had ever changed, and that the meaning of the statute today is controlled by the law of nations as it existed at the time of enactment.

[3] United States v. Said, 757 F.Supp.2d 554, 559 (E.D. Va. 2010).

[4] United States v. Hasan, 747 F.Supp.2d 599, 632 (E.D. Va. 2010).

[5] United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (Story, J.).

[6] U.S. CONST. ART. I, §8, cl. 10.

[7] *See* Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1701–02 (2012) (discussing drafting of the provision and quoting Gouverneur Morris, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614–15 (Max Farrand ed., 1911)).

[8] 757 F.Supp.2d at 559.

Numerous sources suggest, however, that at least since the early twentieth century, piracy has included attempts. Indeed, the Privy Council dealt with this precise question in a well-known decision that squarely concluded that attempts fell within the definition of piracy under the law of nations.[9] Similarly, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) defines piracy as "*any illegal acts of violence or detention*, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed . . . on the high seas, against another ship or aircraft."[10] The definition clearly goes beyond actual robbery to attempts, or mere ship-to-ship violence even without intent to steal.

Yet the court in *Said* dismissed this and other evidence as "unsettled" and not "authoritative."[11] It seems difficult to argue against the authoritativeness of the UNCLOS definition, but Judge Jackson suggested that it was not "authoritative" because some commentators have wondered whether that definition reflects prior custom in certain respects, because national penal provisions about piracy still vary, and because some commentators continue to define piracy as robbery.[12] The district court opinion hints at more fundamental reservations about using foreign or international sources to define custom, given the lack of any definitive body to "bring order" to divergent interpretations.[13] Moreover, tying criminal law to amorphous and diffuse international custom raises due process violations for criminal defendants.

In *Hasan*, the district court took the opposite approach. In a lengthy opinion, Judge Davis reviewed the historical context of the statute, the reasoning of *Smith*, and more recent developments in the field of customary international law as well as multilateral treaties, concluding that UNCLOS Article 101 "reflects the modern customary international law definition of general piracy, which is applicable to 18 U.S.C. §1651."[14]

The court of appeals approved and upheld this approach in its entirety (p. 467). The opinion began by noting the conflict between the *Hasan* and *Said* decisions and then turned to a careful analysis of the U.S. Constitution's Define and Punish Clause. The enumeration of "piracy" in that clause is doubly redundant of felonies and offenses against the law of nations. Relying on recent scholarship,[15] the court of appeals concluded that piracy was separately enumerated to make clear that it could be punished under universal jurisdiction (pp. 454–55). Congress's power to exercise universal jurisdiction is thus limited to, at most, offenses that have clearly acquired this status in international law.[16]

Turning to the piracy statute, the court of appeals concluded that the reference to the "law of nations" in the law was intended to keep pace with external changes in customary international law. Indeed, the purpose of referring to an external body of law was to allow the scope of the statute to change in accordance with the policy of punishing piracy to the full extent permitted by international law. Congress in 1820 certainly understood that the law of nations

[9] *In re* Piracy Jure Gentium, [1934] A.C. 586 (P.C.).

[10] United Nations Convention on the Law of the Sea, Art. 101, *opened for signature* Dec. 10, 1982, 1833 UNTS 3 (emphasis added), *available at* http://www.un.org/depts/los/.

[11] 757 F.Supp.2d at 564.

[12] The relevant passages do not explicitly exclude attempts from the definition of the crime.

[13] 757 F.Supp.2d at 565.

[14] United States v. Hasan, 747 F.Supp.2d 599, 637 (E.D. Va. 2010).

[15] Citing, inter alia, Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 164–67 (2009).

[16] *See Hasan*, 747 F.Supp.2d at 605 & n.7 (citing Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1223–27 (2009)).

evolves and that it would be burdensome to amend the statute to reflect every customary development. This consideration explains the lack of a particularized definition. Moreover, the U.S. Supreme Court had held in *Sosa v. Alvarez-Machain* that the reference to the "law of nations" in the Alien Tort Statute tracks external developments, instead of locking in the 1790 content of customary international law.[17] The same approach applies to the criminal piracy statute, the court of appeals said, because there is no reason to think custom develops for civil purposes while remaining "stagnant" for criminal purposes (pp. 467–68). (Indeed, one might add that the criminal remedy for piracy is more central to customary international law than the unusual damages remedy of the Alien Tort Statute.[18])

Having established the relevance of current customary international law, the court of appeals, like the *Hasan* court, held that UNCLOS is strong evidence of such custom, because of both its broad membership and the widespread view that the relevant norms have become customary law. In addition, it did not suffice to find the norm articulated in the treaty; such statements could be aspirational. A treaty will be evidence of international custom only if states parties actually comport themselves in a manner consistent with the norm concerned (p. 461). In this case, the customary status of attempt-as-piracy is further reflected in numerous criminal cases, from the Privy Council decision in the early twentieth century to a Kenyan piracy prosecution in 2006 (pp. 461–63). The court of appeals noted that the latter decision constitutes particularly strong evidence of custom because of Kenya's leading role in prosecuting pirate suspects captured by multinational naval forces in the Gulf of Aden.

Finally, the Fourth Circuit held that there was no problem of notice, due process, or common law criminality from using an evolving standard incorporated into a criminal statute. Congress had specifically criminalized piracy, which eliminated any concerns about common law crimes. And while the statute tracks custom, the standard for recognizing a customary norm is quite demanding. The court quoted Judge Davis's conclusion in *Hasan* that "the recognition of a general and consistent practice among the overwhelming majority of the international community[ ] necessarily imputes to Defendants fair warning of what conduct is forbidden under §1651" (p. 464).[19] Moreover, the relevant norm is not an amorphous one but, rather, one crystallized and codified in treaties that have been ratified by both the United States and Somalia.[20]

* * * *

The ruling of the court of appeals in *Dire* illustrates some of the questions that can arise when U.S. law and international law intertwine. The piracy statute requires looking to customary international law to determine the content of the offense. The court dismissed concerns about

[17] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[18] *See* Eugene Kontorovich, *A Tort Statute, with Aliens and Pirates,* 107 NW. U. L. REV. COLLOQUIUM 100, 107 (2012).

[19] Quoting *Hasan*, 747 F.Supp.2d at 639.

[20] Here again, the court of appeals quoted the decision in *Hasan*: "[A]lthough the definition of general piracy provided by the High Seas Convention and UNCLOS is not nearly as succinct as 'robbery on the sea,' the definitions are not merely general aspirational statements, but rather specific enumerations of the elements of piracy reflecting the modern consensus view of international law." *Dire*, 680 F.3d at 462 (quoting 747 F.Supp.2d at 634). Somalia is a party to UNCLOS, and the United States ratified its 1958 predecessor, which contains substantively identical provisions on piracy. *See* Geneva Convention on the High Seas, Art. 15, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82.

notice and criminal punishment for offenses not defined by statute by pointing to the clear agreement in international custom about the criminal status of piratical attempts. That a crystal-clear customary definition can substitute for a congressional definition has been clear since *Smith.*

While the *Said* decision erred in thinking the statute "locks in" a historic definition of piracy, one should take seriously the broader concerns it raises about cobbling potentially diffuse and debatable international legal sources into an open-ended criminal norm. Indeed, these concerns led to the Constitution's insistence that Congress "define" not only the "law of nations," but even its more concrete component, piracy. *Dire* emphasized that the piracy statute is an exercise of Define and Punish power. But there is good reason to think exercises of the Define power cannot *redefine* the law of nations.

Federal courts have varied considerably in the standards they insist on for establishing the existence of an international customary norm. In *Hamdan v. Rumsfeld,* the Supreme Court required a very demanding level of evidence to establish the existence of international criminal norms: actual similar practice in other jurisdictions.[21] The Fourth Circuit, without citing *Hamdan,* followed a similar approach. The *Dire* court found overwhelming evidence of custom: not merely the clear language of a foundational treaty generally agreed to represent customary law, but also clear and consistent judicial precedents in other countries over a long period of time. The court made clear that it would not rely simply on "soft law" and scholarly pronouncements.

While attempts are an easy question, one might imagine that "piracy" could not necessarily accommodate *any* broad expansion of its definition in international custom. If, for example, the slave trade or torture came to be equated with piracy, would it be punishable under §1651? Certainly, that section now covers a wider array of conduct than mere robbery at sea, but just where the outer limits of an eventual definitional expansion might be found is far from clear.

Thus, attempts to ram or otherwise injure another vessel without any intent to rob have been held to be piracy for purposes of the Alien Tort Statute.[22] That statute, of course, permits suits "for a tort only, committed in violation of the law of nations."[23] One might wonder whether any piracy claim found to meet this jurisdictional requirement would also satisfy §1651. Similarly, there are serious questions under UNCLOS about whether its piracy provision extends to aiders and abettors on land, and especially aiders and abettors after the fact.[24] Treaties and state practice are imprecise on these questions, and that uncertainty may be enough to defeat a prosecution even under the standards articulated by the court of appeals in *Dire.* It would also be different, for notice purposes, if a new norm were not spelled out clearly in a treaty but rather distilled from the opinions of international courts and scholars.

As it happens, the entire discussion of using evolving custom may have been unnecessary. There is no evidence that piratical attempts were not included in the customary definition of the crime in 1820. The argument that the definition of piracy excluded attempts was based on

[21] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 611–12 (2006) (Stevens, J., plurality opinion) (holding that "conspiracy" to commit war crimes is not a violation of international law and thus could not be punished under the exercise of the Offenses Clause); *see also* Kontorovich, *supra* note 7, at 1737–38.

[22] Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099, 1101–02 (9th Cir. 2013).

[23] 28 U.S.C. §1350 (2011).

[24] *See, e.g.*, United States v. Ali, 885 F.Supp.2d 17, 30–32 (D.D.C. 2012).

a passage in *Smith* that robbery constituted piracy. Nothing suggests that this shorthand definition was meant to exclude liability for attempts; the Supreme Court may have intended simply to indicate the central elements of the crime.[25] Indeed, in 1800 John Marshall said that "[n]ot only an actual robbery, therefore, but cruising on the high seas without commission, and with intent to rob, is piracy."[26] Similar pronouncements by federal courts before *Smith* do not seem to exclude attempts.[27] The *Hasan* court decided not to rule on the content of the 1820 definition, instead finding that in any case today's clearer definitions apply.[28] Again, this reasoning suggests a high threshold for establishing a customary norm. While there is no evidence that attempts were not included in the 1820 definition, there is too little practice either way to establish the requisite "definiteness."

Finally, the United States is one of numerous jurisdictions prosecuting piracy in the Gulf of Aden and Indian Ocean. Given recent pronouncements about the importance of "judicial dialogue," one might expect a greater discussion of these cases.[29] (The court of appeals noted favorably that the Privy Council had "consulted a multitude of domestic and foreign authorities" (p. 457)). Yet surprisingly, both the district courts and the court of appeals did not consult the numerous decisions by courts around the world arising from the eruption of Somali piracy, citing only one contemporary case and neglecting a long line of decisions by the Seychelles Supreme Court (currently the world's leading piracy prosecutor), all of which have held attempts to fall within the international law definition of the crime.[30] Indeed, attempts constituted roughly two thirds of the Somali piratical incidents prosecuted worldwide when *Dire* was decided. Since then, convictions have been issued for piratical attempts in courts in Italy, the Netherlands, Germany, and Japan.[31] *Dire* puts the United States firmly in line with this uniform international practice, but without evidencing much familiarity with it.

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[25] *Hasan*, 747 F.Supp.2d at 621.

[26] United States v. Robins, 27 F. Cas. 825, 862 (D.S.C. 1799) (No. 16,175) (statement of John Marshall in House of Representatives, Mar. 4, 1800). The lawyers in one of the lower-court cases decided in *Smith* tried to use Marshall's position as evidence of the indeterminacy of piracy law, but they had little to impeach it with. They pointed to a statement of the U.S. attorney that robbery was required, but that was not said in a case of attempt and thus, like Justice Story's words in *Smith*, did not appear to be an exhaustive definition. *See* United States v. Chapels, 25 F. Cas. 399, 402 (C.C.D. Va. 1819) (No. 14,782).

[27] *See* United States v. Tully, 28 F. Cas. 226, 229 (C.C.D. Mass. 1812) (No. 16,545) ("A pirate is one . . . who, to enrich himself, either by surprise or force, sets upon merchants or other traders, by sea, to spoil them of their goods . . . .").

[28] 747 F.Supp.2d at 622.

[29] *See, e.g.*, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004).

[30] *See, e.g.*, Republic v. Dahir, Crim. No. 51/2009, para. 65 (Sup. Ct. July 26, 2010) (*Topaz*), *at* http://law.case.edu/grotian-moment-blog/documents/CR51-2009-Judgment.pdf; Republic v. Ise, Crim. No. 75/2010, para. 39 (Sup. Ct. June 30, 2011) (*Talenduic*), *at* http://law.case.edu/grotian-moment-blog/documents/CR75-2010-Judgment.pdf. For background on the recent spate of Somali piracy, see *Agora: Piracy Prosecutions*, 104 AJIL 397 (2010).

[31] *See* Eugene Kontorovich, *The Penalties for Piracy: An Empirical Study of National Prosecution for International Crime* (Northwestern Public Law Research Paper No. 12-16, July 10, 2012), *at* http://ssrn.com/abstract=2103661.