BENCHBOOK on International Law

Diane Marie Amann ed. (2014)

American Society of International Law

The American Society of International Law dedicates
this *Benchbook on International Law* to the
memory of David J. Bederman

Summary Table of Contents[1]

Cover, Copyright, Dedication

Preface i

Summary Table of Contents ii

Detailed Table of Contents vi

I. An International Law Primer I.A-1

A. International Law Defined I.A-1
1. Private International Law I.A-3
2. Foreign Relations Law I.A-3
3. Foreign Law I.A-3
4. Comparative Law I.A-3
5. Transnational Law I.A-4
6. Global Law I.A-5

B. Sources and Evidence of International Law I.B-1
1. Two Primary Sources of International Law I.B-2
2. Secondary Source of International Law I.B-10
3. Subsidiary Means of Determining International Law Rules I.B-11
4. "Soft Law" I.B-13

C. Uses of International Law in U.S. Courts I.C-1
1. Direct Enforcement of Treaty Provisions I.C-1
2. Statutory Implementation or Incorporation of International Law I.C-5
3. Application of Customary Norms and Other International Law Sources I.C-7
4. Consultation of International Sources As an Aid to Interpretation I.C-9

II. Jurisdictional, Preliminary, and Procedural Concerns II.A-1

A. Jurisdiction II.A-1
1. Principles or Bases of Jurisdiction II.A-2
2. Sources of Jurisdiction Under U.S. Law II.A-4
3. Principles or Bases of Jurisdiction and U.S. Courts II.A-6
4. Determining if Congress Intended to Give a Statute Extraterritorial Reach II.A-11

B. Immunities and Other Preliminary Considerations II.B-1
1. Immunities II.B-1
2. Act of State Doctrine II.B-16

[1] This Summary Table of Contents for Am. Soc'y Int'l L., *Benchbook on International Law* (Diane Marie Amann ed., 2014), is available at www.asil.org/benchbook/summarytoc.pdf. To access the entire volume, see www.asil.org/benchbook.

3. Political Question II.B-18
4. *Forum Non Conveniens* II.B-20
5. Time Bar II.B-22
6. Exhaustion of Remedies II.B-22
7. Comity II.B-23
8. Choice of Law II.B-24
9. Recognition and Enforcement of Foreign Judgments II.B-25

C. Discovery and Other Procedures II.C-1
1. Service of Process Abroad II.C-1
2. Taking of Evidence Abroad II.C-4
3. Discovery Requests from Non-U.S. Courts II.C-11

III. International Law in U.S. Courts: Specific Instances III.A-1

A. International Arbitration III.A-1
1. International Arbitration Defined III.A-1
2. How International Arbitration Matters Arise in U.S. Courts III.A-2
3. Legal Framework: The Federal Arbitration Act III.A-3
4. Distinguishing Domestic from International Arbitration Awards III.A-6
5. Request for Injunctive or Other Provisional Measures III.A-11
6. Request for Discovery Order III.A-15
7. Request to Confirm, Recognize, Enforce, or Vacate Arbitral Awards III.A-20
8. Additional Arbitration Research Resources III.A-29

B. International Law Pertaining to Families and Children III.B-1
1. Overview III.B-1
2. Cross-Border Abduction of Children III.B-4
3. Civil Aspects of Cross-Border Child Abduction III.B-5
4. Criminal Aspects of Cross-Border Child Abduction: Federal Prosecution III.B-37
5. Research Resources III.B-46

C. International Sale of Goods III.C-1
1. U.N. Convention on Contracts for the International Sale of Goods III.C-2
2. Researching International Sales Law III.C-21

D. International Air Transportation III.D-1
1. History of International Aviation Law III.D-1
2. Treaties Applicable in U.S. Courts III.D-2
3. Key Treaties and U.S. Principle of Self-Execution III.D-4
4. Inter-Carrier Agreements III.D-4
5. Scope of Application of Treaties III.D-5
6. Determining the Applicable Law III.D-6
7. Federal Jurisdiction III.D-9
8. Venue III.D-11

9. Types of Claims Covered by Treaties III.D-12
10. Limitation of Liability III.D-13
11. Other Defenses III.D-15
12. Treaty Interpretation III.D-16

E. Human Rights III.E-1
1. Alien Tort Statute III.E-2
2. Torture Victim Protection Act III.E-26
3. Human Trafficking III.E-36
4. *Non-refoulement*, or Nonreturn III.E-50

F. Criminal Justice III.F-1
1. *Benchbook* Sections related to Criminal Justice III.F-1
2. Federal Criminal Statutes with Extraterritorial Reach III.F-2
3. International Treaties Concerning Criminal Justice III.F-3
4. Conclusion III.F-4

G. Environment III.G-1
1. Domestic Law and Jurisprudence III.G-1
2. Treaties and Other International Agreements III.G-7

IV. Research and Interpretive Resources IV.A-1

A. Judicial Interpretation of International or Foreign Instruments IV.A-1
1. Vienna Convention on the Law of Treaties IV.A-1

B. Research Resources IV.B-1
1. *Restatements* and Other Print Resources IV.B-1
2. Online Databases IV.B-2

V. Contributors V-1

VI. Acknowledgments VI-1

VII. Index and Tables VII-1

A. Table of Treaties and Other International Instruments VII-2

B. Table of Judicial Decisions VII-5
1. International Courts VII-5
2. National Courts VII-5

C. Table of National Laws, Legislative Materials, Jury Instructions, and Uniform Laws VII-11
1. U.S. Constitution VII-11

2. U.S. Statutes VII-11
3. U.S. Regulations VII-13
4. U.S. Legislative Materials VII-13
5. U.S. Jury Instructions VII-13
6. Uniform Laws VII-13

D. Table of Scholarly Writings VII-14
1. Books VII-14
2. Chapters VII-15
3. Articles VII-16
4. Other VII-17

E. Keyword Index VII-18

Recommended citation:

Am. Soc'y Int'l L., "Preface," in
Benchbook on International Law (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/preface.pdf

Preface

This *Benchbook* provides a hands-on introduction to international law as it arises in courts of the United States. Its primary audience will be U.S. District Judges, typically the first to encounter questions of international law in our system. Others too may find the *Benchbook* of use: Magistrate Judges who may handle discovery and similar matters in the first instance; federal appellate judges who review the work of the district courts; state court judges whose docket includes disputes for which there is concurrent federal-state jurisdiction; administrative law judges; law clerks, legal assistants, and staff attorneys who serve the judiciary; and litigants who seek clearly and accurately to present to judges pertinent issues of international law.

To aid judges in shaping litigation and resolving disputes, the *Benchbook* begins with a primer on international law's sources and status in U.S. courts. Jurisdictional, preliminary, and procedural concerns, like immunities and evidence-gathering, next are treated. The *Benchbook* then provides discussions of concrete instances in which such issues may arise; for example, arbitration, child abduction, human rights, and the international sale of goods. It concludes with issues of interpretation and research resources. Later editions will enrich these discussions, described in the Detailed Table of Contents at http://www.asil.org/benchbook/detailtoc.pdf.

In keeping with the hands-on approach, an outline format is used as much as possible. In all circumstances, this *Benchbook on International Law*, like the Federal Judicial Center manual that inspired it, *Benchbook for U.S. District Court Judges* (6th ed., 2013), endeavors to discuss issues as they arise in U.S. courts.

This *Benchbook* uses the term "international law" in a broad sense. Classical international law, the body of legal obligations that independent nation-states assume in order to regulate their own interactions, is covered as it relates to federal trial courts. Also addressed are laws, norms, and judgments that have an international or cross-border component affecting a person, corporation, or other litigant. These may be labeled international, foreign or foreign relations, comparative, transnational – even global. In some cases, the law may supply a binding rule for the court; in other cases, a litigant may point to it as potentially persuasive authority.

This usage reflects evolution in the discipline for which the *Benchbook*'s publisher, the American Society of International Law, is the principal learned society. ASIL is a nonprofit, nonpartisan organization founded in 1906, chartered by Congress in 1950, and headquartered in Washington, D.C. Its 4,000 members – dozens of whom contributed to this *Benchbook* – include academics, corporate counsel, judges, representatives of governments and nongovernmental organizations, and international civil servants. Central to ASIL's mission of promoting the establishment and maintenance of international relations on the basis of law and justice is its judicial outreach program, a part of which is this *Benchbook on International Law*.

Detailed Table of Contents[1]

Cover, Copyright, Dedication

Preface i

Summary Table of Contents ii

Detailed Table of Contents vi

I. An International Law Primer I.A-1

A. International Law Defined I.A-1

1. Private International Law I.A-3

2. Foreign Relations Law I.A-3

3. Foreign Law I.A-3

4. Comparative Law I.A-3

5. Transnational Law I.A-4

6. Global Law I.A-5

B. Sources and Evidence of International Law I.B-1

1. Two Primary Sources of International Law I.B-2
   a. Treaties or International Agreements I.B-2
      i. Treaty-Making Steps I.B-3
         i.1. Negotiation I.B-4
         i.2. Adoption I.B-4
         i.3. Signature I.B-4
         i.4. Consent to Be Bound, by Ratification or Accession I.B-5
         i.5. Reservations, Understandings, and Declarations I.B-5
         i.6. Entry into Force I.B-6
         i.7. Precise Meanings of "Signatory" and "State Party" I.B-7
         i.8. Finding Data on Treaty-Making Steps Taken by the United States or Other Countries I.B-7
   b. Customary International Law I.B-8
      i. First Customary International Law Element: General and Consistent State Practice I.B-8

[1] This Detailed Table of Contents for Am. Soc'y Int'l L., *Benchbook on International Law* (Diane Marie Amann ed., 2014), is available at www.asil.org/benchbook/detailtoc.pdf. To access the entire volume, see www.asil.org/benchbook.

i.1. Persistent State Objection and Absence of State Objection I.B-9
ii. Second Customary International Law Element: Sense of Legal Obligation/*Opinio Juris* I.B-9
c. *Jus Cogens* or Peremptory Norm I.B-9
d. Conflict between Treaty and Custom: Later-in-Time Rule I.B-10

2. Secondary Source of International Law I.B-10
a. General Principles I.B-10

3. Subsidiary Means of Determining International Law Rules I.B-11
a. Judicial Decisions I.B-11
i. International Court of Justice I.B-12
b. Teachings of Publicists, or Scholarly Writings I.B-13

4. "Soft Law" I.B-13

C. Uses of International Law in U.S. Courts I.C-1

1. Direct Enforcement of Treaty Provisions I.C-1
a. U.S. Constitutional Provisions and Treaty-Making Steps I.C-1
b. How to Determine Which Treaty-Making Steps the United States Has Taken I.C-2
c. Status of Treaties in U.S. Law I.C-2
d. U.S. Courts and Direct Enforcement of Treaties I.C-3
i. Doctrine of Treaty Self-Execution and Non-Self-Execution I.C-3
i.1. Significance of Political Branch Declarations on Self-Execution or Non-Self-Execution I.C-5

2. Statutory Implementation or Incorporation of International Law I.C-5
a. Legislation Implementing Treaty Provisions I.C-5
i. Constitutional Treaty Power and Enactment of Implementing Legislation I.C-5
b. Incorporation of Treaties and Other International Law Sources I.C-6

3. Application of Customary Norms and Other International Law Sources I.C-7
a. Customary International Law I.C-7
b. *Jus Cogens* or Peremptory Norms I.C-8
c. General Principles I.C-8
d. "Soft Law" I.C-9

4. Consultation of International Sources As an Aid to Interpretation I.C-9

II. Jurisdictional, Preliminary, and Procedural Concerns II.A-1

A. Jurisdiction II.A-1

1. Principles or Bases of Jurisdiction II.A-2
a. Territoriality, Including Effects II.A-2

b. Nationality/Active Personality II.A-3
c. Passive Personality II.A-3
d. Protective Principle II.A-3
e. Universality II.A-4
f. Reasonableness Inquiry II.A-4

2. Sources of Jurisdiction Under U.S. Law II.A-4
a. Subject-Matter Jurisdiction II.A-5
b. Personal Jurisdiction II.A-5
i. U.S. Constitutional Jurisprudence II.A-5
i.1. Constitutional Due Process and General Jurisdiction over Multinational Corporations II.A-6
c. Jurisdiction to Enforce II.A-6

3. Principles or Bases of Jurisdiction and U.S. Courts II.A-6
a. Territoriality II.A-6
i. Effects Doctrine / Objective Territoriality II.A-7
ii. Special Maritime and Territorial Jurisdiction II.A-8
b. Protective Principle II.A-8
c. Nationality/Active Personality II.A-9
d. Passive Personality II.A-10
e. Universality II.A-10
f. Reasonableness II.A-11

4. Determining if Congress Intended to Give a Statute Extraterritorial Reach II.A-11
a. Express Statutory Language II.A-12
b. Authoritative Judicial Interpretation II.A-13
c. Pertinent Canons of Construction II.A-13
i. Canon Presuming Against Extraterritoriality II.A-14
i.1. Exception in Criminal Cases II.A-14
i.1.a. General Approach to Ambiguity in Criminal Statutes II.A-15
i.1.b. Presumption of Extraterritoriality in Criminal Statutes II.A-15
ii. *Charming Betsy*: Construing Statute to Comport with International Law II.A-16
iii. Canon Disfavoring Undue Interference with Foreign States II.A-16

B. Immunities and Other Preliminary Considerations II.B-1

1. Immunities II.B-1
a. Foreign Sovereign Immunity II.B-2
i. The United States: The 1976 Foreign Sovereign Immunities Act (FSIA) II.B-2
i.1. International Law Corollary to the FSIA II.B-3
ii. The FSIA in General II.B-3
ii.1. Removal to Federal Court II.B-3
ii.2. Retroactive Application of the FSIA II.B-3
iii. FSIA Definition of "Foreign State" II.B-3
iii.1. Corporations As State Instrumentalities II.B-4

iv. FSIA Exceptions to Sovereign's Immunity from Suit II.B-4
iv.1. Waiver Exception II.B-5
iv.2. Commercial Activity Exception II.B-5
iv.3. Expropriation Exception II.B-6
iv.4. Exception for Torts Occurring in the United States II.B-6
iv.4.a. Applicability of Exception II.B-7
iv.4.b. Circumstances in Which Exception Does Not Apply II.B-7
iv.5. Exception for Enforcement of Arbitration Agreements or Awards II.B-7
iv.6. Terrorism Exception II.B-8
iv.6.a. Countries Designated State Sponsors of Terrorism II.B-8
iv.6.b. Time Bar II.B-8
iv.6.c. Litigation under the Terrorism Exception II.B-8
v. Extent of Liability under the FSIA II.B-9
vi. Execution of Judgments under the FSIA II.B-9
vi.1. Attachment of Foreign State Property before Judgment II.B-9
vi.2. Attachment or Execution of Foreign State Property after Judgment II.B-10
vii. Jurisdictional Discovery in FSIA Cases II.B-10
b. Immunity of Foreign Officials: Common Law Principles II.B-10
i. Head of State/Head of Government Immunity II.B-11
i.1. Head of State Immunity As Status-Based Immunity II.B-12
i.2. Significance of Executive Branch View on Head of State Immunity II.B-12
ii. Diplomatic Immunity II.B-12
ii.1. Status-Based Diplomatic Immunity II.B-13
ii.2. Foreign Officials and their Families When Visiting or in Transit II.B-13
ii.3. Conduct-Based Diplomatic Immunity II.B-14
iii. Consular Immunity II.B-14
iv. Other Foreign Officials II.B-14
v. Immunity of Diplomatic and Consular Premises, Archives, Documents, and Communications II.B-15
v.1. Consent As Exception II.B-15
c. Immunity of International Organizations and Officials of Those Organizations II.B-16

2. Act of State Doctrine II.B-16
a. In General II.B-17
b. Application II.B-17
c. Exceptions II.B-17

3. Political Question II.B-18
a. In General II.B-18
b. Application to Cases Touching on Foreign Relations II.B-19

4. *Forum Non Conveniens* II.B-20
a. In General II.B-20
b. Procedure II.B-20
c. Substance II.B-21
i. Adequate Alternative Forum II.B-21

ii. Balancing of Private Interests and Public Interests II.B-22

5. Time Bar II.B-22

6. Exhaustion of Remedies II.B-22

7. Comity II.B-23
a. In General II.B-23
b. Application II.B-23

8. Choice of Law II.B-24
a. Choice of Law Overview II.B-24
b. Proof of Foreign Law II.B-24

9. Recognition and Enforcement of Foreign Judgments II.B-25
a. Recognition of Foreign Judgments II.B-25
i. Governed by State Law II.B-25
i.1. State Statutes Based on Uniform Acts II.B-25
i.1.a. 1962 Uniform Foreign Money-Judgments Recognition Act II.B-26
i.1.b. 2005 Uniform Foreign-Country Money Judgments Recognition Act II.B-27
i.1.c. Procedure for Recognition of Foreign Judgments II.B-27
ii. Federal Law on Recognition in Defamation Suits II.B-28
b. Enforcement by U.S. Courts of Judgments by Courts of Foreign States II.B-29
c. Enforcement of Arbitral Awards II.B-29

C. Discovery and Other Procedures II.C-1

1. Service of Process Abroad II.C-1
a. Methods of Service II.C-1
i. Individuals II.C-2
ii. Corporations II.C-3
iii. Foreign States or State Agencies II.C-3
b. Service in the United States for Foreign Proceedings II.C-4

2. Taking of Evidence Abroad II.C-4
a. Scope of Discovery in Civil Proceedings II.C-4
b. Mechanisms for Discovery II.C-4
i. Unilateral Means of Evidence Gathering II.C-5
ii. Challenges to Such Requests II.C-6
iii. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters II.C-7
iv. Letters Rogatory II.C-8
v. Mutual Legal Assistance Treaties, or MLATs II.C-8
v.1. MLATs and Letters Rogatory Compared II.C-9
v.2. Scope of Assistance II.C-10

v.3. Individuals' Efforts to Use MLATs II.C-10
v.3.a. Treaties II.C-10
v.3.b. Case Law II.C-11

3. Discovery Requests from Non-U.S. Courts II.C-11
a. Applicable Law II.C-12
b. Procedure II.C-12

III. International Law in U.S. Courts: Specific Instances III.A-1

A. International Arbitration III.A-1

1. International Arbitration Defined III.A-1

2. How International Arbitration Matters Arise in U.S. Courts III.A-2

3. Legal Framework: The Federal Arbitration Act III.A-3
a. Chapter 1 of the Federal Arbitration Act: General Provisions Relating to Both Domestic and International Arbitrations III.A-4
b. Chapters 2 and 3 of the Federal Arbitration Act: Implementing the Conventions III.A-4
i. Chapter 2: Implementing the New York Convention III.A-4
ii. Chapter 3: Implementing the Panama Convention III.A-5
iii. When Both Conventions Appear Applicable III.A-5
iv. Chapters 2 and 3: Federal Jurisdiction III.A-5
v. Chapters 2 and 3: Removal III.A-5
c. If Chapters 2 or 3 Conflict With Chapter 1 ..... III.A-5

4. Distinguishing Domestic from International Arbitration Awards III.A-6
a. Common Requests to U.S. Courts by Parties to International Arbitration III.A-6
i. Request for Order to Compel or to Stay International Arbitration III.A-6
ii. Legal Framework Pertaining to Such Requests III.A-7
iii. Commonly Raised Issues III.A-8
b. Arbitration Clause Severable from Underlying Contract: *Prima Paint* III.A-9
c. Authority to Decide If Parties Agreed to Arbitrate III.A-10
i. *First Options* III.A-10
ii. The Arbitrability Decision and Investor-State Arbitrations III.A-10
iii. The "Pro-Arbitration" Presumption: *Mitsubishi Motors* III.A-11

5. Request for Injunctive or Other Provisional Measures III.A-11
a. When Provisional Measures May Be Sought III.A-12
b. Court-Ordered Provisional Measures III.A-12
c. Standards for Judicial Relief: Federal Rules of Civil Procedure III.A-13
i. Application of Rule 65: Injunctions and Restraining Orders III.A-13
ii. Application of Rule 64: Seizing a Person or Property III.A-14
iii. Prehearing Discovery III.A-14

d. Anti-suit Injunctions III.A-14
e. Judicial Enforcement of Arbitral Interim Measures III.A-15
f. Finality of Arbitral Awards for Interim Relief III.A-15

6. Request for Discovery Order III.A-15
a. Subpoenas Seeking Documents and Witnesses for U.S.-Sited Arbitrations III.A-16
b. Extent of Judicial Power under Section 7 of FAA III.A-17
c. Requests for Documents and Testimony to Aid Foreign Arbitrations III.A-18
d. Extent of Application of 28 U.S.C. § 1782 to Foreign Arbitrations III.A-19
i. Supreme Court *Dicta* III.A-19
ii. Lower Courts III.A-19

7. Request to Confirm, Recognize, Enforce, or Vacate Arbitral Awards III.A-20
a. Legal Framework Applicable to Applications to Confirm or Recognize International Arbitral Awards III.A-21
i. Timing of Requests to Confirm an International Arbitral Award III.A-22
ii. Procedures for Applications to Confirm an International Arbitral Award III.A-22
b. Grounds for Refusing to Enforce an Award III.A-22
i. Grounds Specified in the New York and Panama Conventions III.A-23
ii. Application of Grounds Enumerated in Conventions III.A-23
iii. Frequently Invoked Grounds III.A-24
iii.1. Contrary to Public Policy III.A-24
iii.2. Insufficient Opportunity to Present a Case or Defense III.A-25
iv. Other Grounds III.A-25
c. Legal Framework Pertinent to Applications to Vacate International Arbitral Awards III.A-25
i. Time Limit for Vacating an Award under FAA Chapter 1 ..... III.A-26
d. Grounds for Vacating an Award under FAA Chapter 1 ..... III.A-26
i. Grounds Enumerated in Section 10 of the FAA III.A-26
ii. Grounds Enumerated in Section 11 of the FAA III.A-26
iii. Potential Unenumerated Ground: Manifest Disregard of the Law III.A-27
iii.1. Emergence of the "Manifest Disregard" Ground: *Dictum* in *Wilko* III.A-27
iii.2. Possible Rejection of "Manifest Disregard" Ground: *Hall Street* III.A-27
iii.3. Current Status of This Ground: Uncertain III.A-28
iii.4. "Manifest Disregard" and International Arbitration Awards III.A-28

8. Additional Arbitration Research Resources III.A-29
a. Arbitration *Restatement* Project III.A-29
b. Print Resources III.A-29
c. Online Resources III.A-30

B. International Law Pertaining to Families and Children III.B-1

1. Overview III.B-1

2. Cross-Border Abduction of Children III.B-4

3. Civil Aspects of Cross-Border Child Abduction III.B-5
a. Applicability in the United States of the 1980 Hague Child Abduction Convention III.B-6
i. U.S. Reservations to Ratification of the Convention: Translation and Fees III.B-6
ii. U.S. Implementing Legislation III.B-7
iii. U.S. Implementing Regulations III.B-7
b. How Suits under the Hague Abduction Convention Arise in U.S. Courts III.B-7
c. Prompt Adjudication Requirement and Purposes of Hague Abduction Convention Litigation III.B-8
i. Convention Provisions III.B-8
ii. Implementing Legislation Provisions III.B-9
iii. Case Law III.B-10
d. Interpretation of Hague Abduction Convention Provisions III.B-11
i. Supreme Court's Interpretive Methodology III.B-11
i.1. Text of the Convention III.B-12
i.2. Views of the U.S. Department of State III.B-12
i.3. Case Law in Other Countries, Negotiating History, Expert Commentary, and the Pérez-Vera Report on the Convention III.B-13
i.3.a. Decisions of Foreign Courts III.B-13
i.3.b. Negotiating History III.B-14
i.3.c. Expert Commentary III.B-14
i.3.d. Pérez-Vera Explanatory Report III.B-15
i.4. Objects and Purposes of the Convention III.B-16
e. Left-Behind Parent's Petition III.B-16
f. Concurrent Federal and State Jurisdiction III.B-17
i. Federal Civil Actions for Access, or Visitation, Rights: Circuit Split III.B-17
g. Petitioner's Prima Facie Case for Return III.B-18
i. First Element of Prima Facie Case: Child's Habitual Residence III.B-20
i.1. Child III.B-20
i.2. Habitual Residence III.B-21
i.2.a. Federal Courts' Different Approaches to Habitual Residence Question III.B-21
ii. Second Element of Prima Facie Case: Breach of Custody Rights III.B-22
ii.1. Rights of Custody III.B-22
ii.1.a. Determining Foreign Law III.B-23
ii.2. *Ne Exeat* Orders and "Rights of Custody" III.B-23
ii.2.a. Supreme Court in *Abbott*: *Ne Exeat* Order Requiring Both Parents' Consent Is a "Right of Custody" III.B-24
ii.2.b. Federal *Ne Exeat* Decisions Post-*Abbott* III.B-24
iii. Third Element of Prima Facie Case: Exercise of Custody Rights III.B-25
h. Defenses: Exceptions to Return III.B-26
i. Narrow Construction of Exceptions III.B-27
ii. Exception Based on Petitioner's Consent or Acquiescence III.B-27
iii. Exception Based on Child's Objection III.B-28

iv. Exception Based on Grave Risk of Harm III.B-29
iv.1. Defining "Grave Risk" and "Intolerable Situation" III.B-30
iv.2. Federal Adjudication of Grave Risk Exception III.B-30
iv.3. Whether Proof of Harm to Parent Satisfies Grave Risk Exception III.B-31
iv.4. Additional Resources on the Grave Risk Exception III.B-32
v. Exception Based on Contravention of Fundamental Human Rights Principles III.B-32
i. Nature and Timing of the Return Remedy III.B-33
i. Commencement of Proceedings III.B-34
ii. No Equitable Tolling III.B-34
iii. Whether Child Is Settled in New Environment III.B-34
iii.1. Immigration Status III.B-35
iii.2. Discretion of the Court III.B-36
j. Final Civil Remedy Considerations III.B-36
i. Fees in Civil Remedy Proceedings III.B-36
ii. Appeal of District Court Order: Question of Mootness III.B-36

4. Criminal Aspects of Cross-Border Child Abduction: Federal Prosecution III.B-37
a. Interrelation of the United States' Civil and Criminal Laws on Child Abduction III.B-37
b. Text of the International Parental Kidnapping Crime Act III.B-39
c. Elements of the Parental Kidnapping Offense III.B-40
i. "Child" III.B-40
ii. Removal or Retention of Child III.B-40
iii. Intent to Obstruct Parental Rights III.B-41
iii.1. Requisite Intent III.B-41
iii.2. "Parental Rights" III.B-42
iv. Rights-Holder Other Than a Parent III.B-42
d. Defenses III.B-42
i. Enumerated Affirmative Defenses III.B-42
i.1. Domestic Violence III.B-43
ii. Other Defenses III.B-44
ii.1. Rejected Defense Impugning the Left-Behind Parent III.B-44
ii.2. Rejected Defenses Based on the U.S. Constitution III.B-44
ii.2.a. Foreign Commerce Clause III.B-44
ii.2.b. Free Exercise of Religion III.B-45
ii.2.c. Equal Protection III.B-45
e. Penalties III.B-45

5. Research Resources III.B-46
a. Print Resources III.B-46
b. Online Resources III.B-46
i. State Department's Office of Children's Issues III.B-46
ii. Hague Conference on Private International Law III.B-47

C. International Sale of Goods III.C-1

1. U.N. Convention on Contracts for the International Sale of Goods III.C-2
a. Status of the Convention As U.S. Federal Law III.C-3
b. Organization of the Convention III.C-3
c. Sphere of Application of the Convention III.C-4
i. Place of Business III.C-5
ii. Contracts for the Sale of Goods III.C-5
ii.1. Convention Text III.C-5
ii.1.a. Case Law Interpreting the Convention's Application to "Goods" III.C-6
ii.1.b. Consumer/"Personal Use" III.C-6
ii.1.c. "Auction" III.C-7
iii. Contracts for Supply of Goods vs. Mixed Goods-Labor Contracts III.C-8
iii.1. Contracts for Supply of Goods to be Manufactured or Produced III.C-8
iii.2. Mixed Contracts: Supply of Labor or Other Services As Well As Goods III.C-8
iii.3. Mixed Contracts and Computer Software III.C-9
iv. Designation of Applicable Law within the Agreement III.C-10
iv.1. Excluding Application of the Convention III.C-10
iv.2. Derogating or Modifying the Effect of the Convention III.C-11
d. Interpretive Issues III.C-11
i. Article 7: Interpretation of the Convention's Text and Gaps III.C-11
i.1. International Character of the Convention and Need to Promote Uniformity III.C-12
i.2. Relation of the Convention to the Uniform Commercial Code III.C-12
i.3. Observance of Good Faith in International Trade III.C-13
i.4. Treatment of Matters Not Expressly Discussed in the Convention III.C-14
i.4.a. General Principles in the Convention's Text III.C-15
i.4.b. Informality: General Principle That Agreement Need Not Be in Writing III.C-15
i.4.c. Exception: Opting Out of the Informality Principle III.C-16
ii. UNIDROIT Principles III.C-16
iii. Article 8: Interpretation of the Parties' Conduct III.C-17
iii.1. Absence of a Parol Evidence Rule III.C-18
iii.2. Subjective Determination of Parties' Intent III.C-18
iii.3. Objective Determination of Parties' Intent III.C-19
iv. Article 9: Usage As a Circumstances Relevant to Interpretation III.C-19
iv.1. Usages Agreed to and Practices Established between Themselves III.C-20
iv.2. International Trade Usages III.C-20

2. Researching International Sales Law III.C-21
a. Print Resources III.C-21
b. Online Resources III.C-21
i. UNCITRAL III.C-21
ii. CISG-Advisory Council III.C-22
iii. Pace Law School Database III.C-22

iv. Autonomous Network of CISG Websites III.C-22
v. UNILEX III.C-23
vi. Other Sources III.C-23

D. International Air Transportation III.D-1

1. History of International Aviation Law III.D-1

2. Treaties Applicable in U.S. Courts III.D-2

3. Key Treaties and U.S. Principle of Self-Execution III.D-4

4. Inter-Carrier Agreements III.D-4

5. Scope of Application of Treaties III.D-5

6. Determining the Applicable Law III.D-6
a. Preliminary Issues III.D-6
b. International Round-Trip Flights III.D-6
i. International Round Trips Beginning and Ending in the United States III.D-6
ii. International Round Trips Beginning and Ending Outside the United States III.D-7
c. One-Way International Air Carriage III.D-7
i. Either the Place of Departure or the Place of Destination is in the United States III.D-7
ii. Neither the Place of Departure nor the Place of Destination is in the United States III.D-8
d. Inter-Carrier Agreements III.D-8
i. Claims Governed by the Montreal Convention III.D-9
ii. Claims Governed by the Warsaw Convention and Subsequent Amendments III.D-9
iii. Claims Not Covered by Any Treaty III.D-9

7. Federal Jurisdiction III.D-9
a. Federal Question Jurisdiction III.D-9
b. Removal Jurisdiction III.D-10
c. Removal Jurisdiction and Complete Preemption III.D-10

8. Venue III.D-11

9. Types of Claims Covered by Treaties III.D-12
a. Death or Bodily Injury of a Passenger III.D-12
b. Destruction or Loss of or Damage to Checked or Unchecked Baggage III.D-12
c. Destruction or Loss of or Damage to Cargo III.D-12
d. Damage Caused by Delay in the Carriage of Passengers, Baggage or Cargo III.D-13

10. Limitation of Liability III.D-13

a. "Special Drawing Rights" III.D-13
b. Periodic Adjustment for Inflation III.D-13
c. Limitation of Liability for Death or Injury of Passengers III.D-14
d. Limitation of Liability for Claims Involving Baggage, Cargo, or Delay III.D-14
e. No Punitive Damages III.D-14
f. Prior Changes in Liability Limitations III.D-15

11. Other Defenses III.D-15
a. Contributory Negligence III.D-15
b. Estoppel III.D-15
c. Statute of Limitations III.D-15
d. Federal Preemption III.D-15
e. Sovereign Immunity III.D-16

12. Treaty Interpretation III.D-16

E. Human Rights III.E-1

1. Alien Tort Statute III.E-2
a. Overview of Alien Tort Statute Litigation III.E-2
b. Elements of an Alien Tort Statute Claim III.E-3
i. Alien Plaintiff III.E-3
i.1. Maintenance of Alien Tort Statute and Torture Victim Protection Act Claims III.E-3
ii. Tort III.E-4
ii.1. Violation of a Treaty of the United States III.E-5
ii.2. Violation of the Law of Nations III.E-5
ii.3. Supreme Court's *Sosa* Framework for Determination III.E-5
ii.3.a. Accepted by Civilized World III.E-6
ii.3.b. Defined with Specificity III.E-6
ii.3.c. Practical Consequences III.E-6
ii.4. Supreme Court's Application of Framework in *Sosa* III.E-7
ii.5. Post-*Sosa* Rulings in Lower Courts on Actionable Claims III.E-7
ii.5.a. Ruled Actionable III.E-7
ii.5.b. Division of Authority on Actionability III.E-8
ii.5.c. Ruled Not Actionable III.E-9
iii. Proper Defendant III.E-10
iii.1. Natural Persons III.E-10
iii.2. Nonnatural / Artificial / Juridical Persons III.E-11
iii.2.a. Organizations III.E-11
iii.2.b. Sovereign States III.E-12
iii.2.c. Corporations III.E-12
iii.3. Status of Defendant as State Actor or Private Actor III.E-12
iii.3.a. International Law Torts Applicable to State and Nonstate Actors Alike III.E-13
iii.3.b. International Law Torts Requiring State Action III.E-13

iii.3.c. Division of Authority on Applicability to Private Actors III.E-13
iii.3.d. Potential Liability of Private Actors for Torts Requiring State Action III.E-14
iv. Defendant's Acts Constitute an Actionable Mode of Liability III.E-14
iv.1. Dispute over Consultation of International or Domestic Law III.E-15
c. Defenses III.E-15
i. Presumption against Extraterritoriality III.E-16
i.1. Reasoning in *Kiobel* III.E-16
i.2. Lower Court Rulings Post-*Kiobel* III.E-18
ii. Immunities III.E-19
ii.1. Foreign States and the Foreign Sovereign Immunities Act III.E-19
ii.2. Foreign Officials and Common Law Immunities III.E-19
ii.2.a. Foreign Official's Common Law Immunities III.E-19
ii.2.b. Waiver III.E-20
iii. Act of State III.E-20
iii.1. Degree of Consensus III.E-21
iii.2. Foreign Relations Implications III.E-21
iii.3. Existence of Foreign Government III.E-21
iv. Political Question III.E-22
iv.1. Textual Commitment to Political Branches III.E-22
iv.2. Ability of Court to Identify Standards by Which to Rule III.E-23
iv.3. Respect for the Political Branches III.E-23
v. *Forum Non Conveniens* III.E-23
vi. Time Bar III.E-24
vii. Exhaustion of Remedies III.E-24
viii. Comity III.E-25
d. Damages and Other Remedies III.E-25

2. Torture Victim Protection Act III.E-26
a. Overview of Torture Victim Protection Act Litigation III.E-27
i. Overview of Defenses III.E-27
i.1. Extraterritoriality Not a Defense III.E-28
b. Elements of a Torture Victim Protection Act Claim III.E-28
i. Proper Plaintiff III.E-28
i.1. Human Victim III.E-28
i.2. Victim's Legal Representative / Wrongful-Death Claimant III.E-29
i.3. Any Nationality III.E-29
i.4. Maintenance of Alien Tort Statute and Torture Victim Protection Act Claims III.E-29
ii. Conduct Alleged III.E-30
ii.1. Torture III.E-30
ii.2. Extrajudicial Killing III.E-31
iii. Proper Defendant III.E-32
iii.1. "Individual": Natural Person Only III.E-32
iii.1.a. Foreign States III.E-32
iii.2. Actual or Apparent Authority or Color of Law III.E-32

iv. Defendant Subjected Victim to Torture or Extrajudicial Killing III.E-33
c. Defenses III.E-33
i. Nonretroactivity III.E-34
ii. Act of State III.E-34
iii. Exhaustion of Local Remedies III.E-34
iv. Explicit Time Bar III.E-35
d. Damages and Other Remedies III.E-35

3. Human Trafficking III.E-36
a. Overview of Statutory Law III.E-36
i. Developments Leading to Adoption of the Trafficking Victims Protection Act III.E-37
ii. Relation between the Trafficking Victims Protection Act and International Legal Instruments III.E-37
b. The 2000 Trafficking Protocol III.E-39
c. Trafficking Defined III.E-40
d. Reservations Accompanying U.S. Ratification of the Trafficking Protocol III.E-40
i. Jurisdiction III.E-41
ii. Federalism III.E-41
e. Elements of the Treaty Implemented by U.S. Law and Policy III.E-41
i. General Protection of Victims III.E-42
ii. Immigration Measures III.E-43
iii. Prosecution of Traffickers: Criminal Prohibitions and Definitions III.E-44
iv. Monetary Remedies III.E-45
v. Civil Remedies and Restitution III.E-45
vi. Federal Civil Actions under Chapter 77 ..... III.E-46
vii. Extraterritorial Jurisdiction III.E-46
f. Common Affirmative Defenses III.E-46
i. Limitations Period Defense III.E-46
ii. Constitutional Overbreadth Defense III.E-46
iii. Timing of Conduct: Pre-Enactment Activity Defense III.E-47
iv. Status of the Accused: Diplomatic Immunity Defense III.E-47
v. "No Force, Fraud, or Coercion" Defense III.E-47
vi. Status of Alleged Victim: Family Member Defense III.E-47
vii. Cultural Defense III.E-48
viii. Immigration Status of Alleged Victim: Lack of Standing III.E-48
ix. Immigration Status of Alleged Victim: Immigration "Fraud" III.E-48
x. Defense of Consent III.E-48
xi. Defense Based on Perceived Age of Alleged Victim III.E-48
xii. "Not Slavery" Defense III.E-49
xiii. Independent Contractor/Lack of Agency Defense III.E-49
xiv. Payment of Legal Wages Defense III.E-49
xv. Conclusion III.E-49

4. *Non-refoulement*, or Nonreturn III.E-50
a. History and Scope of *Non-refoulement* Principle III.E-50

b. Pertinent Treaty Provisions Binding the United States III.E-51
i. Protocol Relating to the Status of Refugees III.E-51
ii. Convention Against Torture III.E-52
iii. International Covenant on Civil and Political Rights III.E-53
c. Customary International Law and *Non-refoulement* III.E-53
d. *Non-refoulement* in U.S. Litigation III.E-54
i. *Non-Refoulement* in Processes of Deportation and Removal III.E-54
i.1. Withholding of Removal Under the Refugee Act of 1980 ..... III.E-54
i.2. Withholding of Removal Under FARRA, the Foreign Affairs Reform and Restructuring Act of 1998 (CAT Withholding) III.E-56
i.2.a. Overall Procedure III.E-56
i.2.b. Diplomatic Assurances III.E-57
i.3. Deferral of Removal Under the Foreign Affairs Reform and Restructuring Act of 1998 ..... III.E-58
i.3.a. Overview III.E-58
i.3.b. Diplomatic Assurances III.E-58
ii. *Non-refoulement* in the Context of Extradition III.E-59
iii. *Non-Refoulement* in Other Detention Contexts III.E-60

F. Criminal Justice III.F-1

1. *Benchbook* Sections related to Criminal Justice III.F-1

2. Federal Criminal Statutes with Extraterritorial Reach III.F-2

3. International Treaties Concerning Criminal Justice III.F-3

4. Conclusion III.F-4

G. Environment III.G-1

1. Domestic Law and Jurisprudence III.G-1
a. Relevant U.S. Statutory Framework III.G-1
b. Key Legal Issues in *Massachusetts v. EPA* III.G-3
i. Standing after *Massachusetts v. EPA* III.G-3
ii. Substantive Interpretation of General Environmental Provisions in *Massachusetts v. EPA* III.G-4
c. Other Types of Regulatory Actions III.G-5
i. Suits to Compel Government Action III.G-5
ii. Suits to Stop Government Action III.G-6
d. Public Nuisance Suits Regarding Climate Change, and *American Electric Power Co. v. Connecticut* III.G-6

2. Treaties and Other International Agreements III.G-7
a. U.N. Framework Convention on Climate Change III.G-7
b. Kyoto Protocol to the U.N. Framework Convention on Climate Change III.G-8

c. Copenhagen Accord III.G-9
d. Conclusion III.G-9

IV. Research and Interpretive Resources IV.A-1

A. Judicial Interpretation of International or Foreign Instruments IV.A-1

1. Vienna Convention on the Law of Treaties IV.A-1
a. Background on the Vienna Convention on the Law of Treaties IV.A-1
b. Status of the Vienna Convention on the Law of Treaties within the United States IV.A-2
c. Key Provisions on Interpretation in the Vienna Convention on the Law of Treaties IV.A-3
i. Article 31: General Rule of Interpretation IV.A-3
ii. Article 32: Supplementary Means of Interpretation IV.A-3
iii. Article 33: Interpretation of Treaties Authenticated in Two or More Languages IV.A-4
iv. Judicial Reliance on Interpretive Provisions of the Vienna Convention on Treaties IV.A-4

B. Research Resources IV.B-1

1. *Restatements* and Other Print Resources IV.B-1
a. *Restatements* IV.B-1
i. *Foreign Relations Restatement* IV.B-1
ii. *Arbitration Restatement* Project IV.B-2
b. Additional Print Resources IV.B-2

2. Online Databases IV.B-2
a. Databases Maintained by the United Nations IV.B-2
b. U.S. Department of State *Digest of U.S. Practice* IV.B-3
c. Comprehensive Databases IV.B-3
d. Databases Organized by Country or Region IV.B-4
e. Databases on Regional or International Courts or Tribunals IV.B-5
f. Databases on Specific Topics IV.B-6

V. Contributors V-1

VI. Acknowledgments VI-1

VII. Index and Tables VII-1

A. Table of Treaties and Other International Instruments VII-2

B. Table of Judicial Decisions VII-5

1. International Courts VII-5
a. International Court of Justice VII-5

2. National Courts VII-5
a. United States VII-5
i. U.S. Supreme Court VII-5
ii. U.S. Courts of Appeals VII-6
iii. U.S. District Courts VII-9
iv. U.S. Bankruptcy Courts VII-10
b. Countries Other Than the United States VII-10
i. Austria VII-10
ii. Canada VII-10
iii. Germany VII-10
iv. Italy VII-10
v. Switzerland VII-10

C. Table of National Laws, Legislative Materials, Jury Instructions, and Uniform Laws VII-11

1. U.S. Constitution VII-11

2. U.S. Statutes VII-11
a. Statutes by Name VII-11
b. Statutes by Citation VII-12

3. U.S. Regulations VII-13

4. U.S. Legislative Materials VII-13

5. U.S. Jury Instructions VII-13

6. Uniform Laws VII-13

D. Table of Scholarly Writings VII-14

1. Books VII-14

2. Chapters VII-15

3. Articles VII-16

4. Other VII-17

E. Keyword Index VII-18

Recommended citation:[1]

Am. Soc'y Int'l L., "International Law Defined," in
Benchbook on International Law § I.A (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/definition.pdf

I. International Law Primer

"International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." So wrote the Supreme Court more than a century ago in a maritime action, *Paquete Habana*, 175 U.S. 677, 700 (1900). The oft-cited sentence prompts questions: What is international law? What is an international treaty? International custom? What is the relation of international law to U.S. law? When is the United States obligated to follow a treaty provision or customary norm? When, and to what extent, is either enforceable in the courts of the United States? This *Benchbook on International Law* answers such questions – questions that courts are likely to confront in cases with a cross-border component.

The *Benchbook* uses the term "international law" in a broad sense. It thus treats not only the body of legal obligations that countries assume in order to regulate their own interactions, but also numerous laws, norms, and judgments with intercountry elements relevant to cases in U.S. courts. The instant chapter first elaborates on terms, such as "transnational law," related to this broad meaning. The chapter then offers, as a foundation for the chapters that follow, a primer on pertinent international law sources, doctrines, and institutions.

A. International Law Defined

In its narrowest sense, "international law" refers to laws applicable between "states" – a word that in international law writings typically refers to a country, or sovereign nation-state, and not to a country's constituent elements.[2] International law thus comprises legal obligations to which states have consented in order to regulate the interactions between them. This formulation traditionally concentrated on actions by states; at times, however, it also took into account the behavior of nonstate actors. Examples included the:

- International prohibition against piracy – that is, the prohibition against the commission, typically by a natural person or human being, of robbery or similar crimes on the high seas. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (citing 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769)); *United States v. Smith*, 18 U.S. 153, 159-62 (1820) (Story, J.) (construing the federal crime of piracy by reference to the law of nations).

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.
[2] This *Benchbook* follows that usage, so that "state" means country, and individual states within the United States are designated as such.

- Rights and responsibilities of artificial/juridical/nonnatural persons other than states. *See Advisory Opinion on Reparations for Injuries Suffered in Service of United Nations*, 1949 I.C.J. 174 (Apr. 11) (outlining, in an early decision of the International Court of Justice, described *infra* § I.B.3.a.i, the status in international law of the then-four-year-old United Nations Organization); *see also United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y.1988) (applying 1947 U.N.-U.S. agreement, and dismissing suit brought by the United States against the defendant organization's U.N. observer mission).

International law of this sort is obligatory, binding, "hard law." That trait distinguishes classical international law from "comity," a concept defined *infra* § II.B.7, and from "soft law," discussed *infra* §§ I.B.4, I.C.3.d.

Indicative of this traditional meaning is the definition of "international law" in Section 101 of the *Restatement (Third) of Foreign Relations Law of the United States* (1987):[3]

> [R]ules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.

In the decades since the publication of the *Restatement*, nonstate actors have come to play a greater role in international law and litigation. What is more, areas of law not fully within the above definition have surfaced in federal litigation. Labels for these interrelated and often overlapping areas include:

- Private international law
- Foreign relations law
- Foreign law
- Comparative law
- Transnational law
- Global law

This *Benchbook* covers all these areas, to the extent they are relevant to the dockets of federal courts. Accordingly, each term listed above is defined in the glossary immediately below. *See infra* §§ I.A.1-I.A.6.

After presenting that glossary, the chapter then proceeds to describe what constitutes international law and how such law is determined. *See infra* § I.B. The chapter concludes by discussing uses of international law in the courts of the United States. *See infra* § I.C. As will be seen, at times the law or norm at issue may supply a binding rule for the court; in other cases, a litigant may point to it as potentially persuasive authority.

[3] Designated subsequently as *Restatement*, this 1987 American Law Institute treatise compiles many of the doctrines discussed in this chapter. Its provisions must be consulted with due caution, however, particularly given that it was published decades before the Supreme Court's most recent interpretations of the Alien Tort Statute. On use of this *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, *see infra* § IV.B.1.

1. Private International Law

The term "private international law" comprehends laws regulating private interactions across national frontiers. An example would be law relating to a contract dispute between private citizens of different countries. It is sometimes referred to as international conflict of laws, although the field encompasses more than just conflicts rules.

By tradition, the opposite number of private international law is "public international law," which comprehends laws relating to states and interstate organizations. Developments in the last several decades have blurred this distinction, however. For instance, family issues once considered matters of private law – indeed, private domestic law – now may be susceptible to regulation in accordance with instruments of public international law. *See infra* § III.B.

2. Foreign Relations Law

The term "foreign relations law" encompasses U.S. as well as international laws with substantial significance to U.S. foreign relations. Legal texts thus cover domestic laws pertinent to foreign relations – such as the treaty powers allotted to the President and Congress in Articles I and II – as well as treaty- and custom-based international law applicable in U.S. legal systems. *See generally, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* (4th ed., 2011); Thomas M. Franck, Michael J. Glennon, Sean D. Murphy & Edward T. Swaine, *Foreign Relations and National Security Law* (4th ed., 2011).

The term operates as a frame for the *Restatement* series that is described *infra* § IV.B.1 and cited throughout this *Benchbook*.

3. Foreign Law

"Foreign law" comprehends the laws of countries other than the United States. *See* Morris L. Cohen & Robert C. Berring, *How to Find the Law* 610 (8th ed., 1983). Variously described as "national," "internal," "domestic" – or even, among international lawyers, "municipal" – foreign law may include other countries' constitutions, statutes, regulations, and judicial decisions.

Resources for locating foreign law are detailed, as a general matter, *infra* § IV.B; as to specific areas of law, in separate subsections of this *Benchbook*.

4. Comparative Law

A concise description of comparative law follows:

> Comparative law can be defined as the study of the similarities and differences between the laws of two or more countries, or between two or more legal systems. As such, comparative law is not itself a system or law or body of rules, but rather a method or approach to legal inquiry. It is both an academic discipline and a practical tool for understanding the operation of legal systems or

> particular laws by comparing two or more different systems or the laws of different countries.

Morris L. Cohen & Robert C. Berring, *How to Find the Law* 610 (8th ed., 1983); *see* Ugo A. Mattei, Teemu Ruskola & Antonio Gidi, *Schlesinger's Comparative Law* 7 (7th ed., 2009) (defining comparative law, in a casebook that emphasizes the role of the discipline in an era of globalization, as "an approach to legal institutions or to entire legal systems that study them in comparison with other institutions or legal systems as they exist elsewhere").

Among other things, comparative law provides tools for contrasting common law systems, like those in the United States and other English-speaking countries, from civil law systems, like those in continental European and other jurisdictions. These tools may assist:

- Understanding of foreign law, defined *supra* § I.A.3, and thus of the general principles of law common to the world's major legal systems, the secondary international law source discussed *supra* § I.B, I.B.2. *See* Mattei, Ruskola & Gidi, *supra*, at 8 n.4.

- Interpretation of certain international agreements to which the United States belongs; for example, a treaty that deals with child abduction, detailed *infra* § III.B, and another that deals with the international sales of goods, detailed *infra* § III.C.

5. Transnational Law

At its most basic, the term "transnational" means "across countries," or "going beyond national boundaries." More than a half-century ago, an international law scholar and former State Department lawyer, who would go on to serve as a judge on the International Court of Justice,[4] promoted the term "'transnational law' to include all law which regulates actions or events that transcend national frontiers." Philip C. Jessup, *Transnational Law* 2 (1956). The term "transnational law" comprehends not only traditional, public international law, which is concerned primarily with relations between states, but also private international law and, the author wrote, "other rules which do not wholly fit into such standard categories." Jessup, *supra*, at 2; *see supra* § I.A.1. He elaborated:

> Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups. A private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at a European frontier confronts a transnational situation. So does an American oil company doing business in Venezuela; or the New York lawyer who retains French counsel to advise on the settlement of his client's estate in France; or the United States Government when negotiating with the Soviet Union regarding the unification of Germany. So does the United Nations when shipping milk for UNICEF or sending a mediator to Palestine. Equally one could mention the

[4] The body, also known as the World Court, is discussed *infra* § I.B.3.a.i.

> International Chamber of Commerce exercising its privilege of taking part in a conference called by the Economic and Social Council of the United Nations.[5]

Jessup, *supra*, at 3-4.

In contemporary discourse, the term "transnational law" sometimes is used to convey this broad sweep; at other times, it may be intended in the narrower sense of a legal matter that involves just two countries. The term also may be used as a synonym for private international law, described *supra* § I.A.1.

6. Global Law

"Global law" represents not so much a term of art as an effort to capture the operation of various bodies of law at various levels; that is, to allude to the broader meanings of international law and transnational law. *See supra* §§ I.A, I.A.5. In the United States, the phrase often is used in a colloquial sense, as in "global law firm" or "global law school."

Academics and policymakers also speak of "global governance." One source offers this succinct definition:

> Global governance refers to the way in which global affairs are managed. As there is no global government, global governance typically involves a range of actors including states, as well as regional and international organizations. However, a single organization may nominally be given the lead role on an issue, for example the World Trade Organization in world trade affairs. Thus global governance is thought to be an international process of consensus-forming which generates guidelines and agreements that affect national governments and international corporations.

World Health Org., *Global Governance*, http://www.who.int/trade/glossary/story038/en/ (last visited Feb. 23, 2014).[6]

[5] On the two mentioned international organizations that are part of the U.N. system, see UNICEF, *About UNICEF*, http://www.unicef.org/about/ (last visited Feb. 23, 2014); U.N. Econ. & Soc. Council, *About ECOSOC*, http://www.un.org/en/ecosoc/about/index.shtml (last visited Feb. 23, 2014). On the international nongovernmental organization mentioned, see Int'l Chamber Commerce, *A Word from our Secretary-General*, http://www.iccwbo.org/about-icc/ (last visited Feb. 23, 2014).

[6] On the intergovernmental organization mentioned in this passage, see World Trade Org., *What is the WTO?*, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 23, 2014).

Recommended citation:[1]

Am. Soc'y Int'l L., "Sources and Evidence of International Law," in *Benchbook on International Law* § I.B (Diane Marie Amann ed., 2014), available at www.asil.org/benchbook/sources.pdf

---

I.B. Sources and Evidence of International Law

International lawyers speak of "sources" when describing what constitutes international law, and of "evidence" when describing how international law is determined. The descriptions tend to overlap, and this section considers them together.

The *Restatement* defines "[a] rule of international law" as "one that has been accepted as such by the international community of states," with respect to one of three "sources"; that is, "the ways in which a rule or principle becomes international law." *Id*. §§ 102, 103 cmt. *a*. These appear:

> (a) in the form of customary law;
>
> (b) by international agreement; or
>
> (c) by derivation from general principles common to the major legal systems of the world.

Id. § 102. As discussed in Reporters Note 1 to this section of the *Restatement*, the three sources listed above correspond with those set forth in Article 38 of the Statute of the International Court of Justice,[2] which states in relevant part:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> > a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> >
> > b. international custom, as evidence of a general practice accepted as law;

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

[2] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute]), *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0& (last visited Feb. 13, 2014). Adopted at a diplomatic conference in San Francisco on June 26, 1945, the Charter and the annexed Statute entered into force on Oct. 24, 1945. U.N. Treaty Collection, *Charter of the United Nations and Statute of the International Court of Justice*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=I-1&chapter=1&lang=en (last visited Feb. 23, 2014). The United States, which ratified on Aug. 8, 1945, is a founding member; in total, there are 193 member states. *Id*.

> c. the general principles of law recognized by civilized nations; ....

At the top of the list in both documents are international agreements, or treaties, and international custom, also known as customary international law. These constitute the two primary sources of international law. Considered a "secondary source" is the third-listed item, general principles. *Restatement* § 102 cmt. *l*.

The Statute of the International Court of Justice additionally lists, "as subsidiary means for the determination of rules of law," the following:

> d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations.[3]

All of the above, along with evidentiary and other interpretive issues, are discussed below. This chapter thus now moves to an explanation of overall, black-letter rules. Treated first are the two primary sources of international law:

- Treaties/international agreements
- Customary international law

Then follows a discussion of the secondary source:

- General principles

Examined finally are subsidiary means of determining international law rules; specifically:

- Judicial decisions
- Teachings of publicists, also known as scholarly writings

After presenting this overview of sources and evidence, the chapter turns, *infra* § I.C, to uses of international law in U.S. courts.

1. Two Primary Sources of International Law

The two primary sources of international law – treaties and custom – are defined in turn below.

a. Treaties or International Agreements

After positing international agreements as a primary source of international law, the *Restatement* explains that such "agreements create law for the states parties thereto ...." *Id.*

[3] Omitted by way of ellipsis are the words "subject to the provisions of Article 59," a provision that makes explicit the fact that this court, like some others outside the United States, is not bound by *stare decisis*. The provision states in full: "The decision of the Court has no binding force except between the parties and in respect of that particular case." ICJ Statute, art. 59.

§ 102(3); *see supra* § I.B (quoting *Restatement* § 102(b)). This binding, or obligatory, characteristic is established once states consent to be bound to the agreement. Thereafter, states parties must discharge the obligations they have assumed in good faith – an international law principle known as *pacta sunt servanda* (Latin for "pacts are to be kept").

International agreements go by several names, such as "charter," "convention," "covenant," "pact," "protocol," "statute," and "treaty." "Convention" typically refers to an agreement among many countries, while "charter" or "statute" often is used for the founding document of an institution, and "protocol" for an agreement supplemental to a principal treaty.

In international law, "treaty" refers to an international agreement governed by international law. Treaties may be bilateral, multilateral, or universal, as follows:

- Bilateral treaties involve just two states. An example is the Mutual Legal Assistance Agreement between the United States and Russia, mentioned *infra* §§ II.C.2.v.1, II.C.2.v.3.a.

- Multilateral treaties have multiple states parties. This *Benchbook* discusses many such treaties, covering a range of matters, for example: diplomatic immunities, *infra* § II.B.1.b; arbitration, *infra* § III.A; family and child law, *infra* § III.B; sale of goods, *infra* § III.C; air transportation, *infra* § III.D; human rights, *infra* § III.E; and the environment, *infra* § III.G.

- Universal treaties are those to which all states have consented. Among the very few universal treaties are the four Geneva Conventions of 1949 for the Protection of Victims of War. *See* Int'l Comm. Red Cross, *South Sudan: world's newest country signs up to the Geneva Conventions*, July 17, 2012, http://www.icrc.org/eng/resources/documents/news-release/2012/south-sudan-news-2012-07-09.htm.

Caveat: Speaking precisely, the domestic law of the United States reserves the word "treaty" exclusively for those international agreements that come into being according to procedures set forth in the Constitution. These constitutional requirements, as well as uses of treaties in U.S. courts, are described *infra* § I.C.1. But first, the sections immediately following discuss how an international treaty is made.

i. Treaty-Making Steps

The steps by which a treaty comes into being include:

- Negotiation
- Adoption
- Signature
- Ratification or accession
- Entry into force

International law regarding each step is codified in the 1969 Vienna Convention on the Law of Treaties.[4] The various steps, along with corollary concerns such as reservations and the precise meaning of "signatory," are discussed below.

i.1. Negotiation

Each state has the capacity to negotiate a treaty. *See* Vienna Convention on Treaties, art. 6. Leading the negotiations for the United States are officials from the Executive Branch; to be specific, the U.S. Department of State, along with other agencies, like Defense or Commerce, as warranted by the subject of the treaty. Negotiation may occur over the course of years, in private talks or in public diplomatic conferences. *See* Mark Weston Janis, *International Law* 18-19 (6th ed., 2012).

i.2. Adoption

Once negotiation is completed, states adopt a treaty by an agreed-upon voting process. *See* Vienna Convention on Treaties, art. 9. Adoption fixes the text of the treaty, which then will be opened for signature and, eventually, for full joinder by way of ratification or accession. *See infra* §§ I.B.1.a.i.3, I.B.1.a.i.4.

i.3. Signature

After the adoption of a final text, treaties typically are opened for signature; that is, states are invited to sign the treaty within a specified time period, as a preliminary step toward full membership in the treaty. A state that has attached its signature has not consented to be bound to the terms of the treaty, and thus cannot be sanctioned for violating the treaty's terms. *See infra* § I.B.1.a.i.7 (underscoring the distinctly different meanings of "signatory" and "state party").

But signature is not entirely devoid of meaning. Article 18 of the Vienna Convention on Treaties provides:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; ....

[4] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://www1.umn.edu/humanrts/instree/viennaconvention.html [hereinafter Vienna Convention on Treaties]. This treaty, which entered into force on Jan. 27, 1980, has 113 states parties. U.N. Treaty Collection, *Vienna Convention on the Law of Treaties*, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Feb. 23, 2014). The United States is not among them. *Id*. Nevertheless, as discussed *infra* § IV.A, U.S. officials have recognized many provisions of the treaty to constitute customary international law.

Accord Ian Brownlie, *Public International Law* 610 (7th ed., 2008) (writing that "signature does not establish consent to be bound," but rather "qualifies the signatory state to proceed to ratification, acceptance, or approval and creates an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty").

i.4. Consent to Be Bound, by Ratification or Accession

A state typically consents to be bound to the terms of a treaty by depositing a certain document – known as the instrument of ratification or accession – with a designated entity. *See* Vienna Convention on Treaties, arts. 1(b), 11, 14-15. Depositories include:

- United States, particularly for bilateral treaties to which it is a party.
- United Nations, for multilateral treaties negotiated under U.S. auspices.
- Organization of American States or other regional, intergovernmental organization. *See, e.g., infra* § III.A (discussing an arbitration treaty negotiated under the auspices of the Organization of American States).
- Hague Conference on Private International Law, based in the Netherlands and described *infra* § III.B.1.
- International Civil Aviation Organization, based in Montreal, Canada, and described *infra* § III.D.1.
- International Committee of the Red Cross, http://www.icrc.org/eng/, under whose auspices many international humanitarian law treaties were negotiated.

A state's act of consent to be bound is called "ratification" when it follows the state's earlier signing of the treaty, a step discussed *supra* § I.B.1.a.i.4. It is called "accession" when the state never signed the treaty.

On how to determine if the United States or any other country has ratified or acceded a treaty, see *infra* § I.B.1.a.i.8.

i.5. Reservations, Understandings, and Declarations

Each state follows its own domestic law to determine whether it will consent to be bound to a treaty. *See infra* § I.C.1.a (describing the internal process in the United States).

A state may condition or qualify its joinder of a treaty by the attachment of a "reservation," as long as the treaty itself does not forbid such attachments and the reservation is not "incompatible with the object and purpose of the treaty." Vienna Convention on Treaties, art. 19. A reservation is defined as

> a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State; ...

Id., art. 1(d). States may withdraw previously filed reservations at any time. *See id*., art. 22.

In addition to reservations, states also may choose to include in their instrument of ratification two other types of qualification:

- "Understandings," statements of how the state interprets specified provisions; or
- "Declarations" respecting the treaty.

In labeling a qualification an "understanding" or "declaration," the state effectively maintains that the qualification is not a reservation; nevertheless, as pointed out in *Restatement* § 313 cmt. *g*, regardless of the label that a state may give it, a qualification "constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation."

The United States frequently attaches a package of such qualifications – sometimes called "RUDs," for "Reservations, Understandings, and Declarations" – when it deposits its instrument of ratification or accession to a treaty. The package often includes a statement on whether the treaty provisions are understood to be self-executing, and thus immediately enforceable in U.S. courts, or not. An example is the first declaration, available at https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en#EndDec (last visited Feb. 23, 2014), that the United States attached to its 1992 instrument ratifying the 1966 International Covenant on Civil and Political Rights. On self-executing and non-self-executing treaties, see *infra* §§ I.C.1.d.i, I.C.1.d.i.1.

On how to determine if the United States or any other country has filed such qualifications with respect to a treaty, see *infra* § I.B.1.a.i.8.

i.6. Entry into Force

Treaty texts typically make explicit the number of states that must consent to be bound in order for the treaty to take effect – that is, to enter into force. Even after this entry into force, states may continue to join the treaty; typically, a treaty provision specifies that the treaty will enter into force for such a state a few months after that state deposits its instrument of ratification or accession.

On how to determine whether a treaty has entered into force for the United States or any other country, see *infra* § I.B.1.a.i.8.

i.7. Precise Meanings of "Signatory" and "State Party"

The term "signatory" means only that a state has signed a treaty, as described *supra* §§ I.B.1.a.i.3. "Signatory" does not indicate that the state has ratified or acceded to the treaty. Once a state has taken the further step of ratification or accession, described *infra* § I.B.1.a.i.4, and thus has obligated itself fully to the treaty, the state properly may be called a "state party," a "member state," or a "contracting party," and may be held to answer at the international level if it breaches treaty obligations. The state is not any longer just a "signatory."

Occasionally, even writings of the Supreme Court have erred on this point. *See, e.g.*, *Abbott v. Abbott*, 560 U.S. 1, 16 (2013), *quoted infra* § III.B.3.d.i.3.a. Courts should take care to use the terms "signatory" and "state party" precisely, in order to preserve the important distinction regarding degrees of state obligation.

On how to determine if the United States or any other country is a signatory or, alternatively, a state party to a treaty, see *infra* § I.B.1a.i.8.

i.8. Finding Data on Treaty-Making Steps Taken by the United States or Other Countries

The entity designated as the depository of a particular treaty, see *supra* § I.B.1.a.i.4, compiles information on whether and when the United States or any other country fulfilled specific treaty-making steps, such as signature, ratification or accession, entry into force, and the filing or withdrawal of reservations. Such information is included in this *Benchbook* with respect to every treaty cited.

Treaty depositories that maintain online databases of such information include the:

- United States, often a depository for its bilateral treaties. *See generally* U.S. Dep't of State, *Treaty Affairs*, http://www.state.gov/s/l/treaty/ (last visited Feb. 23, 2014).

- United Nations, which serves as the depository for many multilateral treaties and maintains an online database at U.N. Treaty Collection, https://treaties.un.org/ (last visited Feb. 23, 2014). *Research tip:* To access information from this database, it may prove quickest simply to enter into a web browser like Google the name of the treaty – for example, "International Covenant on Civil and Political Rights" – along with the words "UN Treaty Collection."

- Hague Conference on Private International Law, based in the Netherlands and described *infra* § III.B.1. To access information for treaties it oversees, go to the list at http://www.hcch.net/index_en.php?act=conventions.listing (last visited Feb. 23, 2014), click on the particular treaty, and when it appears, click on the "Status table" link, in the righthand column of the webpage for that treaty.

- International Civil Aviation Organization, based in Montreal, Canada, and described *infra* § III.D.1. It maintains a chart with treaty information at *Current lists of parties to multilateral air law treaties*, http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx (last visited Feb. 23, 2014).

b. Customary International Law

The other primary source of international law, besides international treaties, is international custom. *See supra* § I.B (quoting *Restatement* § 102(a); ICJ Statute, art. 38(1)(b)). Section 102(2) of the *Restatement* offers a definition of this source:

> Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

No code or other authoritative compilation of customary international law exists; rather, a norm of customary international law is determined by proof of two elements:

1) General and consistent state practice; and

2) State behavior on account of a sense of legal obligation, an element also known as *opinio juris*.[5]

Each element is described in turn below. Then follows, *infra* § I.B.1.c, a discussion of a norm related to customary international law, the *jus cogens* or peremptory norm.

On the uses of customary international law in U.S. courts, see *infra* § I.C.3.a.

i. First Customary International Law Element: General and Consistent State Practice

State practice establishing a norm of customary international law may include *inter alia* national legislation, executive orders and official statements, and authoritative judicial decisions. *See* Mark Weston Janis, *International Law* 50-52 (6th ed., 2012) (quoting State Department publication); *Restatement* § 102(3). Such practice need not be universal among all states; rather, it must be "general and consistent," indicating "wide acceptance among the states particularly involved in the relevant activity." *Restatement* § 102 cmt. *b*.

[5] This two-part formulation parallels the description of international custom in Article 38(1)(b) of the Statute of the International Court of Justice, quoted in full *supra* § I.B. Specifically, the *Restatement*'s requirement of "general and consistent state practice" corresponds with the Statute's reference to "general practice," and the *opinio juris* requirement in the *Restatement* corresponds with the Statute's requirement that the practice is "accepted as law."

i.1. Persistent State Objection and Absence of State Objection

A state that demonstrated its rejection of a customary international law norm, by objecting persistently while the norm was forming, is not bound to that norm. *See Restatement* § 102 cmts. *b*, *d*. Conversely, a state that remained silent during the period of formation is deemed to have implicitly accepted the rule. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* xxv (4th ed., 2011).

ii. Second Customary International Law Element: Sense of Legal Obligation/ *Opinio Juris*

General and consistent state practice amounts to customary international law only if states adhere to the practice out of a sense of legal obligation – an element often called *opinio juris*, shorthand for the Latin phrase *opinion juris sive necessitatis* ("opinion of law but of necessity"). *Restatement* § 102 cmt. *c* (stating further that "a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law"). *See supra* § I.B. The presence of this element may be determined not only by states' overt statements, but also by inference drawn from states' action or inaction. *See Restatement* § 102 cmt. *c*.

On "comity" – state practice followed out of a sense not of legal obligation but rather of international friendship – see *infra* § II.B.7.

c. *Jus Cogens* or Peremptory Norms

What is sometimes described as a higher-order norm of customary law emerged in the last half-century or so.[6] This source of law is referred to either as a peremptory norm or as *jus cogens* (Latin for "compelling law"). The principal instrument pertaining to treaties, the Vienna Convention on Treaties discussed *supra* § I.B.1.a.i, refers to this kind of norm in two separate articles. Article 53 states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 of the same treaty provides:

[6] The *Restatement* explained:

> The concept of *jus cogens* is of relatively recent origin. It is now widely accepted, however, as a principle of customary law (albeit of higher status).

Id. § 102, rptr. n.6 (citing Egon Schwelb, *Some Aspects of International* Jus Cogens *as Formulated by the International Law Commission*, 61 Am. J. Int'l L. 946 (1967)).

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

In other words, if a treaty provision or customary international law norm conflicts with a norm recognized as peremptory, the latter will prevail regardless of when the former arose. Moreover, states may not derogate from, or opt out of, the constraints of peremptory norms. *See Restatement* § 102 rptr. n.6 (interpreting the Article 53 reference to "accept[ance] and recogni[tion] by the international community of States" to mean "'a very large majority' of states, even if over dissent by 'a very small number' of states"). Peremptory norms thus operate as an exception both to the general rule of state consent and to the later-in-time rule discussed *infra* § I.B.1.d.

Few rules are said to constitute *jus cogens* or peremptory norms; they include:

- Prohibitions on the use of armed force, set out in the Charter of the United Nations.
- International prohibitions against genocide, torture, and slave trafficking.

See Restatement § 102 cmts. *h*, *k*.

On the use of *jus cogens* in U.S. courts, see *infra* § I.C.3.b.

d. Conflict between Treaty and Custom: Later-in-Time Rule

Treaties and norms of customary international law are considered of equal status under international law. To the extent that a treaty and custom conflict, therefore, whichever arose later in time prevails. *See Restatement* § 102 cmt. *j* & rptr. n.4. As explained *supra* § I.B.1.c, an exception is made in the case of *jus cogens* or peremptory norms, which can displaced only by a new peremptory norm.

Because of the difficulty in pinpointing when a customary norm came into effect, as a practical matter the later-in-time rule applies most frequently to displacement by a subsequent treaty. In any event, courts likely will try to reconcile an asserted conflict rather than apply the rule. *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* xxv-xxvi (4th ed., 2011).

2. Secondary Source of International Law

Posited as a "secondary source" of international law – after the primary sources of treaties and customs – are "general principles common to the major legal systems of the world." *Restatement* § 102 & cmt. *l*. *See* ICJ Statute, art. 38(1)(c) (authorizing International Court of Justice to apply "general principles of law recognized by civilized nations"); *supra* § I.B. This source is discussed below.

a. General Principles

After setting forth general principles as a source of international law in Section 102(1)(c), quoted *supra* § I.B, the *Restatement* offers a more specific definition. Section 102(4) states:

> General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

This source thus operates as a gap-filler – a residual source of law that comes into play when the two primary sources of international law, treaties and custom, fail to provide an applicable rule. *See id*. § 102 cmt. *l.*

Principles that have been invoked in this manner include:

- *Res judicata*
- Equity
- Good faith

See id.; Ian Brownlie, *Public International Law* 19 (7th ed., 2008).

On the use of general principles in U.S. courts, see *infra* § I.C.3.c.

3. Subsidiary Means of Determining International Law Rules

After describing the above sources of international law, the Statute of the International Court of Justice lists, as "subsidiary means of determining international law rules," the following:

- "[J]udicial decisions"; and

- "[T]eachings of the most highly qualified publicists of the various nations."

ICJ Statute, art. 38(1)(d), *quoted supra* § I.B. Each of these – discussed in turn below – also may be said to constitute "evidence" of international law. *See Restatement* §§ 102 rptr. n.1, 103.

On the use of such evidence in U.S. courts, see *infra* § I.C.3.a.

a. Judicial Decisions

Judgments or opinions providing evidence of international law may be issued by national courts; indeed, the decisions of a state's courts may be deemed indicative of state practice for purposes of determining customary international law. *See supra* § I.B. Also relevant may be judgments or opinions issued by arbitral tribunals or international courts. *See Restatement* § 103.

This *Benchbook* discusses many decisions of national and international courts, including some issued by the International Court of Justice, the six-decades-old institution described in the section immediately following. For comprehensive accounts of numerous regional and international forums, see the essays collected in *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Chiara Giorgetti ed., 2012).

i. International Court of Justice

The International Court of Justice – sometimes called the World Court – is "the principal judicial organ of the United Nations." U.N. Charter, art. 92. It succeeded the Permanent Court of International Justice, a similar body that had operated within the framework of the post-World War I League of Nations. *See* Joan E. Donoghue, *The Role of the World Court Today*, 47 Ga. L. Rev. 181, 183-84 (2012); Sean D. Murphy, "The International Court of Justice," *in The Rules, Practice, and Jurisprudence of International Courts and Tribunals* 11, 12 (Chiara Giorgetti ed., 2012).

The court's founding document, the Statute of the International Court of Justice, described *supra* § I.B, "is annexed to," and "forms an integral part," of the 1945 Charter of the United Nations. Int'l Ct. Justice, *Statute of the Court*, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0& (last visited Feb. 23, 2014).

Serving nine-year, renewable terms on the court are fifteen judges, each from a different U.N. member state. ICJ Statute, arts. 3-4, 13. Judges are nominated by states and elected by the United Nations' General Assembly and Security Council; thereafter, the judges serve "independent of their governments." Donoghue, *supra*, at 184 (citing ICJ Statute, arts. 16, 20). At this writing, the American judge on the court is Joan E. Donoghue, formerly a high-ranking attorney at the U.S. Department of State. *See* Int'l Ct. Justice, *Current Members*, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1 (last visited Feb. 23, 2014).

The court is authorized to issue:

- Decisions in "contentious," or adversary, disputes between U.N. member states, provided that the states have consented to the exercise of jurisdiction. *See* ICJ Statute, art. 34(1).

- Advisory opinions, upon proper request by another U.N. entity. *See id*., art. 65(1).

The court's current docket and its prior opinions and judgments (all of which are issued simultaneously in English and French) may be found at Int'l Ct. Justice, *Cases*, http://www.icj-cij.org/docket/index.php?p1=3 (last visited Feb. 23, 2014).

This court, like many outside the United States, is not bound to a rule of *stare decisis*. *See* ICJ Statute, art. 59, *quoted supra* § I.B. Nevertheless, as one scholar has written,

> The International Court of Justice is a highly respected and authoritative judicial tribunal, lying at the center of the U.N. system, with an influence that extends well beyond the legal relations of the Parties that appear before it.

Murphy, *supra*, at 11. This *Benchbook* cites a number of International Court of Justice judgments. *See infra* §§ II.B.1.a.i.1, II.B.1.b.i, II.B.6.

The U.S. Supreme Court occasionally has cited decisions of the International Court of Justice. *E.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736 n.27 (2004) (concluding, in decision discussed *infra* § III.E.1, that respondent's citation to a 1980 International Court of Justice judgment and other authorities did not show the conduct at issue to be an international tort); *United States v. Maine*, 475 U.S. 89, 99 (1986) (citing a 1951 International Court of Justice judgment in the course of deciding a maritime boundary dispute between constituent U.S. states); *United States v. Louisiana*, 470 U.S. 93, 107 n.10 (1985) (same); *United States v. California*, 381 U.S. 139, (1965) (citing a 1949 International Court of Justice judgment in determining the extent of a constituent state's title to submerged lands). A recent series of decisions considered the applicability in the United States of a 2004 International Court of Justice judgment concerning the treatment of foreign nationals arrested in the United States. *E.g.*, *Medellín v. Texas*, 552 U.S. 491 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), discussed *infra* § I.C.1.a.i.

b. Teachings of Publicists, or Scholarly Writings

In contemporary language, what the ICJ Statute, art. 38(1)(d), calls "the teaching of publicists" is perhaps better referred to as scholarly writings. *See Restatement* § 103(2)(c). Assuming that the writing is sufficiently authoritative, it may aid a court's determination of the existence and content of an international law norm.

4. "Soft Law"

The term "soft law" sometimes is applied to international documents and norms that do not impose a specific, binding obligation on a state. *See* Mark Weston Janis, *International Law* 55-56 (6th ed., 2012). Subsumed within this label may be, for example:

- Documents promulgated under the auspices of an intergovernmental organization, such as the United Nations' Standard Minimum Rules for the Treatment of Prisoners. *See* E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), *available at* http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

- International declarations, such as the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), *available at* http://www.un.org/en/documents/udhr/.

- Rules, guidelines, and standards promulgated by nongovernmental organizations. *E.g.*, *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, *available at* http://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx (last visited Feb. 23, 2013). Adopted by the London-based International Bar Association in 2010, these rules are discussed *infra* § III.A.6.b.

  On the use of soft law in U.S. courts, see *infra* § I.C.3.d.

Recommended citation:[1]

Am. Soc'y Int'l L., "Uses of International Law in U.S. Courts," in
Benchbook on International Law § I.C (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/uses.pdf

I.C. Uses of International Law in U.S. Courts

Having set out in broad brush sources and evidence of international law, *supra* § I.B, this chapter now examines ways that such law is used in U.S. courts. These include:

- Direct enforcement of treaty provisions
- Statutory implementation or incorporation of international law
- Application of customary norms and other sources of international law
- Consultation of international sources as an aid to interpretation

Each is discussed in turn below.

1. Direct Enforcement of Treaty Provisions

As noted *supra* § I.B.1.a, the term "treaty" has a singular meaning under the laws of the United States: it is reserved exclusively for those international agreements that come into being according to the procedures contained in the U.S. Constitution.

This section first details constitutional provisions pertinent to treaties, then discusses one use of treaties in U.S. courts, by direct enforcement of treaty terms and by other means.

a. U.S. Constitutional Provisions and Treaty-Making Steps

The Constitution grants treaty-making powers to the political branches of the federal government.[2] It stipulates that the President

> shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; ....

U.S. Const., art. II, § 2[2].

Accordingly, it is the Executive Branch that leads the initial international treaty-making steps of negotiation, adoption, and signature, described *supra* § I.B.1.a.i.

The next steps occur as a matter of U.S. law:

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.
[2] Only the federal government possesses treaty powers. *See* U.S. Const., art. 8, § 10[1] (providing that "[n]o state" in the United States "shall enter into any Treaty, Alliance, or Confederation").

- The President transmits the treaty to the Senate for its advice and consent to ratification. This is done by way of a transmittal package, which includes the full English version of the treaty text and a State Department report on negotiations and treaty contents, as well, perhaps, as proposed reservations, understandings, and declarations – qualifications discussed *supra* § I.B.1.a.i.5.

- Hearings ensue, most often before the Senate Committee on Foreign Relations. Additional qualifications may be attached in this process.

- Implementing legislation may, but need not always, be proposed and acted upon before a full Senate vote.

- Eventually, the full Senate may schedule a vote on the treaty. If the treaty fails to win two-thirds' approval, it may be abandoned or, on occasion, scheduled for a new vote at some later date. If advice and consent is given by a vote of two-thirds or more, the Senate's work is done.

- On receipt of a resolution confirming the Senate's advice and consent, the Executive Branch prepares the instrument of ratification or accession, which the President signs. On a specified date after the United States deposits its instrument of ratification or accession, the treaty enters into force as to the United States, which then is a full state party to the treaty. *See supra* § I.B.1.a.i.4.

b. How to Determine Which Treaty-Making Steps the United States Has Taken

When it first refers to any treaty, this *Benchbook* provides information on that treaty's status, including whether the United States is a "signatory" or a "state party" – precise terms of art discussed *supra* § I.B.1.a.i.4. On how to locate that information and other treaty data, for the United States and for other countries, see *supra* § I.B.1.a.i.8.

c. Status of Treaties in U.S. Law

Regarding the status of treaties concluded according to the provisions *supra* § I.C.1.a, the Constitution's Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const., art. VI[2].

In the event of a conflict between provisions of such a treaty and of a U.S. statute, the provision that took effect later in time prevails. *E.g.*, *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (denying petition for certiorari); *Head Money Cases*, 112 U.S. 580, 599 (1884). Rather than apply the later-in-time rule, courts often will try to reconcile an asserted conflict through canons of construction discussed *infra* § II.A.4.c.

d. U.S. Courts and Direct Enforcement of Treaties

In addition to apportioning treaty powers between the political branches, see *supra* § I.C.1.a, the Constitution describes the jurisdiction of the federal courts with respect to treaties. It states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;....

Id., art. III, § 2[2]. The exercise of this constitutional grant of power applies only to those treaties to which the United States is a party. Moreover, it is subject to the doctrine of treaty self-execution and non-self-execution, discussed below.

i. Doctrine of Treaty Self-Execution and Non-Self-Execution

Upon becoming a party to a treaty, the United States assumes an international obligation to follow the treaty's terms. *See Medellín v. Texas*, 552 U.S. 491, 504 (2008) (writing that rule produced out of treaties to which the United States belongs "constitutes an *international* law obligation on the part of the United States") (emphasis in original); *see also supra* § I.B.1.a.i.4. The United States – the sovereign that entered into the treaty with other countries – is responsible in the event of noncompliance by any governmental unit, state as well as federal. *See Baldwin v. Franks*, 120 U.S. 678, 683 (1887) (writing that treaties "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States"); *accord Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (stating, with regard to a self-executing treaty, that because such a "treaty binds the States pursuant to the Supremacy Clause," states "must recognize the force of the treaty in the course of adjudicating the rights of litigants").

Whether a federal court may supply a remedy for a treaty breach is a separate question, however. *See id*. at 346-47. The answer frequently turns on a doctrine established in a unanimous Supreme Court judgment, *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). *See also Medellín v. Texas*, 552 U.S. 491, 504-13 (2008) (tracing the doctrine).

Called upon in *Foster* to enforce a treaty, the Court first acknowledged a traditional view of a treaty as "a contract between two nations," to be "carried into execution by the sovereign power of the respective parties to the instrument." 27 U.S. (2 Pet.) at 254.[3] Chief Justice John

[3] Still the rule in Britain and several other common law countries, this view requires the enactment of national legislation that indirectly enforce treaty terms; it is called "dualist" because it treats domestic and international law as separate entities. *See* Mark Weston Janis, *International Law* 87-88, 100-03 (6th ed., 2012). At the other end of the

Marshall's opinion for the Court then declared that "a different principle is established" in the United States, by the terms of its founding charter:

> Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Id. Derived from this passage and later Supreme Court judgments is the doctrine of self-execution and non-self-execution, as follows:

- *Self-executing:* A treaty provision deemed "equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision," *id*., operates automatically and may be enforced in U.S. courts as soon as the treaty enters into force for the United States. *See, e.g.*, *Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 U.S. 243, 252 (1984) (holding that air transportation treaty discussed *infra* § III.D is self-executing); *Warren v. United States*, 340 U.S. 523, 526 (1951) (enforcing as self-executing a provision in a 1939 treaty regarding personal injuries incurred while working on a ship); *Cook v. United States*, 288 U.S. 102, 119 (1933) (holding to be self-executing a U.S.-British treaty to combat liquor smuggling).

- *Non-self-executing:* A treaty provision deemed to "import a contract," because "the parties engage[d] to perform a particular act," *Foster*, 27 U.S. (2 Pet.) at 254, is seen to speak to the obligations of the United States' political branches. A non-self-executing provision is held not to create obligations directly enforceable in U.S. courts. Courts may enforce the content of a non-self-executing treaty provision only if and to the extent that the provision has been implemented domestically via federal legislation or regulations. *See, e.g.*, *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 44-45, 50 (1913).

A treaty provision is more likely to be held self-executing if the:

- Terms of the provision are concrete and specific;

- Provision confers individual rights susceptible to judicial enforcement; and

- Negotiation context indicates that drafting states intended the provision to have such an effect.

---

spectrum is the "monist" view, by which a treaty is deemed directly enforceable in a country as soon as it enters into force for that country. *See id*. at 88. In between these two views lies the path marked by the Court in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

Conversely, the more the above factors are absent, the more likely it is that the provision will be held non-self-executing.

i.1. Significance of Political Branch Declarations on Self-Execution or Non-Self-Execution

In recent years, U.S. instruments of ratification frequently have included a declaration – to which the Executive Branch and the Senate agreed in the ratification process – that provisions of the treaty at issue are self-executing or non-self-executing. *See supra* § I.B.1.a.i.5 (discussing reservations, understandings, and declarations). Courts have treated such statements as dispositive. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004).

2. Statutory Implementation or Incorporation of International Law

Federal statutes or regulations may operate to implement terms of treaties the United States has entered. *See supra* § I.C.1.i. U.S. laws also may incorporate international law – treaty provisions and customary international law alike. Implementation and incorporation are discussed in turn below.

a. Legislation Implementing Treaty Provisions

Implementing legislation may operate to make some, but not all, treaty provisions enforceable in U.S. courts. By way of example, the:

- Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, § 105(c), 117 Stat. 650 (2003), codified at 18 U.S.C. § 2423(c) (2006), makes it a crime punishable by up to thirty years' imprisonment for a U.S. citizen or permanent resident to travel overseas to engage in illicit sexual conduct with a child. *See infra* §§ II.A.3.c, III.B.1. This U.S. law implements a treaty-based obligation with respect to the nationality of the accused. *See* 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,[4] art. 4(2)(a). But it omits mention of another treaty basis for criminal jurisdiction, nationality of the victim. *See id*. art. 4(2)(b).

i. Constitutional Treaty Power and Enactment of Implementing Legislation

In *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court rejected a constitutional challenge to a federal statute implementing a U.S.-Britain treaty concerning migratory birds.

[4] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, S. Treaty Doc. No. 106-37, 2171 U.N.T.S. 227, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx. This treaty, which entered into force on Jan. 18, 2002, has 166 parties. *See* U.N. Treaty Collection, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en (last visited Feb. 23, 2014). The United States ratified it on Dec. 23, 2002, subject to a reservation and understandings *available id*.

Holding the statute valid, the opinion for the Court by Justice Oliver Wendell Holmes, Jr., referred to the Treaty Clause quoted *supra* § I.C.1.a and the Supremacy Clause quoted *supra* § I.C.1.c, as well as U.S. Const., art. I, § 8[18], which grants Congress the power

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Holland, 252 U.S. at 432.

On November 5, 2013, the Court heard argument in *Bond v. United States*, No. 12-158, in which the petitioner called into question the holding in *Holland*. *See Bond v. United States*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/bond-v-united-states-2/ (last visited Feb. 23, 2014). Decision is expected before mid-2014.

Regardless of the decision in *Bond*, implementing legislation may be enacted pursuant to other constitutional powers of Congress; for example, when appropriate, the Foreign Commerce Clause, U.S. Const., art. I, § 8[3].

b. Incorporation of Treaties and Other International Law

Rather than rephrase treaty terms, implementing legislation may incorporate terms of a treaty by reference. An example is the:

- International Child Abduction Remedies Act of 1988, Pub. L. No. 100-300, 102 Stat. 437 (Apr. 29, 1988), codified as amended at 42 U.S.C. § 11601 *et seq*. (2006), which explicitly incorporates the treaty on parental child abduction discussed *infra* § III.B.3.

See also infra § III.C (detailing international sale of goods treaty reprinted in full in the U.S. Code).

Statutory incorporation may extend to other sources of international law as well. Examples include the:

- Alien Tort Statute, 28 U.S.C. § 1350 (2006), incorporates both treaty-based and other international law; that is, it grants federal district courts "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." How to construe "law of nations" and "treaty," within the framework of this particular statute, is detailed *infra* § III.E.1.

- Supreme Court judgment concerning the first trial of a Guantánamo detainee. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The Court construed a then-applicable provision of the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq*., which authorized military commissions convened "by the law of war." *Id*. at 601 (quoting statute). By this phrasing, the Court held, Congress had "'incorporated by reference' the common law of war" – a

body of law that included international treaties and customs regulating armed conflict. *Id*. (quoting Ex parte *Quirin*, 317 U.S. 1, 30 (1942)).

3. Application of Customary Norms and Other International Law Sources

Other sources of international law that may be used in U.S. courts include:

- Customary International Law
- *Jus Cogens* or Peremptory Norms
- General Principles
- "Soft Law"

Each is discussed in turn below.

a. Customary International Law

Frequently cited with respect to customary international law, the other primary source of international law besides treaties, is *Paquete Habana*, 175 U.S. 677 (1900). As quoted in full at the very beginning of this chapter, the Court wrote that "[i]nternational law is part of our law," to "be ascertained and administered by the courts" in appropriate cases. 175 U.S. at 700; *see supra* § I. It then continued:

> For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

175 U.S. at 700. The Court's references to the "customs or usages of civilized nations" and, later, to "an ancient usage among civilized nations" which "gradually ripen[ed] into a rule of international law," *id*. at 686, find echo in the contemporary description of customary international law as general, consistent state practice followed out of a sense of legal obligation. *See supra* § I.B. Likewise resonant is the Court's description of scholarly works and judicial decisions as means of determining international custom. *See supra* § I.B.3.

Although the passage in *Paquete Habana* specified a role for the courts, there is academic debate on the nature and scope of this role. *Compare* William A. Fletcher, *International Human Rights in American Courts*, 93 Va. L. Rev. 653 (2007) *and* Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998) *with* Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

Notwithstanding, courts frequently look to customary international law. Examples:

- In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735-8 (2004), the Court, construing the Alien Tort Statute discussed *supra* § I.C.2.b and *infra* § III.E.1, rejected a claim on the ground that no applicable customary international law norm was violated by the challenged conduct.

- In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), the Court opted for a "rule of construction" that "reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow." *See infra* §§ II.A.3.f, II.A.4.c.iii, II.B.7.b (discussing case).

- In *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006), a four-Justice plurality would have determined what judicial procedures a military commission by reference to a customary international law norm composed in part by a provision in a treaty the United States has not ratified.

b. *Jus Cogens* or Peremptory Norms

Litigants might invoke *jus cogens* or peremptory norms, described *supra* § I.B.1.c, in cases brought under statutes incorporating international human rights law or implementing provisions in human rights treaties to which the United States belongs. *See generally infra* § III.E. *See also Yousuf v. Samantar*, 699 F.3d 763, 775-78 (4th Cir. 2012) (holding that former government official was not entitled to foreign official immunity for *jus cogens* violations), *cert. denied*, __ U.S. __, 2014 WL 102984 (Jan. 13, 2014), *discussed infra* § II.B.1.b.

The only Supreme Court opinion mentioning *jus cogens* did so only in the course of declining to resolve litigants' dispute. *Graham v. Florida*, 560 U.S. 48, 82 (2010). Their debate about the norm was "of no import," the Court wrote, given that it considers such international norms while construing the constitution ban on cruel and unusual punishments only to assess "basic principles of decency," and "not because those norms are binding or controlling." *Id.*; *see infra* § I.C.4.

c. General Principles

U.S. judicial decisions occasionally have mentioned general principles common to the world's major legal systems – described *supra* §§ I.B, I.B.2 as a secondary source of international law. *E.g.*, *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399 (4th Cir. 2011); *United States v. Jeong*, 624 F.3d 706, 712 (5th Cir. 2010); *Buell v. Mitchell*, 274 F.3d 337, 371 (6th Cir. 2001); *United States v. Hasan*, 747 F. Supp. 2d 599, 631, 635 (E.D. Va. 2010), *aff'd sub nom. United States v. Dire*, 680 F.3d 446 (4th Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 982 (2013).

Research revealed only one federal appellate decision relying on this source. *Phipps v. Harding*, 70 F. 468, (7th Cir. 1895) (considering "general principles adopted by civilized nations" regarding choice of law in contract disputes).

In contrast, general principles often are employed by international arbitral tribunals, discussed *infra* § III.A, and sometimes as well by national courts in countries other than the United States.

d. "Soft Law"

Consistent with the definition of "soft law" as comprising international instruments that do not place firm duties on states, see *supra* § I.B.4, U.S. courts have not found binding obligations based on these instruments alone. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (stating that the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), "does not of its own force impose obligations as a matter of international law").

A court may be asked to consider a soft law instrument in the course of interpreting domestic law. *E.g.*, *Van Straaten v. Shell Oil Products Co. LLC*, 678 F.3d 486, 489-91 (7th Cir. 2012) (considering a party's invocation of credit-card standards promulgated by the International Organization for Standardization, http://www.iso.org/, a Switzerland-based network of national standards bodies).

A court also may take note of a soft law instrument in support of a conclusion relying for the most part on domestic authorities. *See Estelle v. Gamble*, 429 U.S. 97, 103 n.8 (1976) (citing, among other sources, minimum prisoner treatment standards promulgated by the United Nations).

4. Consultation of International Sources As an Aid to Interpretation

Justices of the Supreme Court at times have consulted foreign and international sources as an aid to interpretation. They have underscored that such sources in no way control a U.S. court's interpretation; rather, such sources have been treated, when and to the extent relevant in a particular case, as sources of potentially persuasive authority. *See Graham v. Florida*, 560 U.S. 48, 82 (2010), *quoted supra* § I.C.3.b.

The practice is longstanding in capital punishment cases: opinions of the Court have looked to foreign and international sources as indicative, along with domestic sources, of "the evolving standards of decency that mark the progress of a maturing society" – standards from which the Eighth Amendment is said to "'draw its meaning.'" *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)); *see id*. at 316 n.21 (citing brief filed by the European Union). *See also Graham v. Louisiana*, 560 U.S. 48, 58, 82 (2010); *Roper v. Simmons*, 543 U.S. 551, 576 (2005). In recent years, the practice has spurred some dissents.

On rare occasion, such consultation has occurred in other constitutional cases. *See Lawrence v. Texas*, 539 U.S. 558, 567-73 (2003) (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.) (interpreting Due Process Clause of the Fourteenth Amendment to evaluate claim involving same-sex intimacy); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16

(1997) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.) (same regarding claim involving assisted suicide).

Recommended citation:[1]

Am. Soc'y Int'l L., "Jurisdictional, Preliminary, and Procedural Concerns," in *Benchbook on International Law* § II.A (Diane Marie Amann ed., 2014), available at www.asil.org/benchbook/jurisdiction.pdf

---

II. Jurisdictional, Preliminary, and Procedural Concerns

Litigation involving international, transnational, foreign, or comparative law frequently poses issues preliminary to considerations of the merits. In this regard, international cases are no different than cases in other fields of law. That said, resolution of preliminary issues in international cases sometimes implicates doctrines that either do not arise, or arise in a different way, in the purely domestic context. Such issues include:

- Jurisdiction
- Preliminary issues such as immunities
- Doctrines like act of state and *forum non conveniens*
- Comity
- Discovery and related procedures

These are discussed in turn below, with emphasis on particular ways that they arise or are treated in international litigation.

A. Jurisdiction

The term "jurisdiction" can have various meanings in transnational cases. The Restatement (Third) of the Foreign Relations Law of the United States[2] divides jurisdiction into three categories:

> (a) jurisdiction to prescribe, *i.e.*, a country's ability to make its law applicable to persons, conduct, relations, or interests;
>
> (b) jurisdiction to adjudicate, *i.e.*, a country's ability to subject persons or things to the process of its courts or administrative tribunals. The U.S. legal categories of personal jurisdiction and subject-matter jurisdiction help delineate the scope of U.S. courts' jurisdiction to adjudicate;
>
> (c) jurisdiction to enforce, *i.e.*, a country's ability to induce or compel compliance or to punish noncompliance with its laws or regulations.

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.
[2] Designated subsequently as *Restatement*, the 1987 Restatement contains many of the doctrines discussed in this chapter. On use of this *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, *see infra* § IV.B.

This chapter first lays out the five bases upon which countries may exercise their jurisdiction to prescribe. It then considers limitations on the exercise of extraterritorial jurisdiction.

1. Principles or Bases of Jurisdiction

The principles governing the exercise of jurisdiction govern the exercise of jurisdiction by any organ of the United States at every level of government.[3] The five recognized bases for asserting prescriptive jurisdiction are:

- Territoriality (conduct taking place within the country's territory, or designed to have effects within the country's territory)
- Nationality (conduct performed by the country's nationals)
- Passive personality (conduct having the country's nationals as its victims)
- Protective principle (conduct directed against a country's vital interests)
- Universality (conduct recognized by the community of nations as of "universal concern")

See Restatement §§ 402, 404 and comments; *see also* Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. 439 (Supp. 1935) (setting forth these principles in a source on which the mid-twentieth-century *Restatement* writers relied). The instant section describes each of the five in turn and considers the reasonableness principle that limits their application (see *Restatement* § 403); subsequently, *infra* § II.A.2, this section examines the interaction of the five principles and U.S. laws.

a. Territoriality, Including Effects

Territoriality is the principle that a country may regulate both civil and criminal matters within its sovereign borders. *See Restatement* § 402 cmt. *c*. It has long been recognized as a basis for the assertion of jurisdiction. Effects jurisdiction may be considered under the heading of territoriality, or under a separate heading. *See id.* § 402 cmt. *d* (taking the position "a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403").

Applications of these propositions in U.S. law – in particular, with respect to two bases of U.S. jurisdiction derived from the principle of territoriality, the effects doctrine/objective territoriality and special maritime and territorial jurisdiction – are discussed *infra* § II.A.3.a.

[3] In international law writings, the term "state" typically refers to a country – a sovereign nation-state – and not to a country's constituent elements. This *Benchbook* follows that usage, so that "state" means country, and individual states within the United States are designated as such.

b. Nationality/Active Personality

Nationality is one of two principles that support the exercise of jurisdiction by reference to a person involved in the conduct at issue. (The other principle is passive personality, described in the section immediately following.) What matters in this first instance is the nationality of the actor, or defendant; for this reason, the nationality principle is sometimes also called the "active personality" principle. *See Restatement* § 402(2).

The nationality principle is grounded in the view that a sovereign state is entitled to regulate the conduct of its own nationals anywhere, for the reason that such nationals owe a duty to obey the state's laws even when they are outside the state. *See Blackmer v. United States*, 284 U.S. 421, 436-37 (1932); *see also* Christopher Blakesley, "Extraterritorial Jurisdiction," *in* 2 *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* 116 (M. Cherif Bassiouni, 3d ed. 2008). This basis for exercising prescriptive jurisdiction is widely accepted and exercised by other countries. *Id*.

c. Passive Personality

This is the second of the two principles that support the exercise of jurisdiction by reference to a person involved in the conduct at issue. (The other principle is nationality/active personality, described in the immediately preceding section.) What matters in this second instance is the nationality of the victim or person at whom the conduct at issue was directed. For this reason, it is called the "passive personality" principle. *See Restatement* § 402 cmt. *g*.

For applications of this principle in the United States, see *infra* § II.A.3.d.

d. Protective Principle

Pursuant to the protective principle, a state may exert jurisdiction over conduct committed outside its territory – by its nationals and non-nationals alike – if the conduct falls within a limited class of offenses directed against state security or critical state interests or functions. As laid out in Section 402(3) and comment f of the *Restatement*, representative offenses may include:

- Espionage
- Counterfeiting of government money or seal
- Falsification of official documents
- Perjury before consular officials
- Conspiracies to violate immigration and customs law

For applications of this principle in the United States, see *infra* § II.A.3.b.

e. Universality

According to the principle of universality, a state may exercise extraterritorial jurisdiction even in the absence of all four jurisdictional links discussed above – but only if the conduct alleged constitutes one of a very few, specified international crimes. *Restatement* § 404 (permitting such exercise "for certain offenses recognized by the community of nations as of universal concern"). Universal jurisdiction derives from the view that certain conduct (such as genocide, torture, piracy, aircraft hijacking, hostage taking, war crimes, and the slave trade) so concerns the entire international community of states that the prosecution of offenders by any state is warranted. *See id.* cmt. *a*. It is not limited to criminal jurisdiction but may also involve civil remedies, such as remedies in tort or restitution for victims. *See id.* cmt. *b.*

For applications of this principle in the United States, see *infra* § II.A.3.e.

f. Reasonableness Inquiry

The Restatement (Third) provides that, even when one or more of the five international law bases for jurisdiction are present, the application of national law to conduct linked to another state or states may still be precluded if such exercise is deemed "unreasonable." *See* Restatement § 403. The U.S. Supreme Court has declined to apply § 403. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-99 (1993). It has also expressed the view that the case-by-case balancing called for in § 403 is "too complex to prove workable." *F. Hoffman-La Roche v. Empagran S.A.*, 542 U.S. 155, 168 (2004).

2. Sources of Jurisdiction Under U.S. Law

Among the provisions of the Constitution that may establish U.S. federal jurisdiction to prescribe are the following:

- *Foreign Commerce Clause:* Article I § 8[3] states in relevant part that "Congress shall have Power … To regulate Commerce with Foreign Nations.…"

- *Offences Clause:* Article I § 8[10] states in relevant part that "Congress shall have Power … To define and punish Piracies and Felonies committed on the high seas, and offences against the Law of Nations.…"

- *Power to Provide for the Common Defense and General Welfare of the United States:* Article I § 8[1].

- *Necessary and Proper Clause:* Article I § 8[18] ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers…").

U.S. state and federal jurisdiction to adjudicate are often analyzed as a matter of U.S. law under the headings of subject-matter jurisdiction and personal jurisdiction.

a. Subject-Matter Jurisdiction

Under U.S. law, the term "subject-matter jurisdiction" refers to the authority of the court to rule on the type of case at hand; that is, the conduct at issue or the status of things in dispute. *See Black's Law Dictionary* 931 (9th ed. 2009). Article III § 2 of the U.S. Constitution provides for federal subject-matter jurisdiction in cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,— between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." State courts remain courts of general jurisdiction, including for matters with international or transnational elements.

b. Personal Jurisdiction

The term "personal jurisdiction" refers to the "court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests." *Black's Law Dictionary* 930 (9th ed. 2009).

i. U.S. Constitutional Jurisprudence

In order to exercise jurisdiction over a person, consistent with U.S. law, courts in the United States must determine that such exercise comports with constitutional guarantees of due process. The federal government is bound to conform with the Due Process Clause of the Fifth Amendment to the Constitution, which states in relevant part:

> No person shall … be deprived of life, liberty, or property, without due process of law ….

Virtually identical words in the Due Process Clause of the Fourteenth Amendment similarly constrain the constituent states of the United States.

Analysis of whether an assertion of personal jurisdiction meets this constitutional standard typically is analyzed according to the principles enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In his opinion for the Court, Chief Justice Harlan Fiske Stone wrote that if a person is not present in a state, then the state may exercise jurisdiction over the person only if the person has

> certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *See also Goodyear Dunlop Tires Operations v. Brown*, __ U.S. __, __, 131 S. Ct. 2846, 2850 (2011) ("A state court's

assertion of jurisdiction . . . is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause.").

i.1 Constitutional Due Process and General Jurisdiction over Multinational Corporations

In *Daimler AG v. Bauman*, __ U.S. __, 134 S. Ct. 746 (2014), the Supreme Court applied the test in *Goodyear Tire* and held that, in the absence of a basis for exercising specific jurisdiction over the claims at issue, a multinational corporation that was not "essentially at home" in the forum could not be subjected to the general jurisdiction of U.S. courts for wrongs alleged to have been committed entirely overseas, by one of its foreign subsidiaries.

c. Jurisdiction to Enforce

The concept of "jurisdiction to enforce," also known as executive or enforcement jurisdiction, is described in Sections 401(c) and 431 of the *Restatement* as the authority to "induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."

Enforcement jurisdiction is primarily territorial. Thus, the United States may enforce a foreign judgment against assets in the United States even if it would have lacked personal jurisdiction over the original case and/or would have had no jurisdiction to prescribe rules for the parties. Conversely, the United States may not seize property abroad to satisfy a U.S. judgment even if the U.S. court had personal jurisdiction over the parties and the United States had jurisdiction to prescribe rules for the case.

As a matter of international law, one state's law enforcement officers may conduct investigations or arrests in the territory of another state only if the latter consents. *Restatement* § 432(2). Engaging in such enforcement measures absent consent is viewed as an infringement of sovereignty and an unlawful use of force.

3. Principles or Bases of Jurisdiction and U.S. Courts

This section provides examples of how U.S. courts apply each of the five principles; that is, territoriality, protective principle, nationality/active personality, passive personality, and universality.

a. Territoriality

Most statutes are presumed to apply in U.S. territory, and a few make this explicit. *E.g.* Foreign Corrupt Practices Act, 15 U.S.C.A. § 78dd-3(a).

Two additional bases of extraterritorial jurisdiction have been derived from the principle of territoriality. Both of these bases rely on interests or concerns within U.S. territory in order to justify the exercise of U.S. jurisdiction outside U.S. territory. Labeled the effects doctrine and special maritime and territorial jurisdiction, each is discussed below.

i. Effects Doctrine / Objective Territoriality

The effects doctrine – linked to the concept of objective territoriality[4] – has roots in jurisprudence of the Supreme Court. Justice Oliver Wendell Holmes, Jr. held more than a century ago:

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

Strassheim v. Daily, 221 U.S. 280, 285 (1911). Thus Judge Learned Hand, deemed the following proposition "settled law" as long ago as 1945:

> [A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.

United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945). Consistent with this U.S. jurisprudence, Section 402(1)(c) of the *Restatement* provides that a state's jurisdiction may be extended to

> conduct outside its territory that has or is intended to have substantial effect within its territory.

See also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

[4] The two concepts are quite similar. The International Law Commission of the United Nations, comprised of experts on international law, articulated the precise difference as follows:

> 11. The *objective territoriality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts outside its territory when a constitutive element of the conduct sought to be regulated occurred in the territory of the State.
> 12. The *effects doctrine* may be understood as referring to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory [of] a State which has a substantial effect within that territory. This basis, while closely related to the objective territoriality principle, does not require that an element of the conduct take place in the territory of the regulating State.

Int'l L. Comm'n, *Report on the work of its fifty-eighth session*, Annex E, at 521-22 (1 May to 9 June and 3 July to 11 August 2006), GAOR, 61st sess., Supp. No. 10 (A/61/10) (emphasis in original), *available at* http://legal.un.org/ilc/reports/english/a_61_10.pdf.

ii. Special Maritime and Territorial Jurisdiction

Within its discussion of grounds for assertion of extraterritorial jurisdiction, *Restatement* § 402 cmt. *h* provides:

> A state may apply its law to activities, persons, or things aboard a vessel, aircraft, or spacecraft registered in the state, as well as to foreign vessels or aircraft in its territorial waters or ports or airspace.

That principle is reflected, for example, in 18 U.S.C. § 7 (2006), titled "Special maritime and territorial jurisdiction of the United States." This statute extends U.S. jurisdiction in certain circumstances and on a variety of bases (including nationality and passive personality), including to:

- Vessels "registered, licensed, or enrolled" under U.S. law and operating on the Great Lakes, *id*. § 7(2);
- Aircraft belonging to the United States or U.S. corporations or citizens when operating outside jurisdiction of a particular state, *id*. § 7(5);
- Any spacecraft registered to the United States, while it the spacecraft is in flight, i*d*. § 7(6); and
- "To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States," *id*. § 7(8).

b. Protective Principle

Among the U.S. laws relying on the protective principle is 18 U.S.C. § 1546 (2006), which defines, as a felony, fraud and misuse related to visas – including a visa application filed at an overseas U.S. consulate by a non-U.S. national alleged to have made a false statement. Other examples include 18 U.S.C. § 470 (counterfeiting outside the United States); 18 U.S.C. §§ 792-99 (espionage); 18 U.S.C. § 1114 (murder of government officials).

Some courts have looked to international law jurisdiction principles explicitly. *See, e.g.*, *United States v. Vilches-Navarete*, 523 F.3d 1, 21-22 (1st Cir.) (discussing the protective principle in the context of jurisdiction over a vessel on the high seas), *cert. denied*, 555 U.S. 897 (2008); *United States v. Peterson*, 812 F.2d 486, 493-94 (9th Cir. 1987) (Kennedy, J.) (same); *Laker Airways, Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984). *See also United States v. Benitez*, 741 F.2d 1312, 1216 (11th Cir. 1984) (conviction of foreign national for attempted murder of DEA agents abroad consistent with protective principle); *U.S. v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir. 1968) (conviction of foreign national for making false statement on visa application to consular officer outside the United States consistent with protective principle).

A more recent discussion of the principle may be found in *United States v. Yousef*, 327 F.3d 56, 110-11 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003).

c. Nationality/Active Personality

The Supreme Court has relied on the nationality principle in cases including *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932). *See also Skiriotes v. Florida*, 313 U.S. 69, 73 (1941) ("[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.")

Provisions that apply on the basis of U.S. citizenship or residence include:

- Taxation. 26 U.S.C.A. § 7701(a)(30(A) (defining "United States person" under the Internal Revenue Code to include "a citizen or resident of the United States").

- Treason by a U.S. citizen. 18 U.S.C. § 2381 (2006); *see Chandler v. United States*, 171 F.2d 921, 930 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

- Failure by male U.S. citizens to register for military service. 50 U.S.C. App. § 453 (2006).

- Violating export controls. *See* Trading with the Enemy Act, 50 U.S.C. App. §§ 5, 16 (2006); Cuban Assets Control Regulations, 31 C.F.R. § 515.329 (2012) (stating that a "[p]erson subject to the jurisdiction of the United States," includes, *inter alia*, "(a) Any individual, wherever located, who is a citizen or resident of the United States; . . . (c) Any corporation organized under the laws of the United States or of any state, territory, possession, or district of the United States").

- Travel by a U.S. citizen or permanent resident in interstate or foreign commerce to engage in illicit sexual conduct with a minor. PROTECT Act, 18 U.S.C. § 2423(c) (2006); *see United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007).

With respect to corporations, the United States exercises nationality jurisdiction sometimes on the basis of their law of incorporation, sometimes on the basis of their principal places of business, and sometimes on the basis of both. *See, e.g.*, 15 U.S.C. § 78dd-2(h)(1)(B). Both definitions of corporate nationality are permitted under international law. Case Concerning the Barcelona Traction, Light and Power Company (Belg. v. Spain), 1970 I.C.J. 3, 42 (Feb. 5).

In addition, the nationality principle has sometimes been applied in cases involving subsidiaries of U.S. corporations. A foreign-incorporated subsidiary of a U.S. company may be subject to U.S. regulations on the basis of the nationality of its parent company. *See Restatement* § 414. Fiscal regulations of foreign-incorporated subsidiaries have given rise to little controversy; that stands in contrast with reactions to attempts to compel foreign subsidiaries to

comply with embargoes and export control regulations imposed by the United States, 50 U.S.C. App. § 2415(2). *Id*. cmt. *a*; *see also id.* § 414, rep. notes 2-4.

d. Passive Personality

Examples of passive personality jurisdiction may be found in matters including those related to terrorism; for example:

- Passive personality has been applied to support jurisdiction in instances of terrorist or other organized, overseas attacks against U.S. nationals, U.S. government officials, or U.S. government property (such as an embassy or military vessel). *See Restatement* § 402(2) cmt. *g* & rep. note 3; *see also United States v. Benitez*, 741 F.2d 1312, 1316-17 (11th Cir. 1984) (discussing the passive personality principle in the course of approving of the prosecution of a Colombian citizen for shooting U.S. agents in Colombia), *cert. denied*, 471 U.S. 1137 (1985).

- Section 1202 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853, codified at 18 U.S.C. § 2332 (2006), makes murder and physical violence committed against U.S. nationals abroad a felony punishable in some cases by the death penalty or by life imprisonment.

- The United States has also exercised passive personality jurisdiction to create civil liability in some instances, for example under the Anti-Terrorism Act, 18 U.S.C. § 2333, and the Foreign Sovereign Immunities Act exception for state sponsors of terrorism, 28 U.S.C. § 1605A(c).

e. Universality

Justice Stephen G. Breyer provided a useful discussion of the universality principle in his concurring opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), a case arising out of the Alien Tort Statute, 28 U.S.C. § 1350 (stating, in full, that "[t]he 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"). As emphasized in Breyer's concurrence, 542 U.S. at 761-63, and in Section 404 of the *Restatement*, the list of offenses deemed serious enough to warrant a state's exercise of universal jurisdiction is short. Frequently included are:

- Piracy
- Slave trading
- Genocide
- War crimes
- Crimes against humanity
- Torture

In a few instances related to such crimes, Congress has enacted legislation resting in whole or in part on the universality principle. *E.g.*, 18 U.S.C. § 1651 (2006) (piracy under the law of nations); 18 U.S.C. § 1091 (2006) (genocide); 18 U.S.C. § 2340A (2006) (torture); 18 U.S.C. § 2441 (2006) (war crimes).

Under certain multilateral treaties, states parties agree to extradite or prosecute individuals alleged to have committed offenses specified in the treaties, even if the conduct occurred outside the state's territory and even if none of the state's nationals is alleged to be involved. When the United States has become a party to treaties with such provisions, it has implemented them via federal statute. In addition to the statutes enumerated above, examples of this type of jurisdiction include:

- Articles 4, 7 and 8 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641, 860 *U.N.T.S.* 105, *available at* http://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf;

- Articles 5, 7 and 8 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 U.S.T. 565, 974 U.N.T.S. 178, *available at* http://www.un.org/en/sc/ctc/docs/conventions/Conv3.pdf;

- Articles 3, 7 and 8 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, 28 U.S.T. 1975, 1035 U.N.T.S. 167, *available at* http://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf; and

- Articles 5, 8 and 10 of the 1979 International Convention against the Taking of Hostages, T.I.A.S. No. 11081, 1316 U.N.T.S. 205, *available at* http://www.un.org/en/sc/ctc/docs/conventions/Conv5.pdf.

f. Reasonableness

Section 403 of the *Restatement* indicates that even in the presence of one or more of the above jurisdictional links, extraterritorial jurisdiction ought not to be exercised if such an exercise would be "unreasonable" – an inquiry determined by consideration of enumerated factors.

The Supreme Court has rejected a case-by-case balancing of interests as "too complex to prove workable" in determining reasonableness. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004). The question instead has been decided on a statute-by-statute basis.

4. Determining if Congress Intended to Give a Statute Extraterritorial Reach

This section discusses the methodology by which courts determine whether Congress intended a particular statute to have extraterritorial reach. The answer is easily found when the statutory language is explicit or when a high court already has rendered an authoritative

interpretation. When these conditions do not exist, courts consider, as appropriate, various canons of construction, pertaining to the presumption against extraterritoriality and the avoidance of conflicts between U.S. and international law or foreign countries' interests.

a. Express Statutory Language

To determine whether a statute expressly addresses the question of extraterritoriality, courts should examine the statute carefully. By way of example, here are three statutes that make explicit Congress' intent that they apply extraterritorially:

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. (2006). This statute defines "employee" to include persons employed in a foreign country:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. *With respect to employment in a foreign country*, such term includes an individual who is a citizen of the United States.

Id. § 2000e(f) (emphasis added); *see also id.* § 2000e-1 (detailing scope of application to foreign corporations).

- Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 *et seq*. (2006). Known as the MDLEA, this statute expressly confers extraterritoriality to its prohibition on drug trafficking in certain circumstances. It states:

> (a) Prohibitions. An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board –
>
> (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
>
> (2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

Id. § 70503(a); *see also id.* § 70503(b) ("Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.").

- Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 *et seq*. (2006). Enacted in

2000 to regulate the overseas activities of private military contractors, this statute, known as MEJA, provides, as codified at 18 U.S.C. § 3261(a):

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States –
>
> (1) while employed by or accompanying the Armed Forces outside the United States; or
>
> (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),
>
> shall be punished as provided for that offense.

b. Authoritative Judicial Interpretation

In the absence of explicit language, an authoritative judicial interpretation may establish whether a statute has extraterritorial reach. Statutory provisions for which the question has been resolved in this manner include:

- Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (2006). In *Morrison v. National Australia Bank*, 561 U.S. 247, __, 130 S. Ct. 2869, 2888 (2010), the Court held that this section applies only to fraud in connection with the purchase or sale of a security in the United States.

- Section 1 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2006). In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993), the Court held that this antitrust law does reach extraterritorially; that is, it "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

c. Pertinent Canons of Construction

Canons of construction particularly pertinent to interpretation of an ambiguous statute about which there is no authoritative precedent include the:

- Presumption against extraterritoriality
- *Charming Betsy* canon
- Presumption against unreasonable interference with another state's authority.

Each is discussed in turn below.

i. Canon Presuming Against Extraterritoriality

In a 2010 decision, the Supreme Court reaffirmed what it termed a longstanding principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 561 U.S. at __, 130 S. Ct. at 2877 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted)).

Application of this presumption should not turn mechanically on where the conduct at issue occurred, but rather upon the "focus" of the statutory provision. For example, in *Morrison*, 561 U.S. at __, 130 S. Ct. at 2884, the Supreme Court rejected claims by a class of foreign investors who sued an Australian banking company and a U.S. subsidiary for overstating the value of the U.S. subsidiary in public documents. The Court applied the presumption against extraterritoriality to hold that Section 10(b) of the Securities Exchange Act of 1934 does not apply extraterritorially because there is "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially." *Morrison*, 561 U.S. at __, 130 S. Ct. at 2883. The Court reasoned that although some deceptive conduct may have originated in the United States, "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," which did not occur in this case. *Id*. at __, 130 S. Ct. at 2884. The Court concluded that § 10(b) reaches the use of manipulative or deceptive devices or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. *Morrison*, 561 U.S. at __, 130 S. Ct. at 2888.

However, the Court has clarified that the presumption against extraterritoriality is not a "clear statement rule." *Id*. at 2883. Rather, a court should consider "all available evidence about the meaning" of a provision. *Sale v. Haitian Centers Council, Inc*., 509 U.S. 155, 177 (1993).

At times the Court also has referred to the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Small v. United States*, 544 U.S. 385, 388 (2005) (quoting *Smith v. United States*, 507 U.S. 197, 204 n. 5 (1993)). This notion is a basis for the presumption against extraterritoriality.

In *Kiobel v. Royal Dutch Petroleum Co*., __ U.S. __, __, 133 S. Ct. 1659, 1669 (2013), the Court considered whether the presumption against extraterritoriality applied to the creation of a cause of action under the Alien Tort Statute, 28 U.S.C. § 1350 (2006). In his opinion for the Court, Chief Justice John G. Roberts, Jr., wrote that the presumption was to be applied, and that no facts in the case at bar served to rebut the presumption. *See Kiobel*, __ U.S. at __, 133 S. Ct. at 1669. This decision is discussed in detail *infra* § III.E.1.

i.1. Exception in Criminal Cases

In general, the same rules of statutory interpretation apply equally to criminal statutes as to civil statutes. There is an exception, however, with regard to extraterritorial reach of criminal statutes, as discussed below.

i.1.a. General Approach to Ambiguity in Criminal Statutes

- First, the court considers whether the statutory provision expressly addresses the question of territorial application. *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002) ("First, we look to the text of the statute for an indication that Congress intended it to apply extraterritorially."). Examples of such statutes include:

    - 18 U.S.C.A. § 2340A(a) (2006) (stating that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both");

    - 18 U.S.C. § 2423(c) (2006) (prohibiting "engaging in illicit sexual conduct in foreign places"); and

    - 21 U.S.C.A. § 959(c) (2006) (making explicit that "[t]his section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States").

- Second, the court determines whether there exists an authoritative interpretation of the territorial scope of the statutory provision. *Neil*, 312 F.3d at 421. *See also United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991), *cert. denied*, 508 U.S. 906 (1993). If a higher court has determined the territorial scope of a statutory provision in a civil context, the statute should be given the same scope in a criminal prosecution. *See United States v. Nippon Paper Industries Co., Ltd*., 109 F.3d 1, 4-7 (1st Cir. 1997) (determining that the Sherman Act should be given the same construction in a criminal prosecution as in a civil case), *cert. denied*, 522 U.S. 1044 (1998).

- Third, if neither of the above steps establishes congressional intent, a court may resort to one of the canons of interpretation discussed *supra* § II.A.4.c.

i.1.b. Presumption of Extraterritoriality in Criminal Statutes

In *United States v. Bowman*, 260 U.S. 94, 98 (1922), the Supreme Court distinguished between crimes that "affect the peace and good order of the community" like murder, robbery, and arson, which are presumed to be territorial, and other crimes that are "not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated," which are not presumed to be territorial.

Following the holding in *Bowman*, courts have applied this analysis to the presumption against extraterritoriality to particular statutes. For example, the U.S. Court of Appeals for the Second Circuit held, based on the following reasoning, that a criminal charge for conspiracy to bomb aircraft applied extraterritorially:

> … Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants' acts and where restricting the statute to United States territory would severely diminish the statute's effectiveness.

United States v. Yousef, 327 F.3d 56, 87 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003). *See also United States v. Frank*, 599 F.3d 1221, 1230 & n.9 (11th Cir.) (giving examples of drug trafficking and smuggling statutes that courts have applied extraterritorially), *cert. denied*, __ U.S. __, 131 S. Ct. 186 (2010).

ii. *Charming Betsy*: Construing Statute to Comport with International Law

Another pertinent canon of construction is known as the *Charming Betsy* principle. It derives from this early pronouncement in an opinion for the Court by Chief Justice John Marshall:

> [A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.

Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804). The result was the *Charming Betsy* canon, an interpretive rule that continues to this day. *See Restatement* § 114. *See generally* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479 (1997) (providing an overview of the development and justifications for this canon).

iii. Canon Disfavoring Undue Interference with Foreign States

In a 2004 judgment, the Supreme Court wrote that it

> ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.

F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004). The Court affirmed this proposition three years later, writing:

> As a principle of general application . . . courts should assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.

Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455 (2007) (internal quotation marks omitted). This canon has not subsequently been invoked by the Court, making its status somewhat uncertain, particularly since the concerns it addresses are already built into the presumption against extraterritoriality.

Recommended citation:[1]

Am. Soc'y Int'l L., "Immunities and Other Preliminary Considerations," in *Benchbook on International Law* § II.B (Diane Marie Amann ed., 2014), available at www.asil.org/benchbook/immunities.pdf

---

B. Immunities and Other Preliminary Considerations

Some issues with a transnational dimension may cause a court to decline to adjudicate a case before it. Several such issues – which courts typically address before turning to the merits of a case – are discussed in this section. They are:

- Immunities
- Act of state
- Political question
- *Forum non conveniens*
- Time bar
- Exhaustion of remedies
- Comity

This section also touches on two other considerations:

- Choice of law when the law of a foreign country is at issue
- Enforcement in U.S. courts of judgments by courts of a foreign state[2]

Each is discussed in turn below.

1. Immunities

Immunity issues may arise in various contexts. This section treats the following:

- Foreign sovereign states
- Foreign officials, including diplomats and consular officers
- International organizations and officials of those organizations

Each is discussed in turn below. On the operation of immunities in the specific context of the Alien Tort Statute, 28 U.S.C. § 1350 (2006), see *infra* § III.E.1.

---

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

[2] In international law writings, the term "state" typically refers to a country – a sovereign nation-state – and not to a country's constituent elements. This *Benchbook* follows that usage, so that "state" means country, and individual states within the United States are designated as such.

a. Foreign Sovereign Immunity

"Foreign sovereign immunity" refers to the doctrine by which the courts of one sovereign state decline to adjudicate lawsuits against a foreign sovereign state or a foreign state's "instrumentalities" – a statutory term discussed *infra* § II.B.1.a.ii. By application of this doctrine, the foreign state may be deemed immune from suit in the courts of the other sovereign state.

i. The United States: The 1976 Foreign Sovereign Immunities Act (FSIA)

Foreign sovereign immunity doctrine in the United States is often traced back to an early Supreme Court decision, *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812). Chief Justice John Marshall held that a warship belonging to a friendly foreign sovereign and located in a U.S. port was not amenable to suit in a U.S. court. He reasoned that, as a matter of "comity," or friendship between states, the United States tacitly had consented to waive jurisdiction it normally could exercise within its own territory.

For more than a century after the decision in *Schooner Exchange*, courts in the United States determined the amenability to suit of a foreign state through case-by-case adjudication. Then, starting in the 1930s, courts generally deferred to U.S. Executive Branch determinations on foreign state immunity.

Foreign sovereign immunity acquired a statutory basis in 1976, when Congress passed the Foreign Sovereign Immunities Act, codified at 28 U.S.C. § 1602 *et seq*. (2006). Civil actions against foreign sovereign states may not go forward in the United States unless they satisfy the narrow exceptions set forth in this statute, typically called the FSIA. As the Supreme Court wrote in one case brought against a foreign country:

> [T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989); *see id*. at 434, 439 (reiterating this principle). The Court repeatedly has reaffirmed that conclusion. *E.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (restating proposition, yet concluding, as discussed *infra* § II.B.1.b, that the FSIA does not cover foreign officials); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (affirming proposition, yet permitting case to go forward pursuant to an exception enumerated in the FSIA). The scope of this statute is described in the ensuing sections.

Certain matters not covered by the FSIA – in particular, the amenability to suit of officials of a foreign sovereign state – remain governed by common law principles and in some cases by other statutes. *See infra* §§ II.B.1.b, III.E.1.

i.1. International Law Corollary to the FSIA

Even as the 1976 statute governs foreign state sovereign immunity in the United States, this form of immunity also may be applied outside the United States. Foreign state sovereign immunity recently was enforced as a matter of customary international law by the International Court of Justice, the judicial organ of the United Nations seated at The Hague, Netherlands. The decision, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 143 (Feb. 3), *available at* http://www.icj-cij.org/docket/index.php?p1=3&k=60&case=143&code=ai&p3=4 (last visited Nov. 30, 2013), pertained only to the immunities enjoyed by a sovereign state; it did not address any immunities that may apply to foreign officials. On customary international law as a source of international law, see *supra* § I.

ii. The FSIA in General

Foreign states are immune from the jurisdiction of the courts of the United States – at the federal and individual-state levels alike – unless one of the FSIA's exceptions applies. Thus the statute provides, at 28 U.S.C. § 1604:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

In other words, a federal court may proceed to adjudicate if it finds one of the exceptions enumerated in the FSIA, 28 U.S.C. §§ 1605-07, applicable to the case. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). These exceptions are described *infra* § II.B.1.a.iii.

ii.1. Removal to Federal Court

Lawsuits filed against foreign states in the courts of constituent states of the United States may be removed to federal court, pursuant to 28 U.S.C. § 1441(d) (2006).

ii.2. Retroactive Application of the FSIA

The FSIA was enacted in 1976. It was held to apply retroactively – that is, to cover claims arising before 1976 – in *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004), which involved a suit to recover a painting that had been stolen during the World War II occupation of Austria by the Nazis.

iii. FSIA Definition of "Foreign State"

The statutory term "foreign state" is defined in the FSIA to include more than just a foreign country. To be precise, "foreign state" comprehends:

- The state itself, 28 U.S.C. § 1603(a) – by way of example, the named petitioner in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004);

- "[A] political subdivision of a foreign state," 28 U.S.C. § 1603(a), (b) – by way of example, the named defendant in *Big Sky Network Canada, Ltd. v. Sichuan Provincial Government*, 533 F.3d 1183, 1198 (10th Cir. 2008); and

- "[A]n agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a), defined in 28 U.S.C. § 1603(b) as a non-U.S. citizen that is "a separate legal person, corporate or otherwise" and "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." By way of example, in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the FSIA was applied in a lawsuit naming as defendant a bank, for the reason that the bank was an agency or instrumentality of the Republic of Nigeria.

iii.1. Corporations as State Instrumentalities

For a corporation to fall within the just-quoted definition set out in 28 U.S.C. § 1603(b), the foreign state must both:

- Own a majority of the corporation's shares at the time the complaint is filed; and
- Hold its shares directly, rather than through an intermediate entity.

Dole Food Co. v. Patrickson, 538 U.S. 468, 477-78 (2003).

iv. FSIA Exceptions to Sovereign's Immunity from Suit

The most important among the exceptions to foreign sovereign immunity enumerated in the FSIA, 28 U.S.C. §§ 1605-07, include:

- Waiver
- Commercial activity
- Expropriation
- Torts occurring in the United States
- Enforcement of arbitration agreements or awards
- Terrorism

Each of these is discussed below.

Other exceptions exist for cases involving: "rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States," 28 U.S.C. § 1605(a)(4); maritime liens, *id.* § 1605(b); and counterclaims, *id.* § 1607.

iv.1. Waiver Exception

In establishing waiver as an exception to foreign sovereign immunity, the FSIA, 28 U.S.C. § 1605(a)(1), provides that a foreign state is not immune if

> the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver ….

The waiver exception in the FSIA is to be "'narrowly construed.'" *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 720 (9th Cir. 1992) (quoting *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988)), *cert. denied*, 507 U.S. 1017 (1993).

"If a sovereign files a responsive pleading without raising the defense of sovereign immunity, then the immunity defense is waived." *Haven v. Rzeczpospolita Polska*, 215 F.3d 727, 731 (7th Cir.), *cert.denied*, 531 U.S. 1014 (2000).

Among the provisions held to constitute a waiver is a contract clause that designates a U.S. forum for the resolution of disputes. *See Themis Capital, LLC v. Democratic Republic of Congo*, 881 F. Supp. 2d 508, 516-17 (S.D.N.Y. 2012).

iv.2. Commercial Activity Exception

A foreign state is not immune from a suit that is based on the state's commercial activities. FSIA, 28 U.S.C. § 1605(a)(2). By the terms of the statute, whether an activity is "commercial" is to be

> determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Id. § 1603(d). The Supreme Court has elaborated, holding that an activity is commercial if

> the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'

Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) (emphasis in original) (quoting *Black's Law Dictionary* 270 (6th ed. 1990)).

Pursuant to the statute, the commercial activity must also have one of three connections to the United States; 28 U.S.C. § 1605(a)(2) thus states that the action must be based on:

- "[A] commercial activity carried on in the United States by the foreign state"; or

- "[A]n act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or

- "[A]n act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States …."

iv.3. Expropriation Exception

Unlawful expropriation, or the taking of private property for the use of the sovereign state, also may constitute a basis for exception from the general rule of foreign sovereign immunity. The FSIA, 28 U.S.C. § 1605(a)(3), states that the exception will apply if:

- "[R]ights in property taken in violation of international law are in issue"; and

- "that property or any property exchanged for such property is":

    - " present in the United States in connection with a commercial activity carried on in the United States by the foreign state"; or

    - "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

With regard to the first prong – rights in property – the *Restatement (Third) of the Foreign Relations Law of the United States* § 712(1) & cmt. *b* (1987)[3] provides that a state violates international law when it takes the property of a nonnational, if the taking "is not for a public purpose; is discriminatory; or is not accompanied by . . . just compensation."

iv.4. Exception for Torts Occurring in the United States

A foreign state is not immune in a suit for money damages for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by" torts committed by the state or its officials or employees acting within the scope of their employment in the United States. 28 U.S.C. § 1605(a)(5); *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

[3] Designated subsequently as *Restatement*; any other *Restatement* discussed in this section is designated by a different ordinal number – for example, *Restatement (Second)*. These American Law Institute treatises compile many of the doctrines discussed in this chapter. The provisions must be consulted with due caution, however, particularly given the publications predated, by decades, the Supreme Court's most recent interpretations of some of these issues. On the use of the *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, *see infra* § IV.B.1.

iv.4.a. Applicability of Exception

The exception applies only to noncommercial torts. 28 U.S.C. § 1605(a)(5). The Supreme Court explained:

> Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law.

Amerada Hess, 488 U.S. at 439-40.

iv.4.b. Circumstances in Which Exception Does Not Apply

The FSIA exception for torts occurring in the United States does not apply to any claim alleging that the foreign state:

- Performed, or did not perform, a discretionary function, 28 U.S.C. § 1605(a)(5)(A); or
- Engaged in "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," *id.* § 1605(a)(5)(B).

iv.5. Exception for Enforcement of Arbitration Agreements or Awards

A foreign state is not immune from an action brought to enforce an arbitration "agreement made by the foreign state with or for the benefit of a private party" or to recognize and enforce an arbitration award made pursuant to such an arbitration agreement, 28 U.S.C. § 1605(a)(6), provided that the:

- Arbitration either takes place or is intended to take place in the United States;
- Agreement or award is governed by a treaty on recognition and enforcement of arbitral awards to which the United States is a party; or
- Underlying claim (absent the arbitration agreement) could have been brought in the United States.

Id. See, e.g., *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 305 (D.C. Cir. 2005) (holding an arbitral award pursuant to the New York Convention enforceable under the FSIA exception).

One U.S. Court of Appeals has held that a court may issue a contempt order if a foreign state that lacks immunity on account of this exception fails to participate in the suit at bar. *FG Hemisphere Assoc., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011).

iv.6. Terrorism Exception

If the United States designates a foreign state to be a state sponsor of terrorism, the terrorism exception to the FSIA, 28 U.S.C. § 1605A, renders that state not immune from certain suits. To be specific, in such an instance there is no immunity from suits seeking money damages

> for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1).

iv.6.a. Countries Designated State Sponsors of Terrorism

For a court to exercise jurisdiction over a foreign state pursuant to the terrorism exception of the FSIA, the United States must have designated the foreign state a state sponsor of terrorism either:

- At the time that the act occurred when the act occurs; or
- As a result of the action on which the suit is based.

Generally, the foreign state must still be so designated:

- When the claim is filed; or
- Within the six-month period before the claim was filed.

28 U.S.C. § 1605A(a)(2)(i)(I).

The United States named four countries – Cuba, Iran, Sudan, and Syria – state sponsors of terrorism as of November 2013. *See* U.S. Dep't of State, *State Sponsors of Terrorism*, http://www.state.gov/j/ct/list/c14151.htm (last visited Nov. 30, 2013).

iv.6.b. Time Bar

The statutory text expressly provides that for a suit to go forward based on the terrorism exception, it must have been filed within ten years after April 24, 1996, or within ten years after the cause of action arose. *See* 28 U.S.C. § 1605A(b).

iv.6.c. Litigation under the Terrorism Exception

The FSIA terrorism exception, 28 U.S.C. § 1605A, has been the subject of considerable litigation. Sample decisions include:

- A bar against suits by persons who had been held hostage following the 1979 takeover of the U.S. embassy – a bar contained in the 1981 U.S.-Iran agreement known as the Algiers Accords – was enforced notwithstanding 2008 amendments to the FSIA terrorism exception. *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 62 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

- A foreign state's motion to vacate a default judgment against it was denied in *Gates v. Syrian Arab Republic*, 646 F.3d 1, 6 (D.C. Cir.), *cert.denied*, 132 S. Ct. 422 (2011).

v. Extent of Liability under the FSIA

The FSIA, 28 U.S.C. § 1606, provides that in any case in which a foreign state is not immune,

> the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Some distinctions are made by statute. These include:

- *Punitive damages.* A foreign state generally may not be held liable for punitive damages, though an agency or instrumentality of the foreign state may. 28 U.S.C. § 1606; *see, e.g., West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 824 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987). Furthermore, punitive damages may be awarded even against the foreign state in cases brought under the FSIA terrorism exception described *supra* § II.B.1.i.3.a, pursuant to the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008), codified at 28 U.S.C. § 1605A(c).

- *Default judgment.* No default judgment may be entered against a foreign state or its agency or instrumentality "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e).

vi. Execution of Judgments under the FSIA

Under the FSIA, the property of a foreign state is "immune from attachment arrest and execution" unless an exception to such immunity applies. 28 U.S.C. § 1609. The general rules are set forth in the ensuing sections.

The court should note, however, that the rules for the execution of judgments under the FSIA's terrorism exception are substantially broader. When the terrorism exception is at issue, the court should consult 28 U.S.C. §§ 1610(a)(4)(b), 1611(b).

vi.1. Attachment of Foreign State Property before Judgment

The property of a foreign state is immune from attachment before entry of a judgment, unless the foreign state has explicitly waived such immunity. *Id.* § 1610(d).

vi.2. Attachment or Execution of Foreign State Property after Judgment

Attachment of execution of a foreign state's property is permitted after judgment if the:

- Property is "used for a commercial activity in the United States," *id.* § 1610(a).

- Judgment is against an agency or instrumentality engaged in a commercial activity in the United States; generally, all of its property is subject to post-judgment attachment or execution. *Id.* § 1610(b).

Diplomatic or military property of a foreign state is immune from post-judgment attachment and execution, as are the assets of a foreign central bank unless the central bank has explicitly waived such immunity. *Id.* §§ 1610(a)(4)(b); 1611(b).

vii. Jurisdictional Discovery in FSIA Cases

A district court may allow discovery, albeit limited, for the purpose of determining a jurisdictional challenge based on the FSIA. Decisions to this effect include:

- *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176-77 (2d Cir. 1998) (holding that court below abused its discretion by refusing request for additional discovery and proceeding to grant defendant's motion to dismiss on FSIA ground).

- *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.) (ruling that a district court authorized "prematurely," and cautioning that, in light of "the tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery," courts should order discovery "circumspectly and only to verify allegations of specific facts crucial to an immunity determination"), *cert. denied*, 506 U.S. 956 (1992).

b. Immunity of Foreign Officials: Common Law Principles

The Foreign Sovereign Immunities Act, codified at 28 U.S.C. § 1602 *et seq.* (2006), applies only to states, not to foreign officials. *Samantar v. Yousuf*, 560 U.S. 305, __, 130 S. Ct. 2278, 2292 (2010), detailed *infra* § III.E.1. (This statute, known as the FSIA, may nevertheless require dismissal of a suit against a foreign official if a foreign state is a required party or the real party in interest.)

Under "the common law of official immunity," which the Supreme Court held applicable in *Samantar*, 560 U.S. at __, 130 S. Ct. at 2290-91, foreign officials may be entitled to immunity

from suit based either on their present status or on the character of their acts. Certain treaties and statutes may inform this analysis. The principal treaties are:

- 1961 Vienna Convention on Diplomatic Relations[4]
- 1963 Vienna Convention on Consular Relations[5]

Principal statutes are:

- Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006)

- International Organizations Immunities Act of 1945, as amended, 22 U.S.C. §§ 288 *et seq*. (2006)

The application of foreign official immunity is discussed below.

i. Head of State/Head of Government Immunity

Pursuant to immunity principles under common law and customary international law, sitting heads of state and heads of government are absolutely immune from the civil and criminal jurisdiction of U.S. courts, subject to exceptions such as waiver. *See Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005); *Lafontant v. Aristide*, 844 F. Supp. 128, 131-32 (E.D.N.Y. 1994).

Head of state immunity also extends to foreign ministers, and may extend to certain other high-ranking officials of foreign governments. Thus ruled the International Court of Justice, in *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, 22 (Feb. 14), *available at* http://www.icj-cij.org/docket/index.php?p1=3&k=36&case=121&code=cobe&p3=4 (last visited Nov. 30, 2013). The court further ruled that although head of state or head of government immunity ends when the official leaves office, the former official enjoys certain "residual" immunities. *Id.* at 26. On customary international law as a source of international law, see *supra* § I.B.2.

---

[4] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *available at* http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf. This treaty, which entered into force on Apr. 24, 1964, has 189 states parties; among them is the United States, which ratified on Nov. 13, 1972. *See* U.N. Treaty Collection, *Vienna Convention on Diplomatic Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en (last visited Nov. 30, 2013). The Convention has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006).

[5] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77; T.I.A.S. 682, 596 U.N.T.S. 261, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf. This treaty, which entered into force on Mar. 24, 1967, has 176 states parties; among them is the United States, which ratified on Nov. 24, 1969. *See* U.N. Treaty Collection, *Vienna Convention on Consular Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last visited Nov. 30, 2013).

i.1. Head of State Immunity As Status-Based Immunity

The immunity accorded a head of state or a head of government is a status-based immunity, dependent on the person's position rather than on the nature of the person's alleged conduct.

i.2. Significance of Executive Branch View on Head of State Immunity

Courts generally defer to the determination by the Executive Branch that a person is, or is not, entitled to head of state immunity. The U.S. Court of Appeals for the Fourth Circuit thus held in 2012 that a "district court properly deferred to the State Department's position" and denied a request for head-of-state immunity brought by the defendant, formerly "a high-ranking official in Somalia." *Yousuf v. Samantar*, 699 F.3d 763, 766, 772 (4th Cir. 2012), *cert. denied*, 2014 WL 102984 (Jan. 13, 2014). (The case arrived at the Fourth Circuit following the Supreme Court remand in *Samantar v. Yousuf*, 560 U.S. 305, __, 130 S. Ct. 2278, 2286 (2010), discussed *supra* § II.B.1.b.)

The Fourth Circuit's reasoning comported with that of other circuits considering the question. *See Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998).

ii. Diplomatic Immunity

Rules regarding the immunities enjoyed by foreign diplomats derive from the 1961 Vienna Convention on Diplomatic Relations,[6] as implemented in the United States via the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006).

International law confers the immunities on the sending state, not the individual; accordingly, only the state to which the diplomat is attached can waive such immunities. *Restatement*, § 464, cmt. *j*, rep. note 15.

Diplomatic immunities may be divided into:

- Status-based
- Conduct-based

---

[6] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *available at* http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf. This treaty, which entered into force on Apr. 24, 1964, has 189 states parties; among them is the United States, which ratified on Nov. 13, 1972. *See* U.N. Treaty Collection, *Vienna Convention on Diplomatic Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en (last visited Nov. 30, 2013).

Each is discussed in turn below.

ii.1. Status-Based Diplomatic Immunity

Status-based immunities depend on a person's present status as a diplomat or head of state. Status-based diplomatic immunity ends once a person's status as a diplomatic agent ends and the person has had a reasonable opportunity to leave the United States. Vienna Convention on Diplomatic Relations, art. 39(2).

The 1961 Vienna Convention on Diplomatic Relations provides that diplomats – including chiefs of mission, *i.e.* ambassadors, and members of the diplomatic staff of a mission – are immune from criminal jurisdiction and are generally immune from civil jurisdiction. Limited exceptions exist for immunity from civil jurisdiction, such as those involving real property, the administration of estates, and commercial activities outside their official functions. Vienna Convention on Diplomatic Relations, art. 31.

A diplomatic agent's family members, "traditionally defined to include the agent's spouse, minor children, and other dependents forming part of the household," are also entitled to the agent's immunities if they are not nationals of the receiving state. *Restatement* § 464, cmt. *a*; Vienna Convention on Diplomatic Relations, art. 37(1). Immunity from criminal jurisdiction extends to the administrative and technical staffs of the mission and their families. Vienna Convention on Diplomatic Relations, art. 37(2). In addition, "service staff who are not nationals or permanent residents of the receiving state are afforded immunity from legal process only in respect of their official acts or omissions." *Id.*; *Restatement* § 464, cmt. *a*.

A determination by the Executive Branch that a person is or is not a diplomatic agent is conclusive upon the courts. *See Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328, 1331 (11th Cir.1984); *Restatement* § 464, rep. note 1. The type of passport a person carries – for example, a diplomatic or an official passport – is not determinative. *See Restatement* § 464, rep. note 1.

ii.2. Foreign Officials and their Families When Visiting or in Transit

The *Restatement* § 464, cmt. *i*, provides:

> High officials of a foreign state and their staffs on an official visit or in transit, including those attending international conferences as official representatives of their country, enjoy immunities like those of diplomatic agents when the effect of exercising jurisdiction against the official would be to violate the immunity of the foreign state.

When members of an accredited diplomatic mission and their family are in or transiting through the territory of a third state, "while proceeding to take up or to return to [their] post, or when returning to [their] own country," they are entitled to such immunities "as may be required to ensure [their] transit and return." Vienna Convention on Diplomatic Relations, art. 40(1).

ii.3. Conduct-Based Diplomatic Immunity

Conduct-based immunities continue after a person has left the office in which the acts were done. Former diplomats continue to enjoy conduct-based immunity only with respect to acts performed in an official capacity as members of a diplomatic mission. Vienna Convention on Diplomatic Relations, art. 39(2).

It is unsettled whether Executive Branch determinations of conduct-based immunities are as conclusive as are determinations of status-based immunities. *See Yousuf v. Samantar*, 699 F.3d 763, 777-78 (4th Cir. 2012) (stated that the Executive's views regarding assertions of conduct-based immunity added to but were not determinative of the question before the court), *cert. denied*, 2014 WL 102984 (Jan. 13, 2014).

iii. Consular Immunity

Unlike diplomats, consular officers do not have status-based immunity. They have only more limited, conduct-based immunity. Under the 1963 Vienna Convention on Consular Relations,[7] consular officers and employees are immune from jurisdiction "in respect of acts performed in the exercise of consular functions," except for suits arising out of contracts not entered on behalf of the sending state; suits arising out of accidents caused by vehicles, vessels, or aircraft; suits in which the sending state has waived immunity; and counterclaims. *Id.*, arts. 43, 45.

An Executive Branch determination of whether a person is a duly accredited consular officer is conclusive, although in some situations whether a given act falls within the scope of consular functions may be determined through litigation. *Restatement* § 464, rep. notes 1, 2.

iv. Other Foreign Officials

The issue of whether foreign officials other than diplomats, consular officials, or heads of state/heads of government are afforded immunity for acts performed under color of law remains unsettled:

- According to the *Restatement (Second) of the Foreign Relations Law of the United States* § 66(f), cmt. *b* (1965),[8] officials are entitled to immunity only if the effect of exercising jurisdiction would be to enforce a rule of law against the state.

---

[7] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77; T.I.A.S. 682, 596 U.N.T.S. 261, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf. This treaty, which entered into force on Mar. 24, 1967, has 176 states parties; among them is the United States, which ratified on Nov. 24, 1969. *See* U.N. Treaty Collection, *Vienna Convention on Consular Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last visited Nov. 30, 2013).

[8] This treatise designated as *Restatement (Second)* in order to distinguish it from *Restatement (Third) of the Foreign Relations Law of the United States* (1987), which is cited throughout simply as *Restatement*. These American Law (continued…)

- But in *Samantar v. Yousuf*, 560 U.S. at 305, n.15 (2010), the Supreme Court wrote that such officials do not fall within the scope of the FSIA, and expressed "no view" on whether the *Restatement (Second)* "correctly sets out the scope of the common law immunity applicable to current or former foreign officials."

v. Immunity of Diplomatic and Consular Premises, Archives, Documents, and Communications

A foreign state's embassy or consulate is, as a general rule, not to be disturbed:

> The premises, archives, documents, and communications of an accredited diplomatic mission or consular post are inviolable, and are immune from any exercise of jurisdiction by the receiving state that would interfere with their official use.

Restatement § 466 (citing Vienna Convention on Diplomatic Relations, arts. 21-24, 27, & 30; Vienna Convention on Consular Relations, arts. 27, 30-33, & 35).

The archives of a mission or consulate, including all papers, documents, etc., are inviolable regardless of location. Vienna Convention on Diplomatic Relations, art. 24; Vienna Convention on Consular Relations, art. 33.

"A diplomatic or consular bag may not be opened or detained." *Restatement* § 466, cmt. *f*. It is noteworthy, however, that "if the competent authorities of the receiving state have 'serious reason to believe' that a consular bag contains something other than correspondence, documents, or articles for official use, the authorities may ask that the bag be opened in their presence"; should that request be "refused, the bag must be returned to its place of origin." *Id.*; *see* Vienna Convention on Consular Relations, art. 35(3).

Communication is also protected, as pursuant to Article 27(1) of the Diplomatic Convention and Article 35(1) of the Consular Convention, the receiving state must "permit and protect freedom of communication by the mission or consular post for all official purposes." *Restatement* § 466, cmt. *f*.

v.1. Consent As Exception

Consent is an exception to the rule against inviolability.

Institute treatises compile many of the doctrines discussed in this chapter. The provisions must be consulted with due caution, however, particularly given the publications predated, by decades, the Supreme Court's most recent interpretations of some of these issues. On the use of the *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, *see infra* § IV.B.1.

Both Article 22 of the Vienna Convention on Diplomatic Relations and Article 31 of the Vienna Convention on Consular Relations prohibit officials of the receiving state from "enter[ing] upon the premises of a diplomatic or consular mission without consent." *Restatement* § 466, cmt. *a*.

Under the Consular Relations Convention, consent is presumed "in case of urgency requiring prompt protective action," such as fire, hurricane, or a riot. *Restatement* § 466, cmt. *a*. The same rules "might be assumed" to apply to the private residence of a diplomatic agent or a member of the diplomatic mission's administrative and technical staff. *Id.* (citing Vienna Convention on Diplomatic Relations, arts. 30, 37). Inviolability does not extend to the residences of other mission personnel or consular officials, but individuals and items located within such residences "may enjoy immunities under this section." *Id.*

c. Immunity of International Organizations and Officials of Those Organizations

International organizations generally enjoy "such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organization, including immunity from legal process, and from financial controls, taxes, and duties." *Restatement* § 467(1). A high-level official of the organization may expressly waive immunity. *Id*. § 467, cmt. *e*.

An official of an international organization is immune from U.S. jurisdiction for "acts or omissions in the exercise of his official functions," and for other acts if the exercise of jurisdiction "would interfere with the independent exercise of his official functions or with his status as an international official." *Restatement* § 469.

The 1947 U.S.-U.N. Headquarters Agreement,[9] art. V, § 15, extends diplomatic immunity to members of U.N. missions having diplomatic status. The International Organizations Immunities Act, 22 U.S.C. § 288 (2006), extends immunity from suit and legal process to officers and employees of international organizations in the United States if they have been so designated by executive order.

2. Act of State Doctrine

The act of state doctrine ordinarily requires U.S. courts to accept the validity of the public acts of a foreign sovereign performed within its own territory. This section discusses the doctrine in general. Other sections of this *Benchbook* may augment this discussion by specific reference to the statute or topic under review. *See, e.g.*, *infra* § III.E.1 (setting forth act of state jurisprudence in suits brought under the Alien Tort Statute, 28 U.S.C. § 1350 (2006); *infra* §

[9] Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, signed June 26, 1947, and approved by the U.N. General Assemlby Oct. 31, 1947, *available at* http://avalon.law.yale.edu/20th_century/decad036.asp.

III.E.2 (describing act of state in relation to the Torture Victim Protection Act, note following 28 U.S.C. § 1350 (2006)).

a. In General

Describing the act of state doctrine in *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409 (1990), the Supreme Court wrote:

> Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.

See also Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The doctrine is a rule of federal common law, which is binding on both federal and state courts, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964).

The jurisprudential foundation for the act of state doctrine has changed over the years, from a basis in international law to one in domestic separation of powers. *See Kirkpatrick*, 493 U.S. at 404. The Supreme Court has explained that the doctrine is not constitutionally required, but has "constitutional underpinnings." *Sabbatino*, 376 U.S. at 423 (internal quotation omitted).

Congress may modify the act of state doctrine, and has done so in the past. *See Restatement* § 444, cmt. *a*.

b. Application

The act of state doctrine applies only to formal acts of state. In contrast, it does not apply to acts such as breach of contract by a state or repudiation of an obligation by a state's counsel at trial. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693-95 (1976). Moreover, the doctrine applies only when a court must "declare invalid, and thus ineffective as a rule of decision for the courts of this country, the official act of a foreign sovereign . . . performed within its own territory." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 405 (1990).

c. Exceptions

The act of state doctrine has a number of exceptions. *See generally Restatement* § 443. Exceptions, as determined by statute or by case law in the lower courts, include the following:

- The doctrine does not apply to takings of property in violation of international law, if the property or proceeds of the property have been brought within the United States. 22 U.S.C. § 2370(e)(2) (2006). Enactment of this statute represented a reversal of the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)

(holding that act of state doctrine barred suit alleging unlawful expropriation by a foreign state).

- The doctrine does not apply, some courts have ruled, if a treaty provides an unambiguous rule of international law for the court to apply. *See Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 428 (6th Cir. 1984); *see also Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995) (noting that *Sabbatino* applied the act of state doctrine only "in the absence of . . . unambiguous agreement regarding controlling legal principles," and concluding that the doctrine should be applied only "in a context . . . in which world opinion [is] sharply divided"), *cert. denied*, 518 U.S. 1005 (1996); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 345 (S.D.N.Y. 2003) (writing that "[t]he more clear-cut the alleged violation of international law, the less deference is due to the acts of a foreign sovereign").

- The doctrine does not apply, in the view of the U.S. Court of Appeals for the Second Circuit, if the U.S. Executive Branch has waived application of the doctrine by writing a so-called *Bernstein* letter. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954); *see also Restatement* § 443, rep. note 8. The Supreme Court declined to address the validity of the so-called *Bernstein* exception in *Sabbatino*, 376 U.S. at 420. In a later judgment, however, three Justices indicated that they would accept it. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972).

3. Political Question

The political question doctrine asserts that political acts of the U.S. government are nonjusticiable. This section discusses the doctrine in general. Other sections of this *Benchbook* may augment this discussion by specific reference to the statute or topic under review. *See, e.g.*, *infra* § III.E.1 (setting forth political question jurisprudence in suits brought under the Alien Tort Statute, 28 U.S.C. § 1350 (2006)).

a. In General

Rooted in the separation of powers structure, the political question doctrine accords judicial deference to the executive and legislative branches. In its seminal decision in *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court articulated six formulations of a political question. "Prominent on the surface of any case held to involve a political question is," the Court wrote, *id.* at 217:

- "[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or"

- "[A] lack of judicially discoverable and manageable standards for resolving it; or"

- "[T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or"

- "[T]he impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or"

- "[A]n unusual need for unquestioning adherence to a political decision already made; or"

- "[T]he potentiality of embarrassment from multifarious pronouncements by various departments on one question."

These factors "are probably listed in descending order of both importance and certainty," Court observed in a subsequent judgment. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

If one of the factors is implicated and "inextricable" from the case, then a court may dismiss on the political question ground. *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006). The court need not address the other factors. *See Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 (2d Cir. 2005), *cert. denied*, 547 U.S. 1193 (2006).

In *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), the Supreme Court rejected the effort by the respondent, the U.S. Secretary of State, to secure dismissal of a suit based on the ground of political question. The opinion for the Court written by Chief Justice John G. Roberts, Jr., characterized the political question doctrine as a "narrow exception" to the general rule that courts must decide cases properly before them. *Id.* at 1427. Accordingly, the Court remanded for determination below whether the statute at issue, pertaining to issuance of passports for U.S. citizens born in Jerusalem, comported with the U.S. Constitution.

b. Application to Cases Touching on Foreign Relations

With respect to foreign relations specifically, the Supreme Court stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Questions related to foreign relations or international law that the Supreme Court has held to be political include the:

- Recognition of a foreign government. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

- Termination of war. *Ludecke v. Watkins*, 335 U.S. 160, 168-69 (1948).

- Need for the advice and consent of the Senate for U.S. ratification of an international agreement. *See Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir.), *cert. denied*, 534 U.S. 1039 (2001). *See also Goldwater v. Carter*, 444 U.S. 996 (1979) (four Justices would have held treaty termination to be a political question).

Furthermore, U.S. Courts of Appeals have determined foreign relations matters to constitute political questions in a number of matters; for example:

- A defamation claim, filed by the target of a U.S. military strike. *El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836, 841-44 (D.C. Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 997 (2011).

- Wrongful death and other claims against former U.S. officials, filed by survivors of a Chilean military officer, *Schneider v. Kissinger*, 412 F.3d 190, 193-97 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006).

- War crimes and extrajudicial killings, *inter alia*, claims, brought against a U.S. company for sales, financed by the U.S. government, of bulldozers to the Israeli Defense Forces, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007).

Questions that courts have held not to be political include:

- Interpretation of a treaty or executive agreement. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986).

- Application of universally recognized human rights law. *Kadić v. Karadžić*, 70 F.3d 232, 249-50 (2d Cir. 1995).

- Claims for the return of property looted during wartime. *Alperin v. Vatican Bank*, 410 F.3d 532, 548-58 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006).

4. *Forum Non Conveniens*

The doctrine of *forum non conveniens* allows a district court to dismiss a suit, even though jurisdiction and venue lie, on the ground that the case should be heard by a foreign court. This section discusses the doctrine in general. Other sections of this *Benchbook* may augment this discussion by specific reference to the statute or topic under review. *See, e.g.*, *infra* § III.E.1 (setting forth inconvenient forum jurisprudence in suits brought under the Alien Tort Statute, 28 U.S.C. § 1350 (2006)).

a. In General

Within the federal system, Congress has codified the *forum non conveniens* doctrine, providing for transfer rather than dismissal of the case. *See* 28 U.S.C. § 1404(a); *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). Dismissal for *forum non conveniens* is more likely to be based on a court's assessment of adjudicative efficiency and fairness. *See Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 521 (S.D.N.Y. 2006), *aff'd*, 343 Fed. Appx. 623 (2d Cir. 2009).

b. Procedure

A court has discretion to decide a *forum non conveniens* motion before determining that it has personal jurisdiction over the defendant or subject matter jurisdiction over the cause of action. *See Sinochem Int'l Co. Ltd.*, 549 U.S. at 424-25.

c. Substance

The grounds for dismissal under this doctrine are:

- The existence of an alternative forum that is both adequate and available; and
- Private and public interest factors substantially weigh in favor of litigating the case in that alternative forum.

See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 257 (1981). In weighing these two factors, courts place a strong presumption in favor of the forum chosen by the plaintiff; however, as the Supreme Court has written, that presumption "applies with less force when the plaintiff or real parties in interest are foreign." *Id*. at 255. The U.S. Court of Appeals for the Second Circuit thus wrote:

> [T]he greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*.

Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001) (footnotes omitted).

The two factors – adequate alternative forum and balancing of interests – are discussed in turn below.

i. Adequate Alternative Forum

Pivotal to the question of whether an alternative forum is available is the following question: Is the defendant is amenable to process in a forum that will permit adjudication of the merits of the dispute? *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *see also Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010). Factors considered in assessing the adequacy of the alternative forum include whether the:

- Dispute may be adjudicated with reasonable promptness;
- Forum is currently available; and
- Remedy provided by the forum is appropriate; or, to the contrary, is "so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all."

Abdullahi, 562 F.3d at 189.

ii. Balancing of Private Interests and Public Interests

If an adequate alternative forum exists, the court must weigh the private interests and the public interests. As described by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), private interests include:

- The ease with which litigants will have access to proof;
- The cost of bringing in witnesses and whether the forum permits compulsory process to obtain the attendance of unwilling witnesses;
- The possibility, if appropriate, of viewing the location where the alleged tort occurred;
- Whether a judgment would be enforceable; and
- Any "other practical problems that make trial of a case easy, expeditious, and inexpensive."

Public interests include the:

- "[A]dministrative difficulties" of congested courts and overburdened juries;
- "[L]ocal interest in having localized controversies decided at home"; and
- Avoidance of "problems in conflict of laws, and in [foreign] law."

Id. at 508-09.

5. Time Bar

As in domestic litigation, suits that implicate international or transnational law may be subject to a limitations period – a period that sometimes may be suspended by virtue of equitable tolling. Examples of specific discussions regarding time bars in this *Benchbook* may be found *supra* § II.B.1.iii.5.b. (Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq*. (2006)); *infra* § III.E.1. (Alien Tort Statute, 28 U.S.C. § 1350 (2006)); *infra* § III.E.2. (Torture Victim Protection Act, note following 28 U.S.C. § 1350 (2006)).

A court must consider this question with respect to the case before it.

6. Exhaustion of Remedies

U.S. domestic law may sometimes require a claimant to exhaust remedies in another venue before litigation may be pursued in federal court. What is called the local remedies rule provides that

> ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.

Restatement § 713, cmt. *f*. The International Court of Justice has held this to constitute a norm of customary international law. *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21), *available at* http://www.icj-cij.org/docket/index.php?p1=3&k=73&case=34&code=sus&p3=4 (last visited Nov. 30, 2013). On such a norm as a source of international law, see *supra* § I. On application of the exhaustion of remedies doctrine in suits alleging violations of human rights, see *infra* § III.E.1. (Alien Tort Statute Alien Tort Statute, 28 U.S.C. § 1350 (2006)); *infra* § III.E.2. (Torture Victim Protection Act, note following 28 U.S.C. § 1350 (2006)).

7. Comity

International comity is the practice by which courts in one country choose to respect the acts of another country. *See Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575 (1926) (describing comity as a concept "which induces every sovereign state to respect the independence and dignity of every other sovereign state"). This section discusses the doctrine in general. Other sections of this *Benchbook* may augment this discussion by specific reference to the statute or topic under review. *See supra* § II.A.3.f (discussing comity and jurisdiction); *supra* § II.B.1.b.i (discussing comity and immunities); *infra* § III.E.1 (discussing comity as applied in suits under Alien Tort Statute, 28 U.S.C. § 1350 (2006)).

a. In General

The Supreme Court defined comity in its judgment in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), as follows:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

See also Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 544 n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.").

b. Application

In practice, comity does not typically serve as an independent basis for a decision. Rather, it informs a court's application of doctrines and statutes historically rooted in comity concerns. These areas of law include:

- Foreign sovereign immunity. *E.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (looking to comity in the course of construing the Foreign Sovereign Immunities Act, a statute outlined *supra* § II.B.1.a).

- Recognition of foreign laws and judgments. *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); *Bank of Augusta v. Earle*, 38 U.S. 519, 589-90 (1839); Joseph Story, *Commentaries on the Conflict of Laws* §§ 23-38 (1834).

- Restraints on the extraterritorial application of U.S. law. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004), discussed *supra* § II.A.3.f.

Some U.S. Courts of Appeals have declined to exercise jurisdiction on grounds of "international comity" when parallel litigation is pending in a foreign court. *See, e.g., Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004).

8. Choice of Law

The choice of law issue arises in cases involving the laws of the United States and of foreign countries, just as it does in cases involving the laws of two different U.S. states. The principles are largely the same in both contexts.

a. Choice of Law Overview

Federal courts sitting in diversity apply the choice of law rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co*, 313 U.S. 487, 496-97 (1941); *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990). As a general matter, courts apply the same choice of law rules to international cases as they do to interstate cases. Choice of law rules are used to decide which jurisdiction's substantive law applies to the merits of a dispute. Procedural questions, by contrast, are governed by the law of the forum. *See Restatement (Second) of Conflict of Laws* § 122 & accompanying notes (1971). In general, the parties may agree on the law to govern their disputes *Id.* § 187.

b. Proof of Foreign Law

Under Federal Rule of Civil Procedure 44.1, a party who intends to rely on foreign law must give reasonable notice to the other party. A party relying on foreign law has the burden of proving that foreign law applies and the content of that law. *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 440-41 (3d Cir. 1999); *Restatement (Second) of Conflict of Laws* § 136, cmt. *f* (1971).

In the absence of adequate proof of foreign law, a court will apply the law of the forum, "except when to do so would not meet the needs of the case or would not be in the interests of justice." *Restatement (Second)* § 136 cmt. *h*; *see Bel-Ray Co.*, 181 F.3d at 441. *See also Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 628-29 (7th Cir. 2010) (discussing the role of experts and treatises in determination of foreign law under Federal Rule of Civil Procedure 44.1).

9. Recognition and Enforcement of Foreign Judgments

Although the term "foreign judgment" is often used in domestic litigation as a term of art to refer to a judgment by a U.S. state, this *Benchbook* uses the term to denote a judgment rendered by the courts of a country other than the United States.

The Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, which applies to judgments of U.S. states, does not apply to foreign state judgments. *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912); *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 321 n.4 (1981) (Stevens, J., concurring in the judgment). U.S. courts typically recognize and enforce foreign judgments nevertheless. That process is described below.

a. Recognition of Foreign Judgments

Because recognition and enforcement are two distinct, although interrelated, concepts in U.S. law, a foreign judgment must be recognized before it can be enforced.

i. Governed by State Law

The vast majority of actions for recognition in the federal courts are diversity actions. As a result, the decision to give effect to a foreign judgment is almost always made under the law of a U.S. state. Such law typically entails application of either:

- A statute; or
- Common law principles of comity.

Each is discussed in turn below.

i.1. State Statutes Based on Uniform Acts

U.S. state laws pertaining to the recognition of foreign judgments typically derive from the state's adoption of one of two foreign judgment recognition acts promulgated by the Uniform Law Commission, a Chicago-based nonprofit organization founded more than 120 years ago as the National Conference of Commissioners on Uniform State Laws. *See* Uniform L. Comm'n, *About the ULC*, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC (last visited Nov. 30, 2013). The two statutes are:

- 1962 Uniform Foreign Money Judgments Recognition Act
- 2005 Uniform Foreign-Country Money Judgments Recognition Act

Each is discussed in turn below. For a more detailed account, see Ronald A. Brand, *Recognition and Enforcement of Foreign Judgments* (Fed. Judicial Ctr., 2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf.

i.1.a. 1962 Uniform Foreign Money-Judgments Recognition Act

As of late 2013, thirty-one states, plus the District of Columbia and the U.S. Virgin Islands, had adopted the 1962 Uniform Foreign Money Judgments Recognition Act. *See* Uniform L. Comm'n, *Legislative Fact Sheet - Foreign Money Judgments Recognition Act*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act (last visited Nov. 30, 2013).

Referred to here as the 1962 Foreign Judgments Recognition Act, this uniform statute is codified in the *Uniform Laws Annotated* and designated 13 U.L.A. 149 (1986); full text also is available at http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf.

As stated in § 2, the 1962 Foreign Judgments Recognition Act applies to "any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." A judgment is conclusive "to the extent that it grants or denies recovery of a sum of money." *Id.* § 3.

Thus premised on the assumption that the judgment is valid, the 1962 Act specifies the grounds for nonrecognition. Section 4(a) of the Act requires nonrecognition if one of three situations is present; that is, if the:

- Judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;[10] or
- Foreign court did not have personal jurisdiction over the defendant; or
- Foreign court did not have jurisdiction over the subject matter.

The Act also permits non-recognition on six grounds enumerated in Section 4(b); to precise, if the:

- Party that was the defendant in the foreign court proceedings did not receive notice of the proceedings in sufficient time to enable that party to defend;
- Judgment was obtained by fraud;
- Cause of action on which the judgment is based is repugnant to the public policy of the state in which the proceedings are taking place;

[10] Refusals to enforce on this ground are rare. *But see Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (refusing to recognize a $97 million Nicaraguan judgment on the ground of systemic lack of impartiality).

- Judgment conflicts with another final and conclusive judgment;

- Proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

- Foreign court was a seriously inconvenient forum for the trial of the action, in a case in which jurisdiction is based only on personal service.

The Act does not require reciprocity in recognition. Moreover, it does not cover judgments for taxes, fines, penalties, or matrimonial or family matters.

i.1.b. 2005 Uniform Foreign-Country Money Judgments Recognition Act

As of late 2013, eighteen states and the District of Columbia had adopted the 2005 Foreign-Country Money Judgments Recognition Act. *See* Uniform L. Comm'n, *Legislative Fact Sheet - Foreign-Country Money Judgments Recognition Act*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited Nov. 30, 2013).

Referred to here as the 2005 Foreign Judgments Recognition Act, this uniform statute is codified in the *Uniform Laws Annotated* and designated 13 U.L.A. 7 (2005); full text also is available at http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf.

The 2005 Foreign Judgments Recognition Act updates and revises certain aspects of the 1962 Act. For example, it expands the scope of the public policy exception. Furthermore, it adds two discretionary grounds for nonrecognition; specifically, that the:

- Judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

- Specific proceedings leading to the foreign court judgment were incompatible with the requirements of due process of law.

2005 Foreign Judgments Recognition Act, § 4(c)(7)-(8), 13 U.L.A. 7 (2005).

i.1.c. Procedure for Recognition of Foreign Judgments

The filing of a separate action on the judgment is the most frequently used procedure under state law for seeking recognition and enforcement of a foreign judgment. Rule 64 of the Federal Rules of Civil Procedure allows federal courts to apply these state law mechanisms.

Also pertinent may be the 1964 Revised Uniform Enforcement of Foreign Judgments Act,13 U.L.A. 261 (1999), *available at* http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf.[11]

ii. Federal Law on Recognition in Defamation Suits

Although typically state law governs U.S. courts' recognition of foreign judgments, a 2010 congressional enactment constitutes an exception to this general rule. The enactment is intended to undermine what is known as "libel tourism"; that is, the practice by which a plaintiff brings a defamation suit in a country where freedoms of speech and press are more circumscribed than in the United States. The 2010 federal law aimed at preventing U.S. courts from enforcing ensuing foreign judgment is entitled the Securing the Protection of our Enduring and Established Constitutional Heritage Act. More commonly called the SPEECH Act, it is codified at 28 U.S.C. § 4101 *et seq*.

The protections of the SPEECH Act extend only to:

- U.S. citizens;
- Aliens who either are permanent U.S. residents or were lawfully residing in the United States when the allegedly defamatory speech was researched, prepared or disseminated; and
- Business entities either "incorporated in" or having their "primary location or place of operation, in the United States." 28 U.S.C. § 4101(6).

The SPEECH Act prohibits recognition and enforcement of a foreign defamation judgment unless the court concludes:

1. Either that the:
    - Defamation law applied in the foreign court provided at least as much protection of freedom of speech and press as would have been provided in the case under U.S. federal and state law; or
    - Foreign law provides less protection, but the judgment debtor nevertheless would have been found liable for defamation under U.S. law;

[11] *See* Uniform L. Comm'n, *Legislative Fact Sheet – Enforcement of Foreign Judgments Recognition Act*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Enforcement%20of%20Foreign%20Judgments%20Act (last visited Nov. 30, 2013) (indicating that nearly all the U.S. states, as well as the District of Columbia and the U.S. Virgin Islands, had adopted this 1964 Act).

2. The foreign court's exercise of personal jurisdiction over the judgment debtor comported with the due process requirements imposed on U.S. courts by the U.S. Constitution; and

3. If the judgment debtor is an interactive computer service under section 230 of the Communications Act of 1934, 47 U.S.C. §230 (2012), the defamation judgment is consistent with that section.

28 U.S.C. § 4102 (a)-(c). The party seeking recognition has the burden of proof to establish that these requirements for recognition have been met. *Id.* §4102 (a)(2). Appearance in the foreign court does not deprive the judgment debtor of the right to oppose recognition and enforcement, nor does it constitute a waiver of any jurisdictional claims the judgment debtor may have. *Id.* §4102(d).

b. Enforcement by U.S. Courts of Judgments by Courts of Foreign States

Once the terms of a judgment have been recognized using one of the mechanisms described above, a court will turn to consideration of whether to enforce the judgment; that is, whether it will require the judgment debtor to carry out the terms of the judgment.

The specific procedures available to a court for enforcement of a recognized foreign judgment are determined by state law. Federal Rule of Civil Procedure 64 provides that federal, as well as state courts, may take advantage of these procedures.

If the court determines that the foreign judgment should be recognized, then it will determine whether the means of enforcement requested by the plaintiff should be granted. Federal Rule of Civil Procedure 69(a).

Also pertinent may be the 1964 Revised Uniform Enforcement of Foreign Judgments Act,13 U.L.A. 261 (1999), *available at* http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf.[12]

c. Enforcement of Arbitral Awards

The recognition and enforcement of international arbitral awards is governed by the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[13] as

---

[12] *See* Uniform L. Comm'n, *Legislative Fact Sheet – Enforcement of Foreign Judgments Recognition Act*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Enforcement%20of%20Foreign%20Judgments%20Act (last visited Nov. 30, 2013) (indicating that nearly all the U.S. states, as well as the District of Columbia and the U.S. Virgin Islands, had adopted this 1964 Act).

[13] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf. This treaty, which entered into force on June 7, 1959, has 149 states parties; among them is the United States, for which the treaty entered into force on Dec. 29, 1970. *See* U.N. Comm'n Int'l Trade Law, *Status*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Nov. 30, (continued…)

implemented domestically via chapter 2 of the U.S. Federal Arbitration Act, codified at 9 U.S.C. §§ 201-08 (2006). This and other aspects of foreign arbitrations, as they arise in U.S. courts, may be found *infra* § III.A.

2013). Practitioners in this area sometimes call this the New York Convention; the court should be aware that practitioners in other areas may refer to other treaties promulgated in New York by the same shorthand name.

Recommended citation:[1]

Am. Soc'y Int'l L., "Discovery and Other Procedures," in
Benchbook on International Law § II.C (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/discovery.pdf

C. Discovery and Other Procedures

The rules of discovery and other procedures vary greatly between jurisdictions. This is especially true in the context of international courts as compared to U.S. courts. Some unified international standards for discovery and other procedures are codified in the Hague Conventions, prepared and monitored by the Hague Conference on Private International Law. Often referred to by the acronym HCCH,[2] the Hague Conference is an international, intergovernmental organization that works to develop and service multilateral legal instruments in the areas of civil and commercial law. For more information, *see* http://www.hcch.net/index_en.php?act=text.display&tid=1 (last visited Dec. 9, 2013).

This chapter first outlines the common methods of service of process abroad for U.S. proceedings and service of process in the United States for foreign proceedings, and then examines ways to conduct discovery abroad, and comply with discovery requests from foreign courts.

1. Service of Process Abroad

Service of process abroad in cases before U.S. courts is governed by federal law, including the Federal Rules of Civil Procedure and numerous statutes. Many foreign jurisdictions, however, restrict the methods of service of judicial documents. Moreover, in some countries, service of judicial documents is considered a judicial or governmental function, and private parties attempting personal service will violate local law.

The U.S. Department of State maintains a helpful website about service of process abroad at http://travel.state.gov/law/judicial/judicial_680.html (last visited Dec. 9, 2013). Country-specific information on service of process is available at http://travel.state.gov/law/judicial/judicial_2510.html (last visited Dec. 9, 2013).

a. Methods of Service

The appropriate method of service depends on the individual or entity being served. No statute or rule permits service upon a foreign embassy or consulate in the United States as a means of serving individuals, corporations, or foreign states. Nor are U.S. Foreign Service officers normally permitted to serve process overseas on behalf of private litigants. *See* 22 C.F.R. § 92.85 (2012) (prohibiting officers of the Foreign Service from serving process or legal papers

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.
[2] The acronym derivation from a combination of the English and French versions of the organization's name, "Hague Conference/Conférence de La Haye."

or appointing others to do so except when directed by the Department of State).

Litigants sometimes may use mechanisms set forth in two treaties to which the United States is a party:

- The 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters.[3] Known as the Hague Service Convention, this treaty requires its sixty-plus member states to designate a Central Authority to receive requests for service of process via forms available at http://www.usmarshals.gov/forms/usm94.pdf (last visited Dec. 9, 2013). The treaty also allows member states to object to certain other means of service.

- The 1975 Inter-American Convention on Letters Rogatory.[4] Applicable between the United States and a dozen Latin American countries, this treaty likewise requires member states to designate a Central Authority to receive requests for service of process via forms available at http://www.hagueservice.net/forms/USM-272-frm.pdf (last visited Dec. 9, 2013).

Specific methods of service, on individuals, corporations, and foreign states or state agencies, are discussed below.

i. Individuals

Service of process upon an individual in a foreign country is permitted in Fed. R. Civ. P. 4(f) by, among other methods:

- Registered or certified mail (return receipt requested), unless prohibited by the law of the foreign country;[5] or

- Means authorized by an international treaty.

[3] Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Nov. 15, 1965, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969), *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=17 [hereinafter Hague Service Convention]. This treaty has 68 states parties, among them the United States, for which the treaty entered into force on Feb. 10, 1969. *See* Hague Conference on Private International Law, *Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited Dec. 9, 2013). The Permanent Bureau of the HCCH has published a useful *Practical Handbook on the Operation of the Hague Service Convention* (2006); it is available at http://www.hcch.net/index_en.php?act=publications.details&pid=2728.

[4] Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. 98-27, O.A.S.T.S. No. 43 (reprinted in 28 U.S.C. § 1781 (2006)) (entered into force Jan. 16, 1976), *available at* http://www.oas.org/juridico/english/treaties/b-36.html [hereinafter Inter-American Service Convention]. This treaty has 18 states parties, among them the United States, which deposited its instruments of ratification on July 28, 1988. *See* Dep't Int'l L., Org. of Am. States, *B-36: Inter-American Convention on Letters Rogatory*, http://www.oas.org/juridico/english/sigs/B-36.html (last visited Dec. 9, 2013).

[5] Some foreign countries restrict or prohibit personal service within their territory by foreign litigants, and some restrict or prohibit service by certain methods, such as postal mail or e-mail.

ii. Corporations

Service of process upon a foreign corporation, association, or partnership is governed as follows:

- If the foreign corporation or other entity is in the United States, by Fed. R. Civ. P. 4(h)(1); and

- If the foreign corporation or other entity is abroad, by Fed. R. Civ. P. 4(h)(2). This subsection of the rule also governs domestic corporations, associations, or partnerships abroad. Essentially, for entities located abroad, Rule 4(h)(2) allows service by all methods permitted for personal delivery under Rule 4(f), with the exception of personal delivery on an individual under Rule 4(f)(2)(C)(i).

iii. Foreign States or State Agencies

Service of process upon a foreign state or the agency or instrumentality of a foreign state is governed by Fed. R. Civ. P. 4(j)(1), which states:

> A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

Part of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608 (2006), sets out different paths for serving the state, as opposed to its agencies and instrumentalities:

- For a foreign state, serve, as set out in 28 U.S.C. § 1608(a), by:

    - Registered or certified mail (return receipt requested) to the head of the ministry of foreign affairs;

    - Diplomatic (State Department) channels; or

    - Means set out in an applicable treaty.

- For an agency or instrumentality of a foreign state, serve, as set out in 28 U.S.C. § 1608(b), by:

    - Registered or certified mail (return receipt requested);

    - Delivery to an officer or agent authorized to receive service in the United States; or

    - Means authorized in an applicable international treaty.

b. Service in the United States for Foreign Proceedings

If a foreign plaintiff or court seeks to serve a person in the United States, 28 U.S.C. § 1696(a) permits the district court of the district in which the person resides to "order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal." Service may also be accomplished by methods other than court order. *Id.* § 1696(b).

2. Taking of Evidence Abroad

The globalization of business and increased travel has increased transnational litigation – and with it, the need for litigants to obtain information, evidence, and records from foreign jurisdictions. Foreign judicial systems often differ from those of the United States with regard to the appropriate scope of discovery; moreover, other countries often have very different rules on privacy and data protection. This is particularly true with regard to the civil law systems that prevail in many countries of continental Europe and in many of their former colonies. For example, a number of foreign jurisdictions restrict or forbid pretrial discovery, and many require judicial approval for all discovery. This section explores the extent to which discovery may be sought from parties and nonparties abroad in civil proceedings, and the mechanisms used to obtain discovery located abroad.

a. Scope of Discovery in Civil Proceedings

A district court may order "discovery of any matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1). As this rule contains no geographic limitation, it encompasses evidence located abroad. Discovery may be sought from parties and nonparties alike, as follows:

- *Party to transnational litigation*: Parties are subject to the discovery requests available generally under the Federal Rules of Civil Procedure. Requests may cover, for example, depositions, interrogatories, requests for documents, inspections, physical and mental examinations, and requests for admission. Failure to comply with discovery orders is subject to the usual range of sanctions under Fed. R. Civ. P. 37.

- *Nonparty who is a U.S. national or resident, located in a foreign country:* Such nonparties may be compelled to testify or to produce documents pursuant to two federal subpoena provisions: 28 U.S.C. § 1783(a) and Fed. R. Civ. P. 45(b).

- *Nonparty located abroad and not a U.S. national or resident:* Discovery may be sought from such nonparties via letters of request or via letters rogatory, which are judicial requests for assistance to courts in independent jurisdictions, as discussed *infra* § II.C.2.b.iv. Alternatively, the production of documents and testimony may be compelled if the court has jurisdiction over the foreign nonparty.

b. Mechanisms for Discovery

U.S. courts and litigants may use four types of mechanisms to obtain discovery located

abroad:

- Federal courts may act unilaterally, employing their usual statutory and inherent authority to compel discovery in cases before them;

- Letters of request pursuant to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters;[6]

- Letters rogatory transmitted via diplomatic channels; or

- Requests for assistance pursuant to Mutual Legal Assistance Treaties, typically called MLATs, which are available only in criminal cases, as detailed *infra* § II.C.2.v.

Because many of these mechanisms can be employed in both civil and criminal matters, this section discusses them in general below, with references to civil and criminal sources as relevant.

i. Unilateral Means of Evidence Gathering

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure generally govern a federal court's ability to compel discovery, and as discussed *supra* § II.C.2.a, federal courts can use standard methods of compelling discovery in some cases with international aspects.

Specific statutes also govern a federal court's power to order discovery of evidence located abroad. Federal law authorizes at least nine methods by which a U.S. court may order the production of evidence located abroad, testimony from witnesses abroad, or the transfer to the United States of private assets located abroad. The applicability of the various methods depends on the type of case at hand, although most methods are available in both civil and criminal proceedings.

In particular, a U.S. court may:

1. Compel testimony of U.S. nationals or residents located abroad through subpoenas issued pursuant to 28 U.S.C. § 1783, Fed. R. Civ. P. 45(b), as discussed *supra* § II.C.2.a., or Fed. R. Crim. P. 15. *See also* § II.C.2.b. (discussing blocking statutes).

2. Compel production of documents located abroad, provided that: the court has personal jurisdiction over the alleged wrongdoer; the documents or other tangible evidence are in the possession, custody, or control of the alleged wrongdoer or a related entity; and the production of the evidence is not protected by an evidentiary

[6] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 255, 847 U.N.T.S. 231, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=82 [hereinafter Hague Evidence Convention]. This treaty, which entered into force on Oct. 7, 1972, has 57 states parties; among them is the United States, for which the treaty entered into force on Oct. 7, 1972. *See* Hague Conference on Private International Law, *Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last visited Dec. 9, 2013).

privilege. *See* Fed. R. Civ. P. 34; Fed. R. Crim. P. 15. *See also* In re *Marc Rich & Co.*, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983).

3. Compel production – even from a person or entity not party to the lawsuit, a target of the investigation, or a defendant in the prosecution – of documents located abroad. Production may include documents of foreign banks or corporations, or documents of foreign branches of U.S. banks or corporations with which the target or defendant conducted business. *See* Fed. R. Civ. P. 34(c), 45; Fed. R. Crim. P. 15, 17.

4. Compel, through a subpoena, testimony from a foreign witness present in the United States. *See* Fed. R. Civ. P. 45; Fed. R. Crim. P. 15, 17. *See also United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

5. Compel production of documents from foreign entities by a subpoena *duces tecum* of a foreign entity over whom the U.S. court has personal jurisdiction. *See* Fed. R. Civ. P. 45; Fed. R. Crim. P. 17.

6. Compel consent to disclose third-party records, as a means to overcome bank secrecy. *See Doe v. United States*, 487 U.S. 201 (1988).

7. Compel both targets of U.S. criminal investigations and defendants not to engage in attempts to block prosecutors' efforts to obtain evidence by bringing an action before a foreign court. *See United States v. Davis*, 767 F.2d 1025, 1036-40 (2d Cir. 1985).

8. Compel repatriation of assets to pay a fine or taxes or to effect a forfeiture. *See* 26 U.S.C. § 7402(a) (2012). *See also United States v. McNulty*, 446 F. Supp. 90 (N.D. Cal. 1978).

9. Impose a tax levy on a bank in the United States for funds of a taxpayer located in a foreign branch. *See* 26 U.S.C. § 7402(a) (2006). *See also United States v. First Nat'l City Bank*, 379 U.S. 378 (1965).

ii. Challenges to Such Requests

Among the most difficult circumstances for obtaining evidence abroad are those that involve third parties abroad, by means of subpoenas directing either witness testimony from foreign persons or the production of documents from foreign entities. The person whose testimony or assistance is sought may challenge the use of coercive methods by, *inter alia*:

- Alleging breach of constitutional rights, such as the privilege against self-incrimination, the guarantee of due process, or the ban on improper search and seizures;

- Questioning assertions of jurisdiction;

- Raising conflicts of law defenses; and/or

- Contesting foreign sovereign compulsion.

This last avenue, contesting foreign sovereign compulsion, arises when a party contends that compliance with the laws of the United States would cause the party to violate the laws of a foreign state to which the party is also subject. The Supreme Court has not addressed whether foreign sovereign compulsion is a defense to noncompliance with U.S. law; indeed, in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), it declined to reach a foreign sovereign compulsion defense question on which certiorari had been granted. A number of lower courts, however, have recognized the existence of the defense. *E.g.*, *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297-98 (D. Del. 1970).

iii. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The United States is party, along with more than fifty other countries, to a multilateral treaty that governs foreign evidence gathering; specifically, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, also known as the Hague Evidence Convention.[7]

Use of this treaty is not mandatory. Rather, as the Supreme Court explained in *Société Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 536 (1987):

> [T]he Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad.

Discovery may be sought either directly, because the court has personal jurisdiction over the entity in possession of the relevant information, or indirectly, by way of a request for assistance to a foreign court embodied by a letter rogatory. In either instance, the district court should determine on a case-by-case basis whether comity – by which courts, out of concern for friendly relations among countries, exercise discretion to conform to an international legal norm – militates in favor of resorting to the Convention's procedures rather than U.S. discovery rules. *See id*. at 533; *supra* § II.B.7 (discussing comity).

Articles 1 through 14 of the Hague Evidence Convention permit discovery by letter of request, which is a request from the court in one state to the "Central Authority" of the foreign state, asking the receiving state to assist in obtaining the evidence requested. If the receiving state honors the request, it becomes the "executing state." Article 11 provides that a person requested to give evidence may claim a privilege under the law of either the requesting or the

[7] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 255, 847 U.N.T.S. 231, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=82 [hereinafter Hague Evidence Convention]. This treaty, which entered into force on Oct. 7, 1972, has 57 states parties; among them is the United States, for which the treaty entered into force on Oct. 7, 1972. *See* Hague Conference on Private International Law, *Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last visited Dec. 9, 2013).

executing state.

Discovery of documents is often more limited under the Hague Evidence Convention than under U.S. discovery rules. This is because many member states have declared, pursuant to Article 23 of the Convention, that they will not execute letters of request "for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

iv. Letters Rogatory

A letter rogatory is a request by which a court in one jurisdiction asks court in another, foreign jurisdiction to employ the latter court's procedures in order to aid the administration of justice in the former court's country. For example, a foreign court may be asked to examine witnesses based on interrogatories drafted in the United States, typically by counsel for the party seeking the discovery. *See* 28 U.S.C § 1782(a) (2006).

Unlike the letters of request discussed *supra* § II.C.2.b., which travel through the "Central Authorities" of governments, letters rogatory frequently are transmitted through diplomatic channels. In the United States, the Department of State has authority to transmit letters rogatory and to return responses to such letters via diplomatic channels. 28 U.S.C. § 1781 (2006). In some countries, a letter rogatory is signed by a judge, but may be transmitted by local legal counsel to the court in the country to which the letter is directed.

The letter rogatory is one of the most commonly used methods by litigants in the United States to obtain evidence abroad through compulsory process. Details on preparing a letter rogatory may be found on the State Department's website, at http://travel.state.gov/law/judicial/judicial_683.html (last visited Dec. 9, 2013).

v. Mutual Legal Assistance Treaties, or MLATs

Mutual Legal Assistance Treaties, commonly known as MLATs, are treaties by which member states establish mechanisms for securing evidence. They occur most often in criminal and tax matters; MLATs cannot be used in civil litigation. The United States has entered both bilateral and multilateral MLATs.

Among the multilateral treaties to which the United States is a party and which have mutual legal assistance provisions include:

- 2000 U.N. Convention Against Transnational Organized Crime,[8] also known as the Palermo Convention;

[8] U.N. Convention Against Transnational Organized Crime, art. 18, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Vol. 1, U.N. Doc. A/55/49 (2001), *available at* http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. This treaty, which entered into force on Sept. 29, 2003, has 179 states parties, among them the United States, which ratified on Nov. 3, 2005. U.N. Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Dec. 9, 2013).

- 1996 Organization of American States Inter-American Convention against Corruption;[9] and

- 2000 U.N. Convention Against Corruption.[10]

See Michael Abbell, *Obtaining Evidence Abroad in Criminal Cases* 276-90 (2010).

v.1. MLATs and Letters Rogatory Compared

MLATs have many benefits compared to letters rogatory. In particular, MLATs create a binding legal obligation to respond; moreover, MLAT procedures are more expeditious, partly because there is a direct link to process requests, through the "Central Authority" in each country. Yet on account of limitations on use, MLATs do not displace other methods: generally, MLATs apply only in criminal and tax cases, and as discussed below, even in these types of caes private litigants' use of MLATs is limited.

Unlike requests for assistance under letters rogatory, the execution of which is discretionary, execution of an MLAT request is required by treaty and can be refused only for one of the few grounds specified in the pertinent treaty. For instance, the U.S.-Russia MLAT states that the receiving state may deny legal assistance if one of three situations is present; that is, if the:

- "[R]equest relates to a crime under military law that is not a crime under general criminal law";

- "[E]xecution of the request would prejudice the security or other essential interests of the Requested Party"; or

- "[R]equest does not conform to the requirements of this Treaty."

Treaty between the United States of America and the Russian Federation on Mutual Legal Assistance in Criminal Matters, U.S.-Russia, art. 1, June 17, 1999, T.I.A.S. 1304, *available at* http://www.state.gov/documents/organization/123676.pdf [hereinafter U.S.-Russia MLAT].

[9] Inter-American Convention against Corruption, art. XIV, Mar. 29, 1996, S. Treaty Doc. No. 105-39, 35 I.L.M. 724, *available at* http://www.oas.org/juridico/english/treaties/b-58.html. This treaty, which entered into force on Mar. 6, 1997, has 33 states parties, among them the United States, which deposited its instrument of ratification on Sept. 29, 2000. Org. Am. States, Dept. Int'l L., *B-58: Inter-American Convention on Corruption*, http://www.oas.org/juridico/english/Sigs/b-58.html (last visited Dec. 9, 2013).

[10] U.N. Convention Against Corruption, art. 46, opened for signature Dec. 9, 2003, S. Treaty Doc. No. 109-6 (2005), 2349 U.N.T.S. 41, *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. This treaty, which entered into force on Dec. 14, 2005, has 169 states parties, among them the United States, which ratified on Oct. 30, 2006. U.N. Treaty Collection, *United Nations Convention Against Corruption*, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-14&chapter=18&lang=en (last visited Dec. 9, 2013).

v.2. Scope of Assistance

MLATs provide for a variety of assistance; for example:

- Serving or producing documents;
- Providing records;
- Locating persons;
- Taking testimony or statements of persons;
- Executing requests for search and seizure;
- Forfeiting criminally obtained assets; and
- Transferring persons in custody for testimonial purposes.

MLATs require evidence to be transmitted in a form admissible in the courts of the requesting state. As a result, evidence transmitted pursuant to an MLAT request is more likely to be admissible than if it is obtained by letters rogatory.

v.3. Individuals' Efforts to Use MLATs

At times defendants and other persons, as opposed to governments, will seek to make requests under an MLAT. As discussed below, such efforts posed difficulties. Authorities are divided with regard to such requests. Some MLATs specifically exclude such requests.

v.3.a. Treaties

Newer MLATs to which the United States is a party provide explicitly that the mechanisms are for the use of the contracting governments, not individual defendants. For example, Article 1 of the 1999 U.S.-Russia MLAT, *supra*, states:

> This Treaty is intended solely for cooperation and legal assistance between the Parties. The provision of this Treaty shall not give rise to a right on the part of any other persons to obtain evidence, to have evidence excluded, or to impede the execution of a request.

To similar effect, Article 2 of the 1992 Inter-American Convention on Mutual Assistance in Criminal Matters[11] makes clear:

[11] Inter-American Convention on Mutual Assistance in Criminal Matters, May 23, 1992, O.A.S.T.S. No. 75 (entered into force Apr. 14, 1996), *available at* http://oas.org/juridico/english/Treaties/a-55.html. This treaty has 27 states parties; among them the United States, for which the treaty entered into force on May 25, 2001. Dep't of Int'l L., Org. of Am. States, *A-55: Inter-American Convention on Mutual Assistance in Criminal Matters*, http://oas.org/juridico/english/Sigs/a-55.html (last visited Dec. 9, 2013).

> This convention applies solely to the provision of mutual assistance among states parties. Its provisions shall not create any right on the part of any private person to obtain or exclude any evidence or to impede execution of any request for assistance.

No such prohibition appears, however, in other instruments on the subject, including a model treaty approved in 1990 by the U.N. General Assembly.[12]

v.3.b. Case Law

U.S. case law exemplifies the limited reach of MLATs for individual defendants. In one instance, a court allowed the use of the U.S.-Switzerland MLAT to order the United States to make a request on behalf of a defendant. *United States v. Garcia*, 37 F.3d 1359, 1366-67 (9th Cir. 1994) (interpreting Treaty on Mutual Assistance in Criminal Matters with Related Note, U.S.-Switz., May 25, 1973, 27 U.S.T. 2019), *cert. denied*, 514 U.S. 1067 (1995). In that case, Switzerland did not object to the request.

Most efforts to using MLATs to challenge the exclusion of evidence obtained by defendants and third parties have not succeeded. *See United States v. Rommy*, 506 F.3d 108, 128-29 (2d Cir. 2007) (rejecting claim that evidence allegedly obtained in violation of an MLAT should be excluded), *cert. denied*, 552 U.S. 1260 (2008); *United States v. Davis*, 767 F.2d 1025, 1029 (2d Cir. 1985) (ruling that a defendant lacked standing to move to exclude or suppress records on the basis of a purported MLAT violation).

In 2002, the Supreme Court of British Columbia denied a U.S. request for assistance for records under the U.S.-Canada MLAT because it found abuse of process in connection with the U.S. efforts to obtain records regarding alleged tax offenses. *United States v. Schneider*, 2202 B.C.S.C. 1014 (July 5, 2002), *available at* http://www.uniset.ca/other/cs6/2002BCSC1014.html. The case illustrates the effort of at least one court to balance the need for assistance with respect for the law. *See* Bruce Zagaris, *British Columbia Court Denies U.S. MLAT Request Due to Abuse of Process*, 18 Int'l Enforcement L. Rep. 422-24 (2002).

3. Discovery Requests from Non-U.S. Courts

Just as U.S. courts may request discovery from a foreign state, a foreign tribunal or interested person may direct a letter rogatory or other request for judicial assistance to the United States. The foreign proceeding need not be pending or imminent; nor does the evidence sought have to be discoverable under foreign law. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-62 (2004).

[12] U.N. Model Treaty on Mutual Assistance in Criminal Matters, G.A. Res. 45/177, 45, U.N. GAOR Supp. (No. 49A), U.N. Doc. A/45/49 (Dec. 14, 1990), *available at* http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

a. Applicable Law

The statute governing such requests is 28 U.S.C. § 1782 (2006). Entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," it states in full:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
>
> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

By its terms the statute permits, but does not require, a district court to order testimony or document production in specified circumstances. Factors a court may consider were enumerated by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-66 (2004):

- If the person from whom the party seeks discovery lies beyond the evidence gathering powers of the foreign tribunal;
- "The nature of the foreign tribunal";
- "The character of the proceedings underway abroad"; and
- "The receptivity of the foreign government or the court or the agency abroad to U.S. federal-court judicial assistance."

b. Procedure

Normally, if it grants assistance, a U.S. district court will appoint a "commissioner" –

often, an Assistant U.S. Attorney or some other lawyer employed by the Department of Justice – to supervise the taking of testimony in connection with the request.

If the requesting foreign court has not prescribed the procedure to be used to execute its request, 28 U.S.C. § 1782 states that the Federal Rules of Civil Procedure are to be applied.

A person who testifies pursuant to a U.S. court order may assert any pertinent privilege that is permitted either under U.S. law or under the law of the country where the proceeding is pending.

Recommended citation:[1]

Am. Soc'y Int'l L., "International Arbitration," in
Benchbook on International Law § III.A (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/arbitration.pdf

III. International Law in U.S. Courts: Specific Instances

International law arises frequently in specific contexts, among them:

- International Arbitration
- International Law Respecting Families and Children
- International Sale of Goods
- International Air Transportation
- Human Rights, including laws combating torture and human trafficking
- Criminal Justice
- Environment

Each is discussed in the succeeding chapters.

A. International Arbitration

This section discusses instances in which U.S. courts may be asked to intervene in an international arbitration.

1. International Arbitration Defined

International arbitration is a privately sponsored system through which parties agree to resolve cross-border disputes, in commercial and other settings.

In the United States, requests for judicial intervention related to international arbitration are governed by the Federal Arbitration Act, codified as amended 9 U.S.C. §§ 1 *et seq*. (2006), and frequently called the FAA.

Included within these requests are FAA provisions that implement obligations the United States undertook in 1970, and again in 1990, when it ratified two multilateral treaties on the recognition and enforcement of international arbitration agreements and awards. Respectively, these treaties are the:

- 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a global treaty typically called the New York Convention;[2] and

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.
[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf [hereinafter New York Convention]. The New York Convention has 149 states parties, including the United States, for which the

- 1975 Inter-American Convention on International Commercial Arbitration, a regional treaty typically called the Panama Convention.[3]

Except where there is a need to distinguish between the two, the New York and Panama Conventions generally are referred to in this chapter as the "Conventions." Arbitration agreements or awards that – due to their international nature – fall within the purview of either Convention shall be referred to as "Convention agreements" or "Convention awards."

Parties need not do anything particular for their dispute to be deemed "international." Rather, pursuant to Sections 202 and 302 of the FAA, 9 U.S.C. §§ 202, 302, an arbitration is international, and thus falls under the ambit of the Conventions and the FAA's associated implementing legislation, as long as it involves commerce and furthermore:

- Involves at least one foreign party;
- Involves property located abroad;
- Envisages performance or enforcement abroad; or
- Has some other reasonable relation with one or more foreign states.

An arbitration agreement may appear in a contract, in the form of a dispute-resolution clause by which the parties agree to settle specified future disputes through arbitration instead of litigation. New York Convention, art. II; Panama Convention, art. 1. The clause may name as administrator an institution such as the International Centre for Dispute Resolution (http://www.adr.org/icdr), a U.S.-based division of the American Arbitration Association.

The parties may select arbitrators themselves or designate an authority to appoint on their behalf. The fees of these arbitrators, as well as the costs of any administering arbitral institution, are borne by the parties. Pursuant to the law governing the merits of the dispute and any arbitral rules that the parties select, the arbitration tribunal will hear the dispute and issue a legally binding and enforceable award.

2. How International Arbitration Matters Arise in U.S. Courts

A U.S. court should not decide the merits of a dispute that is subject to a valid arbitration agreement. 9 U.S.C. §§ 3-4, 9-11, 207, 201 (implementing New York Convention, arts. II, V; Panama Convention, arts. 1, 5). Nevertheless, a U.S. court may receive, from a party to an arbitration, applications to:

---

treaty entered into force on Dec. 29, 1970. *See* U.N. Comm'n on Int'l Trade L. (UNCITRAL), *Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Mar. 10, 2014).

[3] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245, *available at* http://www.oas.org/juridico/english/treaties/b-35.html [hereinafter Panama Convention]. Of the 35 countries that belong to the Organization of American States, 19 are states parties to the Panama Convention, including the United States, which deposited its instrument of ratification on Sept. 27, 1990. *See* Dep't of Int'l L., Org. of Amer. States, *Multilateral Treaties*, http://www.oas.org/juridico/english/sigs/b-35.html (last visited Mar. 10, 2014).

- Help constitute or fill vacancies in an arbitral tribunal.

- Compel a party to submit to an international arbitration, which may be accompanied with a request to stay or dismiss related litigation.

- Enjoin a party from proceeding with international arbitration.

- Compel discovery or other disclosure in aid of an international arbitration or enforce subpoenas issued by an arbitral tribunal.

- Order injunctive relief or other provisional measures in aid of arbitration.

- Confirm or vacate an international arbitration award.

- Recognize and enforce an international arbitration award.

The purpose of this *Benchbook* section on international arbitration is to provide guidance as to the U.S. and international laws relevant to deciding such applications.

3. Legal Framework: The Federal Arbitration Act

Commercial arbitration is as old as the United States. Despite this long tradition, some jurists were skeptical about the arbitral process. Justice Joseph Story, for example, wrote in his *Commentaries*:

> [C]ourts of justice are presumed to be better capable of administering and enforcing the real rights of the parties than any mere private arbitrators, as well from their superior knowledge as their superior means of sifting the controversy to the very bottom.

Joseph Story, 1 *Commentaries on Equity Jurisprudence as Administered in England and America* § 670 (Melville Bigelow, 13th ed. 1886). Story's presumption stood in tension with two goals, seen to promote trade and investment:

- Respect for a pre-existing agreement of the parties; and
- Reinforcement of predictability.

E.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) (describing the parties' agreement to arbitrate as a "freely negotiated private international agreement"); *Société Nationale Algerienne Pour La Recherche v. Distrigas Corp.*, 80 B.R. 606, 612 (Bankr. D. Mass. 1987) (stating that the U.S. "Supreme Court powerfully advocates the need for international comity in an increasingly interdependent world," and adding that "[s]uch respect is especially important, in this Court's view, when parties mutually agree to be bound by freely-negotiated contracts").

Over time, a framework of U.S. statutes and treaties operated to tip the balance in favor of enforcing arbitral agreements. The most influential law is the Federal Arbitration Act, codified as amended at 9 U.S.C. §§ 1 *et seq*. (2006), and frequently called the FAA.

Congress passed the Federal Arbitration Act in 1925 with the aim, as stated by the Supreme Court, "to place arbitration agreements 'upon the same footing as other contracts.'" *Scherk*, 417 U.S. at 510 (citation omitted). The statute displaced an old English common law practice of refusing to enforce such agreements. 65 Cong. Rec. 1931 (1924).

a. Chapter 1 of the Federal Arbitration Act: General Provisions Relating to Both Domestic and International Arbitrations

Chapter 1 of the FAA applies to both domestic and international arbitrations. The statute's core provisions concern matters such as:

- Enforceability of arbitration agreements
- Compulsion of arbitration and stays of related state or federal litigation
- Compulsion of discovery and testimony
- Limited judicial oversight of arbitral awards

These are discussed below.

b. Chapters 2 and 3 of the Federal Arbitration Act: Implementing the Conventions

Chapters 2 and 3 of the FAA constitute amendments designed to implement the New York and Panama Conventions into domestic law, as described in the subsections below.

i. Chapter 2: Implementing the New York Convention

Amendments made to the FAA in 1970 and now contained in chapter 2 (codified at 9 U.S.C. §§ 201-08) implemented the New York Convention, which the United States joined the same year. A Senate report explained that the amendments were intended to promote international trade and investments, thus benefiting U.S. companies through the establishment of a stable, effective system of international commercial dispute resolution. S. Rep. No. 91-702, at 1-2 (1970).

To those ends, chapter 2 of the FAA sets forth procedures for the recognition and enforcement of international arbitration agreements and awards that:

- On the one hand, were made in a foreign country; or,

- On the other hand, were made within the United States, yet possess one of the cross-border components listed *supra* § III.A.1.

ii. Chapter 3: Implementing the Panama Convention

Amendments made to the FAA in 1990, and now contained in 9 U.S.C. §§ 301-07, implemented the Panama Convention, which the United States joined the same year. Chapter 3 thus provides for the recognition and enforcement of international arbitration agreements and awards covered by the Panama Convention. 9 U.S.C. § 301.

iii. When Both Conventions Appear Applicable

Due to the nationalities of the respective parties, some disputes might appear to fall under both the New York Convention and the Panama Convention. Generally, the New York Convention controls in such instances. 9 U.S.C. § 305(2). If most parties to the arbitration agreement are citizens of a country that has ratified or acceded to the Panama Convention and are member States of the Organization of American States, however, that regional treaty is to be applied. *Id*. § 305(1).[4]

iv. Chapters 2 and 3: Federal Jurisdiction

Federal district courts have original jurisdiction over litigation relating to any international arbitration falling within chapters 2 and 3 of the FAA regardless of the amount in controversy. 9 U.S.C. §§ 203, 302.

v. Chapters 2 and 3: Removal

The FAA expressly allows defendants to remove to federal court an action or proceeding pending in state court, if the matter relates to an international arbitration covered by chapter 2 or chapter 3. 9 U.S.C. §§ 205, 302.

c. If Chapters 2 or 3 Conflict With Chapter 1

In general, chapter 1 of the FAA applies equally to all arbitrations, international as well as domestic. On matters not covered in chapters 2 or 3, chapter 1 is to be applied. 9 U.S.C. §§ 208, 307.

An exception occurs if a provision of chapter 2 or 3 conflicts with chapter 1. In this case, the provision in chapter 2 or 3 – the chapters that specifically govern international arbitrations – displaces the conflicting provision of chapter 1. *Id.*

An example: The time limit for confirming awards in the case of an international arbitration covered by the New York Convention or the Panama Convention is three years, pursuant to chapters 2 and 3 of the FAA. *See* 9 U.S.C. §§ 207, 302. This displaces the shorter, one-year limit contained in chapter 1. 9 U.S.C. § 9.

[4] For a list of Panama Convention member states, see Dep't of Int'l L., Org. of Amer. States, *Multilateral Treaties*, http://www.oas.org/juridico/english/sigs/b-35.html (last visited Mar. 10, 2014).

4. Distinguishing Domestic from International Arbitration Awards

An arbitration may be deemed "international" under U.S. law and thus fall within the purview of the Conventions and the associated implementing legislation in chapters 2 and 3 of the FAA, providing that it meets the foreign nexus requirements set forth *supra* § III.A.1, whether the arbitration takes place in the United States or abroad.

Because the U.S. legal standards for enforcement of international arbitration awards vary to some degree based on where an award is rendered, however, it is sometimes necessary to distinguish between international arbitration awards rendered in the United States from those rendered abroad. This chapter thus refers to international arbitration awards which were rendered in the United States, or which applied U.S. procedural law, as "U.S. Convention Awards"; in contrast, this chapter refers to international arbitration awards which were rendered abroad as "Foreign Convention Awards."

Both of these types of Convention awards are to be further distinguished from "domestic awards," which result from arbitrations occurring in the United States that do not involve any of the international components listed *supra* § III.A.1. Purely "domestic awards" are covered exclusively by chapter 1 of the FAA, whereas Convention awards are also subject to chapters 2 or 3 of the FAA, the provisions implementing the Conventions.[5]

a. Common Requests to U.S. Courts by Parties to International Arbitration

A court in the United States may be asked to intervene in an international arbitration in a number of ways, as described *supra* § III.A.2, and further discussed below.

i. Request for Order to Compel or to Stay International Arbitration

Federal courts may be asked to compel arbitration when one party to an arbitration agreement:

- Simply refuses to arbitrate; or
- Has filed a lawsuit in a U.S. court instead of arbitrating, in which instance a motion to stay the lawsuit likely will accompany the request to compel arbitration.[6]

Conversely, the opposing party may seek a permanent stay of arbitration. Common arguments in favor of staying arbitration include:

- The agreement to arbitrate under review is invalid; or

[5] This chapter does not address enforcement of awards rendered pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1720, 575 U.N.T.S. 159, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (known as the ICSID or Washington Convention).

[6] Regarding requests for anti-suit injunctions, which prevent a party from prosecuting a foreign lawsuit in contravention of an agreement to arbitrate, see *infra* § III.A.2.

- Though valid, the arbitration agreement does not apply to the particular dispute at issue.

ii. Legal Framework Pertaining to Such Requests

Resolution of requests to compel or stay international arbitration implicates both the FAA and the two treaties its provisions implement, the New York Convention and the Panama Convention, *cited in full supra* § III.A.1.

Pursuant to Section 2 of the FAA, 9 U.S.C. § 2, a "written provision" evincing an intention to submit existing or future disputes to arbitration shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

A U.S. district court may compel arbitration under three scenarios; specifically:

- Under Section 4 of the FAA, 9 U.S.C. § 4, provided that the district court would have otherwise had jurisdiction over the dispute:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such [arbitration] agreement would have had jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

- Under Section 206 of the FAA, 9 U.S.C. § 206, and corresponding Article II(3) of the New York Convention for cases falling within the New York Convention.

    - Section 206 of the FAA, 9 U.S.C. § 206, provides:

    > A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

    - In turn, Article II(3) of the New York Convention provides:

    > The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement

> within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

- Under Section 303 of the FAA, for cases falling under the Panama Convention. Section 303, codified at 9 U.S.C. § 303, provides:

> (a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.
>
> (b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the [Panama Convention.][7]

When so requested by a party, the court has discretion to stay a lawsuit that is referable to arbitration pursuant to an arbitration agreement. 9 U.S.C. § 3. Indeed, upon consideration of various factors, it may dismiss litigation in aid of arbitration, rather than simply order a stay pending arbitration. *See* John Fellas, "Enforcing International Arbitration Agreements," *in International Commercial Arbitration in New York* 234 (James H. Carter & John Fellas eds., 2010).

Conversely, a court may order a permanent stay of arbitration if the dispute falls outside the scope of the arbitration agreement or is otherwise not arbitrable. *Id.*

iii. Commonly Raised Issues

Petitions to compel or stay arbitration frequently require courts to determine:

- First, whether the parties agreed to arbitrate the dispute – an issue often described as concerning the formation and validity of the arbitration agreement under review;

- Second, if the parties did so agree, whether the particular dispute is arbitrable – an inquiry potentially involving several subquestions:

[7] Although parties frequently invoke both section 4 of the FAA and the relevant sections within chapters 2 or 3 of the FAA when seeking to compel international arbitration, section 4 of the FAA only permits a district court to refer parties to arbitration in "the district in which the petition for an order directing such arbitration is filed." 9 U.S.C. § 4. By contrast, sections 206 and 303 empower a court to direct that arbitration be held in accordance with the agreement of the parties "at any place therein provided for, whether that place is within or without the United States." Thus, where parties seek a U.S. district court order compelling arbitration in another district or abroad, grounds for invoking either chapter 2 or 3 of the FAA must also be present.

- What is the scope of the arbitration agreement? Is it broad enough to cover the particular issues in dispute?

- Does the agreement to arbitrate bind the particular parties at issue – e.g., was it intended to cover certain nonsignatories?

- Has the party seeking arbitration waived their right to arbitrate by, for instance, engaging in litigation on the subject matter of the dispute?

- Might the issues covered by the arbitration agreement otherwise be nonarbitrable because, for example, they violate fundamental public policy?

If the dispute falls within the scope of the arbitration agreement, a motion to compel likely will be granted even if U.S. public policy is implicated. As the Supreme Court explained in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985), a U.S. court, on a requested review of the consequent arbitral award, will have an opportunity to ensure satisfaction of the United States' legitimate interest in having its laws enforced.

b. Arbitration Clause Severable from Underlying Contract: *Prima Paint*

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), a judgment that derives from a domestic arbitration yet applies equally to international arbitrations, the Supreme Court adopted the presumption that arbitration clauses are "separable" or "severable" from the underlying commercial contract in which they are contained.

Plaintiff-petitioner in *Prima Paint Corp.* had filed a federal complaint for fraudulent inducement, claiming that defendant-respondent had deliberately concealed its insolvency when signing a consulting agreement, which contained an arbitration clause. Plaintiff-petitioner also asked the district court to enjoin an arbitration sought by defendant-respondent. Defendant-respondent cross-moved to stay the court action and compel arbitration pursuant to Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3, 4. Defendant-respondent argued that whether there was fraud in the inducement of the consulting agreement was a question for the arbitrators, and not for the district court.

In its 1967 judgment, the Supreme Court agreed with defendant-respondent that arbitration should go forward; the Court wrote that "except where the parties otherwise intend, arbitration clauses . . . are 'separable' from the contracts in which they are embedded." *Prima Paint Corp.*, 388 U.S. at 402. Although specific challenges to the validity of the agreement to arbitrate are subject to judicial review, the Court noted that challenges to the validity of the overall contract are to be determined by the arbitrators. *Id.* at 404. In sum, "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate," *id.* Therefore, if the suit challenges the validity of the contract as a whole, that does not specifically implicate the arbitration clause, and the matter should be referable to arbitration. *See also Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 449 (2006).

c. Authority to Decide If Parties Agreed to Arbitrate

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), another judgment arising out of a domestic arbitration, the Court outlined how authority was to be allocated between courts and arbitrators with regard to challenges to the existence, validity, or enforceability of arbitration agreements. At this writing, the Court is considering extent to which that framework applies to one type of international arbitration – that between a private investor and a sovereign state. Each aspect is described in turn below.

i. *First Options*

Respondents in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), had asked a district court to vacate an arbitral award stemming from a dispute over the clearing of stock trades. They argued *inter alia* that the arbitral panel had wrongly reserved for itself the threshold question whether the dispute was subject to arbitration. At issue, in the words of the Supreme Court, was "who – court or arbitrator – has the primary authority to decide whether a party has agreed to arbitrate." *Id*. at 942. Ruling against respondents, the Court held:

- Generally, U.S. courts are to determine in the first instance if parties agreed to submit the dispute to arbitration – an issue to be decided by applying "ordinary state-law principles that govern the formation of contracts." *Id.* at 944. *See also* Gary B. Born, 1 *International Commercial Arbitration* 1071 (3d ed. 2010) (writing that in *First Options* the Supreme Court made clear that "[t]he 'pro-arbitration' rule of interpretation adopted by U.S. courts applies only to interpreting the scope of an existent arbitration agreement, and not to determining whether a valid arbitration agreement exists").

- An exception is to be made if the agreement under review makes clear that the parties intended the arbitral tribunal to decide this preliminary issue. *First Options*, 514 U.S. at 944-45.

ii. The Arbitrability Decision and Investor-State Arbitrations

In *BG Group plc v. Republic of Argentina*, __ U.S. __, 2014 WL 838424 (U.S.) (Mar. 5, 2014), the Supreme Court reviewed, for the first time, an arbitration based on one of the thousands of bilateral investment treaties, or BITs, that states have concluded in recent decades. A treaty clause required a British private investor to submit its dispute to Argentina's courts and wait eighteen months before seeking arbitration. The investor did not do so. Arbitrators, in an award issued after an arbitration conducted in Washington, D.C., excused this noncompliance. A federal appellate court then applied *de novo* review to overturn the award; however, the Supreme Court reversed. Justice Stephen G. Breyer's opinion for the seven-member majority invoked precedents like *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), discussed *supra* § III.A.4.c.i, to hold that the question was one for the arbitrators to decide. *BG Group*, 2014 WL 838424, at *12. A concurrence by Justice Sonia Sotomayor stressed that the decision left open the question of how to interpret clauses that – unlike the one at issue – expressly condition a state's consent to arbitrate on fulfillment of the local litigation requirement. *See id*. at *13-*15.

iii. The "Pro-Arbitration" Presumption: *Mitsubishi Motors*

The Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*., 473 U.S. 614 (1985), emphasized the strong judicial regard for the enforceability of arbitration agreements, especially in the international context.

In the case, which involved a dispute between a Japanese automobile manufacturer and an American dealer, the Court addressed the interplay between the legal framework for international arbitration and federal antitrust laws. In compelling the parties to arbitrate an antitrust dispute despite the respondents' objections that such claims could not be arbitrated on public policy grounds, the Court reaffirmed the strong federal policy supporting the enforcement of agreements to arbitrate. *See Mitsubishi Motors Corp.*, 473 U.S. at 624-28.

At issue were Sections 4 and 201 of the FAA, 9 U.S.C. §§ 4, 201, the latter of which implements Article II of the New York Convention. Invoking these sections, petitioner had sought to compel respondent to arbitrate a dispute pursuant to a prior agreement. Respondent's counterclaim relied *inter alia* on the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2006), and on the argument that the strong public interest issues at stake in antitrust matters rendered such claims nonarbitrable. *Mitsubishi Motors*, 473 U.S. at 624-25.

The Court held that the antitrust claims could be resolved in arbitration. It acknowledged prior courts' concerns about the ability of arbitrators properly to balance the business and public interests at issue in antitrust matters. *Mitsubishi Motors Corp.*, 473 U.S. at 628-29. These were held to be outweighed, not only by the fact that courts would have an opportunity to review the consequent arbitral award, as discussed *supra* § III.A.3.b.iv., but also by:

- "'[H]ealthy regard' for the strong federal policy favoring arbitration";
- "[C]oncerns of international comity";
- "[R]espect for the capacities of foreign and transnational tribunals"; and
- "[S]ensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi Motors Corp.*, 473 U.S. at 626.

5. **Request for Injunctive or Other Provisional Measures**

Parties may also petition U.S. courts – most often in the early stages of an international arbitration – to order some form of injunctive relief. What is sought variously is referred to as provisional measures, interim relief, or preliminary measures.

Provisional measures are intended to preserve the efficacy of the arbitral process and to ensure that the ultimate award will not be rendered meaningless through the dissipation of assets or evidence. As explained in Born, *International Commercial Arbitration*, *supra*, at 1943-44:

Provisional measures have particular importance in international disputes. Cases involving litigants from different nations pose special risks, including the increased danger that vital evidence will be taken out of the reach of relevant tribunals or that assets necessary to satisfy a judgment will be removed to a jurisdiction where enforcement is unlikely.

a. When Provisional Measures May Be Sought

A party may request provisional relief before issuance of a final arbitration award in order to:

- Protect assets or property in dispute;
- Preserve evidence relevant to the dispute; or
- Enjoin certain conduct that might frustrate the ultimate purpose of the arbitral process.

A request for court ordered provisional measures can arise under one of two circumstances. To be precise, a party either may:

- Apply directly to a court for provisional measures; or
- Petition a court to secure judicial enforcement of provisional measures granted in the first instance by the arbitral tribunal.

Under both scenarios, provisional measures are designed to preserve and promote the efficacy of the arbitral process by protecting assets or evidence relevant to the dispute or the award, or by prohibiting conduct that would otherwise threaten to frustrate the arbitral process.

For a detailed discussion of when provisional measures may be sought, see Born, *International Commercial Arbitration*, *supra*, at chapter 16.

b. Court-Ordered Provisional Measures

Because there can be a lag between the time in which an arbitration is commenced and an arbitral panel can be constituted, parties sometimes seek direct court intervention in order to secure assets or evidence while the panel is being formed. Even after an emergency arbitrator has been assigned or a tribunal appointed, parties may prefer court-issued preliminary relief in some situations. A party may wish to move *ex parte* because of a risk of dissipation of assets, for instance, given that *ex parte* relief is generally not available from arbitral tribunals. Alternatively, a party may seek to freeze funds or enjoin the conduct of a bank or other third party not subject to the jurisdiction of the arbitration tribunal.

The Supreme Court has not decided the extent to which judicial relief may be ordered in aid of an international arbitration implicating the New York Convention. "[W]hen seized of an

action in a matter in respect of which the parties" have agreed to arbitrate, a court must, "at the request of one of the parties, refer the parties to arbitration," according to New York Convention, art. II(3). Courts variously have interpreted this provision:

- On the one hand, by a restrictive reading, to mean that a court's jurisdiction is limited to compelling arbitration or confirming an existing arbitral award. *See McCreary Tire & Rubber Co. v. CEAT, S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974).

- On the other hand, by a more expansive reading that takes into account the treaty's pro-arbitration purpose and concludes that a court may award the usual provisional remedies available in court in favor of arbitration, including injunctive relief that preserves assets. *See Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990), *cert. denied*, 500 U.S. 953 (1991).

c. Standards for Judicial Relief: Federal Rules of Civil Procedure

In considering standards to apply to requests for provisional measures, courts frequently look to Federal Rules of Civil Procedure; specifically, to:

- Rule 65, "Injunctions and Restraining Orders," for injunctive relief; and

- Rule 64, "Seizing a Person or Property," for requests for attachments.

Each is discussed in turn below.

i. Application of Rule 65: Injunctions and Restraining Orders

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, courts hearing requests for provisional relief in international arbitration matters generally require:

- Advance notice to the adverse party – unless the standard for an *ex parte* temporary restraining order, set forth in Rule 65(b)(1), is met;

- Security for the payment of costs or damages to a wrongly enjoined party, Fed. R. Civ. P. 65(c); and

- Satisfaction by the movant of standards for injunctive relief applied within the federal circuit. Usually this involves some balancing of standard injunction factors – such as irreparable harm in the absence of such relief, likelihood of success on the merits, or serious questions going to the merits – combined with some balancing of the public and private equities.

ii. Application of Rule 64: Seizing a Person or Property

When a party seeks to freeze or attach assets in aid of arbitration, federal courts usually apply the state law standard for attachments, consistent with Rule 64(a) of the Federal Rules of Civil Procedure.

iii. Prehearing Discovery

Although federal courts are cautious when ordering any form of prehearing discovery, as discussed *infra* §II.C.2.b.i., such requests for interim relief have been granted in "limited" circumstances. *See Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 479-80, 486 (4th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000). The court in that case wrote that such relief could be available if:

- Evidence sought is "time-sensitive" or "evanescent"; or the
- Movant seeks "to perpetuate, rather than discover, the evidence."

d. Anti-suit Injunctions

One form of provisional measure that a party may request directly from a court is the "anti-suit injunction," by which a court orders a person subject to its jurisdiction not to go forward with a foreign lawsuit that contravenes an arbitration agreement. Such relief is not expressly authorized within the international arbitration framework of the FAA, the New York Convention, and the Panama Convention. Yet the power of a court to issue such an injunction – aimed not at a foreign court, but rather at a party – is established. *China Trade & Dev't Copr.v. M.V.Choong Yong*, 837 F.2d 33, 35-36 (2d Cir.1987).

Failure to comply with such an injunction may be treated as a contempt of court and may be punished by fine. *A. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 714 (5th Cir. 2002), 537 U.S. 1106 (2003).

Various U.S. courts of appeals have disagreed on the degree of deference to be given foreign litigants when considering a request for an anti-suit injunction – an injunction that may place the principle of comity at odds with federal policy in favor of enforcing arbitration agreements. *Compare, e.g., Paramedics Electromedicina Comercial, LTDA. v. GE Med. Sys. Info. Techs.*, 369 F.3d 645, 652-54 (2d Cir. 2004) (advising sparing use of anti-suit injunctions) *with Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir.) (declining, in the court's words, "to genuflect before a vague and omnipotent notion of comity" whenever asked "to enjoin a foreign action"), *cert. denied*, 519 U.S. 821 (1996).

Courts do tend to agree on two threshold requirements for an anti-suit injunction. As summarized in *China Trade & Dev't Copr.v. M.V.Choong Yong*, 837 F.2d 33, 35 (2d Cir.1987):

- First, "the parties must be the same in both matters"; and

- Second, "resolution of the case before the enjoining court must be dispositive of the action to be enjoined."

e. Judicial Enforcement of Arbitral Interim Measures

The legal framework for international arbitrations – the FAA and the Conventions – is silent with respect to:

- Whether arbitral tribunals may order provisional relief; and

- Whether courts may enforce, by sanctions or otherwise, provisional measures that an arbitral tribunal grants.

Nevertheless, courts generally have:

- Upheld the power of tribunals to order such measures, providing such relief is consistent with the grant of authority contemplated under the parties' arbitration agreement, *see Banco De Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003); and

- Limited judicial review of an arbitration panel's interim order to grounds enumerated for vacating or modifying arbitral awards in Sections 10 and 11 of the FAA, 9 U.S.C. §§ 10, 11, and the similar grounds for denying confirmation and recognition of arbitral awards in Articles V of the New York and Panama Conventions. *See infra* § III.A.7 for a more detailed discussion of these vacatur and nonconfirmation standards.

f. Finality of Arbitral Awards for Interim Relief

The question may arise whether an arbitral tribunal's award of interim relief is sufficiently final such that a court may vacate, confirm, or enforce it in accordance with the New York Convention, as implemented as a matter of U.S. law by the FAA. This Convention states at Article III:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon….

In line with this provision, a U.S. court typically enforces an interim arbitral award if it will "finally and definitively resolve self-contained issues in the case," as stated in Robert H. Smit & Tyler B. Robinson, "Obtaining Preliminary Relief," *in International Commercial Arbitration in New York* 257 (James H. Carter & John Fellas eds., 2010).

6. **Request for Discovery Order**

With regard to discovery, parties in an international arbitration may ask a U.S. court to:

- Subpoena documents or witnesses; or

- Enforce a documentary or testamentary subpoena issued by an arbitral tribunal.

The avenue for such requests varies according to the venue of the arbitration:

- If an arbitration is sited in the United States, the FAA governs.

- As for foreign arbitral proceedings, a party might invoke 28 U.S.C. § 1782 (2006); some but not all U.S. judicial circuits will entertain such requests.

Each of these avenues is discussed below.

Efforts to vacate a documentary subpoena issued by an arbitral tribunal are governed by the FAA and the Conventions it implements, according to the standards for nonrecognition or vacatur of arbitral awards, discussed *infra* § III.A.7.

a. Subpoenas Seeking Documents and Witnesses for U.S.-Sited Arbitrations

Section 7 of the FAA, 9 U.S.C. § 7, pertains to requests for document or witness subpoenas to be used in an international arbitration sited in the United States. It states in full:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

According to this section, therefore:

- Arbitrators are empowered to issue written summons for witness testimony or document production as long as it is material to the dispute; and

- In the event of noncompliance with such a summons, the U.S. district court in whose jurisdiction the arbitrators sit may be asked both to compel production of the witness

> or document at issue and to hold the individual refusing to comply in contempt. U.S. courts have held that in enforcing arbitral summons under Section 7 of the FAA, 9 U.S.C. § 7, U.S. courts are bound by the requirement, set out in Rule 45 of the Federal Rules of Civil Procedure, that subpoenas be served only within the judicial district in which the U.S. district court issuing the subpoena is located. This requirement forecloses extraterritorial service of subpoenas on any person located outside the United States. Born, *International Commercial Arbitration*, *supra*, at 1929.

On its face, Section 7 of the FAA, 9 U.S.C. § 7, seems to limit the power of U.S. courts to enforcing discovery orders of an arbitral tribunal. In some cases, however, one of the parties to an arbitration may seek judicial assistance in taking evidence or obtaining disclosure directly from a court, without the involvement or approval of the arbitral tribunal. While U.S. courts are divided on the propriety of such requests, some U.S. courts have held that Section 7 permits court-ordered discovery at the request of a party in "exceptional circumstances." As one commentator has observed:

> [T]hese courts have generally required a fairly compelling demonstration of need for particular evidence, that otherwise will likely be unavailable, in an arbitration, as well as a showing that the arbitral tribunal itself is not constituted or is otherwise unable to take or safeguard evidence.

Born, *International Commercial Arbitration*, *supra*, at 1930. Thus, he continued, "in some respects, these decisions can best be understood as forms of court-ordered provisional measures in aid of arbitration, typically granted prior to the constitution of an arbitral tribunal." *Id*. at 1930-31.

b. Extent of Judicial Power under Section 7 of FAA

By its text quoted *supra* § III.A.6.a, Section 7 of the FAA, 9 U.S.C. § 7, makes clear that an arbitral tribunal may require third parties to attend an arbitration hearing and bring documentary evidence with them. However, as noted in John L. Gardiner, et al., "Discovery," *in International Commercial Arbitration in New York* 288-90 (James H. Carter & John Fellas eds., 2010), U.S. courts of appeals disagree on whether Section 7 encompasses prehearing discovery from third parties, as follows:

- Applying a strict reading, some courts have limited arbitrators' authority to compel third parties to submit to discovery to an order compelling nonparties to appear before the tribunal and to hand over the requested documents at that time. *See*, *e.g.*, *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406-08 (3d Cir. 2004); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-18 (2d Cir. 2008).

- Applying a more expansive reading, other courts have permitted limited prehearing discovery from certain third parties; for example, if the nonparty is "intricately related to the parties involved in the arbitration," *In re Sec. Life Ins. Co. of Am.*, 228 F.3d

865, 871 (8th Cir. 2000) (internal quotation to lower court omitted), or if a "special need or hardship" is present, *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 271 (4th Cir. 1999).

Some authorities distinguish between prehearing document discovery and prehearing depositions, reasoning that the former may be less intrusive and thus more consistent with the goals of arbitration:

- Article 3 of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, adopted by the International Bar Association in 2010 and available at http://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx (last visited Mar. 10, 2014). This article suggests rules for document discovery, but is silent on depositions.

- American Arbitration Association International Centre for Dispute Resolution, *ICDR Guidelines for Arbitrators Concerning Exchanges of Information*, para. 6(b) (in effect since May 2008), *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002579 (last visited Mar. 10, 2014). This passage takes the position that "[d]epositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration."

c. Requests for Documents and Testimony to Aid Foreign Arbitrations

Parties whose arbitrations are sited outside the United States sometimes seek U.S. court orders to obtain evidence within the United States pursuant to the pertinent federal statute, codified at 28 U.S.C. § 1782 (2006). Entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," this statute states in full:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

d. Extent of Application of 28 U.S.C. § 1782 to Foreign Arbitrations

With regard to the provision in 28 U.S.C. § 1782, quoted above, that an order may be secured "for use in a proceeding in a foreign or international tribunal," controversy persists over whether Congress intended the term "tribunal" to include arbitral panels, and if so, whether that definition encompasses panels in private commercial cases. This disagreement is discussed further below.

i. Supreme Court *Dicta*

The Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004), suggested that an arbitral panel is included within the meaning "tribunal" as set out in 28 U.S.C. § 1782. In her opinion for the Court, Justice Ruth Bader Ginsburg wrote:

> 'The term "tribunal" . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.'

Intel Corp., 542 U.S. at 258 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026, n.71 (1965)). The Court did not decide if assistance pursuant to 28 U.S.C. § 1782 is available in connection with foreign arbitral proceedings, however, as that question was not presented.

ii. Lower Courts

Most recent U.S. judicial decisions have concluded that 28 U.S.C. § 1782 does apply to international arbitral proceedings. Yet U.S courts of appeals remain divided as to whether Section 1782 extends both to foreign private commercial arbitrations and to foreign arbitral proceedings that are public in nature (such as arbitrations dealing with bilateral investment treaties or conducted under the auspices of ICSID, the World Bank's Washington, D.C.-based International Centre for Settlement of Investment Disputes). Since the Supreme Court's 2004 *Intel* decision:

- Neither the Second nor the Fifth Circuit has revised its earlier holding that Section 1782 does not permit discovery assistance to foreign private commercial arbitration tribunals. *See Nat'l Broad. Co., Inc. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881-83 (5th Cir. 1999).

- By contrast, the Eleventh Circuit affirmed a district court order granting Section 1782 discovery assistance in aid of a foreign private arbitral proceeding. *In re Consorcio*

Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987, 993-94 (11th Cir. 2012).

7. **Request to Confirm, Recognize, Enforce, or Vacate Arbitral Awards**

In addition to petitions to stay or compel arbitration, discussed *supra* § III.A.4.a, to secure provisional relief, discussed *supra* § III.A.5, or to compel discovery, discussed *supra* § III.A.6, U.S. courts may receive from parties to an international arbitration various requests with respect to an arbitral award. The party that wins the arbitration may seek to enforce an arbitration award through:

- *Confirmation:* Reduction of the arbitral award to a judgment by the court;

- *Recognition:* Obtaining of a court's "formal certification that an ICSID award is a final and binding disposition of contested claims," Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration* 179 (2d ed. rev. 2010) (discussing differences between confirmation and recognition), and thus obtain preclusive effect as to the issues decided in the award; or

- *Execution:* Collection of the award, following confirmation or recognition, through means such as an attachment or lien.[8]

Conversely, the losing party may request to vacate – to have an award "annulled" or "set aside" by a competent authority such that it will cease to have legal effect, at least under the laws of the state where it was annulled.

The place where such requests may be brought depends on the nature of the request:

- *Requests to confirm or recognize:* Pursuant to the FAA provisions implementing the Conventions, such requests may be brought in any U.S. district court, regardless of where the award was rendered. 9 U.S.C. §§ 207, 302.

- *Requests to vacate:* The New York Convention has been construed to require that such requests be brought only in the country of "primary jurisdiction;" that is, the country where, or under the law of which, the arbitral award was made. *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004).

A court in another country may deny recognition or enforcement, but may not vacate or annul, an arbitral award made in the United States.

[8] This chapter does not deal with execution, which is often governed by state law standards, but which nevertheless can implicate complex questions in the international arbitration arena, such as the extent to which foreign government entities can resist execution on grounds of sovereign immunity. *See, e.g.*, Brian King, Alexander Yanos, Jessica Bannon Vanto & Phillip Riblett, "Enforcing Awards Involving Foreign Sovereigns," *in International Commercial Arbitration in New York* 419-22 (James H. Carter & John Fellas eds., 2010).

Petitions to confirm, recognize, and vacate international arbitral awards may present complex questions relating to:

- Differences among grounds for nonrecognition or vacatur of arbitral awards set forth in the relevant instruments – that is, the FAA and the Conventions, which it implements;

- The extent to which federal courts may review an assertion that an arbitral tribunal committed legal error; and

- Whether parties contractually may expand the scope of judicial review of an award.

Such issues are discussed below.

a. Legal Framework Applicable to Applications to Confirm or Recognize International Arbitral Awards

With the exception of certain procedural requirements supplied by chapter 1 of the FAA, chapters 2 and 3 of the FAA provide the general framework for the confirmation and recognition of international arbitration awards falling under the New York or Panama Conventions: that is, as described *supra* § III.A.3.b.i., awards that:

- Were made abroad; or

- Were made in the United States, but :
    - Involve a foreign party;
    - Involve property located abroad;
    - Envisaging performance abroad; or
    - Have some other reasonable relation to foreign states.

Section 207 of the FAA, 9 U.S.C. § 207 – part of chapter 2, which implements the New York Convention – states in full:

> *Award of arbitrators; confirmation; jurisdiction; proceeding*
>
> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Section 302 of the FAA, 9 U.S.C. § 302, incorporates Section 207's confirmation provisions for awards falling under the Panama Convention, which is implemented in chapter 3 of the FAA. Unlike chapter 2 – which does not restrict enforcement to awards rendered in other New York Convention signatory states – Section 302, 9 U.S.C. § 302, states:

Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

> Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

i. Timing of Requests to Confirm an International Arbitral Award

Pursuant to the above legislation implementing both the New York Convention and the Panama Convention, a party may seek recognition and enforcement by moving to confirm a foreign award in a U.S. court within three years from the date of that award. 9 U.S.C. §§ 207, 302.

ii. Procedures for Applications to Confirm an International Arbitral Award

Chapter 1, Section 13, of the FAA, 9 U.S.C. § 13, provides that a party moving for confirmation of an award must supply the clerk of the court with the following papers at the time that the party's motion for confirmation is brought:

- The arbitration agreement;
- The award; and
- All affidavits, legal briefs, or other documentary evidence in support of the order sought.

Pursuant to Section 6 of the FAA, 9 U.S.C. § 6, which provides that applications under the statute "shall be made and heard in the manner provided by law for the making and hearing of motions," applications to confirm international arbitral awards should be brought by motion or petition to confirm an award, not a complaint.

Section 9 of the FAA, 9 U.S.C. § 9, supplies the instructions for service of process in an action to enforce an award. Identical instructions for service of process in actions to vacate an award are found in Section 12 of the FAA, 9 U.S.C. § 12. These sections provide for different methods of service depending on whether the adverse party is a resident or not of the district in which the award was made. John V.H. Pierce and David N. Cinotti, "Challenging and Enforcing International Arbitral Awards in New York Courts," *in International Commercial Arbitration in New York* 363 (James H. Carter & John Fellas eds., 2010).

b. Grounds for Refusing to Enforce an Award

Pursuant to the above legislation implementing both the New York Convention and the Panama Convention, a court shall confirm an arbitral award unless a ground for denying nonrecognition or enforcement specified in the relevant treaty applies. 9 U.S.C. §§ 207, 302.

i. Grounds Specified in the New York and Panama Conventions

Article V(1) of both Conventions provides circumstances under which a decision may be refused by a party to the arbitration, at the request of the party against whom it is invoked, if that party can prove one of the following:

- Incapacity or invalidity of the agreement under the applicable law;
- Ineffective or incomplete notice to a party about the arbitrator or arbitration procedure;
- Inability of a party to present a defense;
- The disputes addressed by the decision were not agreed upon by the parties when they submitted to arbitration; the sections of such a decision containing issues agreed upon for arbitration may still be binding on the parties;
- Procedure of the tribunal departing from that agreed upon by the parties, or where no agreement exists, procedure of the tribunal that departs from the law of the State where the arbitration took place; or
- A nonfinal or annulled decision, or one suspended by a competent authority in the State where the decision was made.

Article V(2) of both Conventions provides circumstances under which a decision may be refused by an authority of a State where recognition and execution of the judgment is sought. These include:

- The law of the State does not allow for settlement by arbitration of the subject matter in question; or
- The public policy of the State does not permit recognition or execution of the decision.

ii. Application of Grounds Enumerated in Conventions

No ground set out in either Convention permits nonrecognition on the basis that an arbitral tribunal's decision was wrong on the facts or law. As stated in Born, *International Commercial Arbitration*, *supra*, at 2865:

> It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign arbitral awards in recognition proceedings.

Section 207 of the FAA, 9 U.S.C. § 207, explicitly states that a court "shall," upon application of a party, confirm an award unless one of the grounds quoted *supra* § III.A.7.b.i. is

met. A court is not required to deny recognition even if such grounds are shown – Article V of the New York Convention states that "[r]ecognition and enforcement of the award may be refused" based on the enumerated grounds, not that it must. Born, *International Commercial Arbitration, supra,* at 2722. The same is true of Article 5 of the Panama Convention.

Additionally, Article VI of the New York Convention provides that a court faced with an application for confirmation or recognition "may" stay such proceedings to await the outcome of proceedings to vacate or annul before a competent authority; that is, a court in the jurisdiction in which, or under the law of which, the award was rendered. Article 6 of the Panama Convention contains a similar provision.

In effect, the U.S. court may exercise its discretion to proceed or to adjourn its own proceedings. *See Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004).

Under both Conventions, a court may require the party seeking to stay confirmation proceedings while its application for vacatur or set aside is pending elsewhere to give the other party seeking confirmation "suitable security." New York Convention, art. VI; Panama Convention, art. 6.

iii. Frequently Invoked Grounds

Two lower court decisions illustrate how U.S. courts may apply certain of the more frequently invoked grounds specified in the New York and the Panama Conventions; specifically, the grounds of:

- Public policy
- Insufficient case presentation

Each is discussed in turn below.

iii.1. Contrary to Public Policy

Both the New York Convention, art. V(2)(b), and the Panama Convention, art. 5(2)(b), expressly permit a U.S. court to refuse to confirm an international arbitral award if to do so would be contrary to U.S. public policy.

This ground is narrowly construed – so that arbitral awards may be confirmed and enforced – and thus is seldom invoked successfully. *See*, *e.g.*, *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974) (stating that the public policy exception only applies if "enforcement would violate the forum state's most basic notions of morality and justice").

iii.2. Insufficient Opportunity to Present a Case or Defense

The New York Convention, art. V(1)(b), expressly permits a U.S. court to refuse to confirm an international arbitral award if a party was denied an opportunity to present its case. A similar provision in the Panama Convention, art. 5(1)(b), pertains to denial of the opportunity to present a defense.

In *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992), the court held that an arbitral tribunal had so restricted a party's ability to present its evidence in support of its claim that denial of enforcement was warranted.

iv. Other Grounds

For detailed discussion of judicial applications of other enumerated grounds, see Born, *International Commercial Arbitration*, *supra*, at chapter 25(D)(4).

c. Legal Framework Pertinent to Applications to Vacate International Arbitral Awards

As noted *supra* § III.A.7, actions to vacate international arbitration awards are distinct from actions to confirm or recognize international arbitration awards. The latter actions can be brought in any jurisdiction; in contrast, actions to vacate international arbitration awards can only be properly brought in the country of "primary jurisdiction." This is the country where, or under the law of which, the arbitral award was made. Therefore, U.S. courts may vacate only international awards rendered in the United States or under U.S. procedural law, defined above as "U.S. Convention Awards." For "Foreign Convention Awards," U.S. courts may deny recognition or enforcement pursuant to the standards set forth in Article 5 of the Conventions, as set forth in the section above; however, courts may not technically "vacate" those awards.

Authorities are divided on which chapters of the FAA govern requests to vacate U.S. Convention Awards:

- A majority of the U.S. Courts of Appeals has held that chapter 1 of the FAA governs; specifically, Sections 9-11 of the FAA, 9 U.S.C. §§ 9-11. *E.g.*, *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc*., 126 F.3d 15, 23 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). *See also Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 292 (3d Cir. 2010).

- A minority of such courts, and several commentators, disagree. Identifying congressional intent to maintain consistency of treatment between U.S. and Foreign Convention Awards, these authorities maintain that what governs is chapters 2 and 3 of the FAA, 9 U.S.C. §§ 207, 302, which incorporate the grounds for nonrecognition of international arbitral awards set forth in Articles 5 of the New York and Panama Conventions. *See, e.g.*, *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999); American Law Institute,

Restatement Third, The U.S. Law of International Commercial Arbitration, Tentative Draft No. 2, §§ 4-3 cmt. *c*, 4-11 cmt. *a* (2012).[9]

This issue is also discussed *infra* § III.A.7.d.

i. Time Limit for Vacating an Award under FAA Chapter 1

"Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. As noted *supra* § III.A.7.d.i.3, this section of the FAA also supplies the procedures for service of process of such motion. These procedures vary, based on whether the adverse party is a resident of the district where the award was made.

d. Grounds for Vacating an Award under FAA Chapter 1

As discussed below, federal jurisdictions that apply chapter 1 of the FAA to actions to vacate U.S. Convention Awards look primarily to two sections of the FAA:

- For annulment of an award, to Section 10 of the FAA, 9 U.S.C. § 10
- For correction or modification of an award, to Section 11 of the FAA, 9 U.S.C. § 11

Each is discussed below.

i. Grounds Enumerated in Section 10 of the FAA

Grounds for vacating an award pursuant to Section 10 of the FAA, 9 U.S.C. § 10, include:

- The award was procured by corruption, fraud, or undue means;
- One or more arbitrators were corrupt or unduly partial to one side;
- Arbitrators improperly refused to postpone a hearing or to hear material evidence;
- Arbitrators misbehaved in a way that prejudiced a party's rights; and
- Arbitrators exceeded or imperfectly executed their powers.

ii. Grounds Enumerated in Section 11 of the FAA

Section 11 of the FAA, 9 U.S.C. § 11, provides the following additional grounds for modifying or correcting an award "so as to effect the intent thereof and promote justice between the parties":

[9] On the status of this *Restatement* project by the American Law Institute, see *infra* §§ III.A.8.a, IV.B.1.

- Evident material miscalculation of figures or material mistake in the award's description of a person, thing, or property;

- Arbitrators awarded on a matter not submitted, affecting the merits; and

- Imperfection in form that does not affect the merits.

iii. Potential Unenumerated Ground: Manifest Disregard of the Law

Neither Section 10 nor Section 11 of the FAA expressly permits an award to be vacated on account of any sort of mistake of law; nevertheless, some U.S. courts have vacated awards on the ground that the arbitral tribunal manifestly disregarded the law. As described below, this unenumerated ground emerged out of dictum in a mid-twentieth century Supreme Court decision. It then sustained criticism by commentators and a later Court. Yet it remains somewhat intact, at least in some circuits.

iii.1. Emergence of the "Manifest Disregard" Ground: *Dictum* in *Wilko*

In his opinion for the Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953),[10] which involved a domestic arbitration award, Justice Stanley Reed observed in passing:

> [T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

Some lower courts interpreted this dictum as implying that chapter 1 of the FAA permitted review of arbitral awards on the ground of manifest disregard of the law. *See Gov't of India v. Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989). Another court questioned this reasoning. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

iii.2. Possible Rejection of "Manifest Disregard" Ground: *Hall Street*

Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008), involved a motion to vacate, modify or correct a domestic arbitral award. The Court was asked to determine whether parties to an arbitration agreement might contract to permit judicial review on a ground not mentioned in Sections 9-11 of the FAA, 9 U.S.C. §§ 9-11 – in this case, as stated in the arbitration agreement, the ground of "legal error." 552 U.S. at 579-80. Petitioner relied on the "manifest disregard of law" dictum in *Wilko*, 346 U.S. at 436-37, quoted *supra* § III.A.7.d.iii.1, to argue that review extend beyond the grounds enumerated in the statute.

In his opinion for the Court, Justice David Souter countered that *Wilko* could not bear such weight, and suggested in part that "manifest disregard" might have been "shorthand" for one of the statutorily enumerated grounds. *Hall Street*, 552 U.S. at 585. "[I]t [made] more sense," the Court reasoned, "to see the three provisions, §§ 9-11, as substantiating a national

[10] The Court overruled an unrelated point of law in *Wilko* in a subsequent decision. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588.

iii.3. Current Status of This Ground: Uncertain

The inference that the Court in *Hall Street* had abandoned "manifest disregard of the law" won support from authorities that opposed its application as a separate, unenumerated ground to upset arbitral awards. *See* Born, *International Commercial Arbitration*, *supra*, at 2640. Some courts indeed adopted this inference. *See, e.g.*, *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (drawing this inference in dictum).

But the Supreme Court has indicated that it considers the question still open. In dicta in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010), Justice Samuel A. Alito, Jr., wrote for the Court:

> We do not decide whether '"manifest disregard"' survives our decision in *Hall Street* … as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. . . . Assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow.

Some lower courts considering the issue since the Court's decision in *Hall Street* have continued to recognize the standard – not as a standalone ground, but rather in the form of a "judicial gloss" on the statutorily enumerated grounds. *E.g.*, *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277, 1281, 1283 (9th Cir.), *cert. denied*, 558 U.S. 824 (2009); *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010).

iii.4. "Manifest Disregard" and International Arbitration Awards

Neither the New York Convention nor the Panama Convention recognizes "manifest disregard of the law" as a basis for denying recognition or enforcement of international awards. *See* 9 U.S.C. §§ 207, 302 (implementing New York Convention, art. V, Panama Convention, art. 5); *supra* § III.A.7.d.i.a. Both permit such nonrecognition, however, if a competent court in the country where the award was rendered has vacated the award. New York Convention, art. V(1)(e); Panama Convention, art. 5(1)(e).

Consequently, consider the case of an international arbitration award made in the United States – an award this section calls a U.S. Convention Award. If it were vacated in one U.S. court by reason of "manifest disregard of the law" – applying chapter 1 rather than chapter 2 of the FAA – that or another U.S. court may deny an application seeking enforcement and recognition of the vacated award.

The indirect result is to render the award ineffective on a ground not contained in either of the Conventions that the FAA is supposed to implement. This inconsistency drives the argument, maintained by some commentators and by a minority of courts, that chapter 2 should

govern the standards pertaining to the recognition or nonrecognition of all international arbitration awards, whether made in the United States or overseas, to the exclusion of chapter 1's separate grounds for vacatur. *See supra* § III.A.7.d.i.1.

8. Additional Arbitration Research Resources

Numerous print and online resources may aid research on questions relating to international arbitration.

a. Arbitration *Restatement* Project

The American Law Institute is in the process of completing the *Restatement (Third) of the U.S. Law of International Commercial Arbitration*. The Reporter for this Restatement is Columbia Law Professor George A. Bermann; Associate Reporters are Pepperdine Law Professor Jack J. Coe, University of Kansas Law Professor Christopher R. Drahozal, and Pennsylvania State Law Professor Catherine A. Rogers.

Notwithstanding the title, this publication will be the first *Restatement* on the subject of international commercial arbitration. A Tentative First Draft was approved in 2010, a Tentative Second Draft in 2012, and a Tentative Third Draft in 2013.

Texts of these drafts, as well as other information about the project, may be found at American Law Institute, *Current Projects*, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20 (last visited Mar. 10, 2013).

b. Print Resources

Print resources on international arbitration, other than the draft *Restatement* just described, include:

- Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern & Hunter on International Arbitration* (5th ed. 2009).
- Gary B. Born, *International Commercial Arbitration* (2009).
- Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3d ed. 2010).
- Lucy Reed, Jan Paulsson, and Nigel Blackaby, *Guide to ICSID Arbitration* 179 (2d ed. rev. 2010)

c. Online Resources

Resources on international arbitration available online include:

- S.I. Strong, *International Commercial Arbitration: A Guide for U.S. Judges* (Fed. Judicial Ctr. 2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/$file/strongarbit.pdf.

Recommended citation:[1]

Am. Soc'y Int'l L., "International Law Pertaining to Families and Children," in *Benchbook on International Law* § III.B (Diane Marie Amann ed., 2014), available at www.asil.org/benchbook/family.pdf

---

III.B. International Law Pertaining to Families and Children

Globalization is transforming family law. Matters that once were resolved exclusively under the laws of the fifty U.S. states now may be the subject of international treaties. Provisions in some of those treaties are enforceable in U.S. courts, given that the United States is a treaty party and has enacted implementing legislation or regulations.

This section begins with an overview of international law regarding families and children, particularly as implemented in the United States. It then focuses, *infra* § III.B.2, on the issue most litigated in the federal courts – cross-border child abduction, which is subject both to a civil remedy of prompt return and, in some instances, to punishment as a felony.

1. Overview

International treaties cover a range of issues involving families and children, including:

- Marriage/dissolution of marriage
- Child support/child custody
- Adoption
- Domestic violence/violence against women or children
- Health and education
- Sexual exploitation
- Trafficking[2]
- Labor/hazardous working conditions
- Women's and children's rights

The United States is not a party to all the treaties concerning such issues. For example, the United States is among the few countries in the world that does not belong to either the 1989 Convention on the Rights of the Child[3] or the 1979 Convention on the Elimination of All Forms of

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

[2] The U.S. legal framework that implements international treaties intended to combat the cross-border trafficking of human beings is discussed in another section of this *Benchbook*, *infra* § III.E.3.

[3] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Children's Convention], *available at* http://www.ohchr.org/en/professionalinterest/pages/crc.aspx. This treaty, which entered into force on Sept. 2, 1990, has 193 parties; the United States signed on Feb. 16, 1995, but has not ratified. *See* U.N. Treaty Collection, *Convention on the Rights of the Child*, https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (last visited Mar. 13, 2014). The only other nonparty states are Somalia and South Sudan. *See id*.

Discrimination against Women, both negotiated under the auspices of the United Nations.[4] Those treaties are not directly enforceable in U.S. courts. On occasion, however, the Supreme Court has cited them in the course of interpreting constitutional provisions. *See Graham v. Louisiana*, 560 U.S. 48, 81 (2010) (citing Children's Convention); *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (same); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (citing Women's Convention). *See also supra* § I (discussing the doctrine of treaty non-self-execution and the interpretive practice).

The United States does belong to two treaties supplemental to the Children's Convention:

- 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict[5]

- 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[6]

Criminal prohibitions in these two treaties have been implemented via U.S. legislation. *See* Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2, 122 Stat. 3735, 3735, codified as amended at 18 U.S.C.A. § 2442 (West Supp. 2010) (making the recruitment or use of children under fifteen as soldiers a federal offense punishable by up to life in prison); Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, § 105(c), 117 Stat. 650 (2003), codified at 18 U.S.C. § 2423(c) (2006) (providing that sex tourism by a U.S. citizen or permanent resident is punishable by up to thirty years' imprisonment). Except for a reference to the latter statute's extraterritorial jurisdiction component, *supra* § II.A.3.c, these statutes and treaties are not described further in this edition of the *Benchbook*.[7]

---

[4] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter Women's Convention], *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm. This treaty, which entered into force on Sept. 3, 1981, has 187 states parties; the United States signed on July 17, 1980, but has not ratified. *See* U.N. Treaty Collection, *Convention on the Elimination of All Forms of Discrimination against Women*, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en (last visited Mar. 13, 2014).

[5] 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict, May 25, 2000, S. Treaty Doc. No. 106-37, 2173 U.N.T.S. 222, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx. This treaty, which entered into force on Feb. 12, 2002, has 154 parties. See U.N. Treaty Collection, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en (last visited Mar. 13, 2014). The United States ratified it on Dec. 23, 2002, subject to a declaration and understandings *available at id*.

[6] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, S. Treaty Doc. No. 106-37, 2171 U.N.T.S. 227, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx. This treaty, which entered into force on Jan. 18, 2002, has 166 parties. *See* U.N. Treaty Collection, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en (last visited Mar. 13, 2014). The United States ratified it on Dec. 23, 2002, subject to a reservation and understandings *available id*.

[7] Also omitted from this edition is discussion of child and family issues arising in immigration and asylum litigation.

Nearly two dozen treaties involving child and family issues have been negotiated within the framework of the Hague Conference on Private International Law, an intergovernmental organization founded in 1893.[8] The organization's development and monitoring of such treaties furthers its purpose of promoting "the progressive unification of the rules of private international law" – the traditional term for the conflict-of-laws resolution of disputes between private litigants.[9] Among Hague Conference treaties to which the United States is a party are these two:

- 1980 Hague Convention on Civil Aspects of International Child Abduction[10]

- 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption[11]

Virtually no state or federal decision refers to the second treaty; accordingly, it is not discussed further in this *Benchbook.*

The first treaty, in contrast, concerns a frequently litigated issue: How to remedy the cross-border abduction of a child? Resolution of that question in the United States is discussed in the sections below.

---

[8] *See* Hague Conf. on Private Int'l L., *Areas of Private International Law: International Protection of Children, Family and Property Relations*, http://www.hcch.net/index_en.php?act=text.display&tid=10#family (last visited Mar. 13, 2014); Trevor Buck, Alisdair A. Gillespie, Lynne Rosse & Sarah Sargent, *International Child Law* 67 (2d ed. 2010). Documents often refer to this organization as HCCH, the English-French acronym for Hague Conference-Conférence de la Haye.

[9] Statute of the Hague Convention on Private International Law, art. 1 (entered into force July 1, 1995), *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=29. *See generally* Peter Trooboff & Frederike E.M. Stikkelbroeck, *Reflections on the Hague Conference on Private International Law at 140 – 20 Years Forward*, 25 Hague Ybk. Int'l L. 59 (2013) (publishing commentary on the role of the Hague Conference in relation to other international groups, such as UNICEF).

[10] Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11, 1343 U.N.T.S. 98 [hereinafter Convention or 1980 Hague Child Abduction Convention], *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=24. This treaty, which entered into force on Dec. 1, 1983, has ninety-one parties. *See* Hague Conf. on Private Int'l L., *Status table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Mar. 13, 2014). The treaty entered into force for the United States on July 1, 1988. *Id*. At the time of ratification, the United States attached reservations, discussed *infra* § III.B.3.a.i.

[11] Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-51, 1870 U.N.T.S. 167, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=69. This treaty entered into force on May 1, 1995, and has ninety-three states parties; it entered into force for the United States on April 1, 2008. *See* Hague Conf. on Private Int'l L., *Status table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Mar. 13, 2014). This treaty, which allocates responsibility for adoptions between the two countries involved, was implemented via the Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000), codified at 42 U.S.C. §§ 14901-54 (2006). *See generally* U.S. Dep't of State, *Intercountry Adoption*, http://adoption.state.gov/index.php (last visited Mar.13, 2014) (giving information on adoption from Convention states parties and nonparty states).

2. Cross-Border Abduction of Children

The wrongful taking of children across national borders is regulated by a legal framework that includes an international treaty to which the United States is party, as well as U.S. statutes and regulations, as follows:

- 1980 Hague Convention on Civil Aspects of International Child Abduction[12]
- International Child Abduction Remedies Act of 1988, the statute implementing the 1980 Hague Abduction Convention[13]
- Implementing regulations issued by the U.S. Department of State[14]
- International Parental Kidnapping Crime Act of 1993[15]

The last instrument, which makes cross-border parental kidnapping a federal felony offense and often is reserved for situations not otherwise resoluble, is described *infra* § III.B.4.

The first three instruments pertain to the civil remedy available in U.S. courts: the swift return of the child to his or her habitual place of residence (subject to several enumerated exceptions), in order to restore the *status quo ante* the child's removal. The return remedy often is litigated in U.S. courts; indeed, the Supreme Court has considered aspects of the Hague Abduction Convention in three cases:

- *Abbott v. Abbott*, 560 U.S. 1 (2010), in which the Court construed "rights of custody," a pivotal term in the Convention. *See infra* §§ III.B.3.d, III.B.3.g.ii.2.
- *Chafin v. Chafin*, __ U.S. __, 133 S. Ct. 1017 (2013), in which the Court held that the return of a child to her country of habitual residence, pursuant to a U.S. District Court order issued in Hague Abduction Convention litigation, did not moot a father's appeal of that court order. *See infra* §§ III.B.3.j.ii.
- *Lozano v. Montoya Alvarez*, __ U.S. __, 2014 WL 838515 (Mar. 5, 2014), in which the Court held that a one-year deadline – marking the period during which the return of a child

[12] Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11, 1343 U.N.T.S. 98 [hereinafter Convention or 1980 Hague Abduction Convention], *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=24. This treaty, which entered into force on Dec. 1, 1983, has ninety-one parties. *See* Hague Conf. on Private Int'l L., *Status table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Mar. 13, 2014). The treaty entered into force for the United States on July 1, 1988. *Id*. At the time of ratification, the United States attached reservations, discussed *infra* § III.B.3.a.i.

[13] Pub. L. No. 100-300, 102 Stat. 437 (Apr. 29, 1988), codified as amended at 42 U.S.C. §§ 11601-11 (2006). At times cases are said to concern "the Convention," as shorthand for "the Convention and the implementing laws."

[14] 22 C.F.R §§ 94.1-94.8 (2013) (original version published at 53 Fed. Reg. 23608 (June 23, 1988)).

[15] Pub. L. 103-173, § 2(a), 107 Stat. 1998 (1993), codified as amended at 18 U.S.C. § 1204 (2006).

pursuant to the Hague Abduction Convention is nearly automatic – is not subject to equitable tolling. *See infra* § III.B.3.i.ii.

The rationales of the Supreme Court in these cases – along with selected decisions by lower federal courts respecting both this custody-rights remedy and the access-rights framework – are set forth in the following discussion.

3. Civil Aspects of Cross-Border Child Abduction

Establishing prompt return as an international remedy for the wrongful taking or retention of a child across national borders is the 1980 Hague Convention on Civil Aspects of International Child Abduction.[16] This multilateral treaty is the product of years of negotiations conducted under the auspices of the Hague Conference on Private International Law, the century-old intergovernmental organization that monitors implementation, convenes the International Hague Network of Judges described *infra* § III.B.5.b.ii, and provides information, publications, and model forms respecting the Convention. *See* Hague Conf. on Private Int'l L., *Welcome to the Child Abduction Section*, http://www.hcch.net/index_en.php?act=text.display&tid=21 (last visited Mar. 13, 2014); *supra* § III.B.1.

Countries concluded the Convention in 1980

> [f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody,

and, furthermore,

> [d]esiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access ….

Hague Abduction Convention, preamble; *see also id.*, art. 1, *quoted infra* § III.B.3.c.i.

Among the matters treated in the forty-five articles of the Convention are the return remedy, access rights, and the role of the "Central Authority," which in the United States is handled by the State Department. Each concern is detailed in the sections that follow.

[16] Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11, 1343 U.N.T.S. 98 [hereinafter Convention or 1980 Hague Abduction Convention], *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=24. This treaty, which entered into force on Dec. 1, 1983, has ninety-one parties, called "contracting states." *See* Hague Conf. on Private Int'l L., *Status table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Mar. 13, 2014). The treaty entered into force for the United States on July 1, 1988. *Id.* At the time of ratification, the United States attached reservations, *available at* http://www.hcch.net/index_en.php?act=status.comment&csid=652&disp=resdn, which stipulated that documents must be in English and that the United States would not assume the costs of litigation.

a. Applicability in the United States of the 1980 Hague Child Abduction Convention

The 1980 Hague Abduction Convention has been in effect in the United States since Sept. 1, 1988. *See* Hague Conf. on Private Int'l L., *Status table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Mar. 13, 2014).

The Convention applies whenever both countries involved in the cross-border dispute are states parties – called "contracting states" within the framework of this treaty. For a full account of when the Convention took effect in the ninety-one contracting states, see *id.*

No civil remedy is available if the other country at issue does not have a reciprocal treaty relationship with the United States, either because the country is not a party to the Hague Convention or because the United States has not accepted the country's accession to that Convention. *See* Hague Abduction Convention, art. 38, para. 4, *quoted in Taveras v. Taveras*, 397 F. Supp. 2d 908, 911 (S.D. Ohio 2005) (ruling that the Convention did not apply because the United States had not accepted the accession of the foreign country involved), *aff'd on other grounds sub nom. Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007). A list setting forth the date on which the Convention entered into force between the United States and seventy-two other contracting states may be found at U.S. Dep't of State, *Hague Abduction Convention Country List*, http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html (last visited Mar. 13, 2014)).

If the dispute at issue relates to a country that is not in the requisite treaty relationship with the United States, the federal government may choose to prosecute pursuant to the criminal statute discussed *infra* § III.B.4.

i. U.S. Reservations to Ratification of the Convention: Translation and Fees

When the United States deposited its instrument of ratification on April 29, 1988, it attached reservations[17] requiring that:

- All documents from foreign countries must be translated into English; and
- As a general matter, the United States will not assume the costs of litigation.[18]

[17] For a general discussion of reservations, understandings, and declarations, see *supra* § I.

[18] In full, these reservations stated, with reference to certain Convention articles:

> (1) Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation: All applications, communications and other documents sent to the U.S. Central Authority should be accompanied by their translation into English.
>
> (2) Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program.

See http://www.hcch.net/index_en.php?act=status.comment&csid=652&disp=resdn (last visited Mar. 13, 2014).

On domestic application of the second reservation, see *infra* § III.B.3.j.i.

ii. U.S. Implementing Legislation

Implementing the provisions of the 1980 Hague Abduction Convention in the United States is the International Child Abduction Remedies Act of 1988, Pub. L. No. 100-300, 102 Stat. 437 (Apr. 29, 1988), codified as amended at 42 U.S.C. §§ 11601-11 (2006) and often called by its acronym, ICARA.

This statute establishes jurisdiction and procedures for adjudication of Convention disputes, further defines certain Convention terms, and sets out the data collection, processing, and other implementing roles of various governmental agencies.

iii. U.S. Implementing Regulations

Regulations further implementing this statute initially were published at 53 Fed. Reg. 23608 (June 23, 1988), and now may be found, as amended, at 22 C.F.R §§ 94.1-94.8 (2013).

The regulations first designate the Office of Children's Issues in the State Department's Bureau of Consular Affairs as the "Central Authority," the U.S. agency responsible for working on Hague Abduction Convention matters with counterparts in other countries. *Id.* § 94.2; *see* International Child Abduction Remedies Act, 42 U.S.C. § 11606(a) (providing for the President to designate the U.S. Central Authority).

The regulations then proceed to discuss the Office's functions and procedures for seeking assistance from the Office. *Id.* §§ 94.3-94.8.

b. How Suits under the Hague Abduction Convention Arise in U.S. Courts

U.S. litigation under the Hague Abduction Convention typically begins with the filing of a petition by a parent or other lawful caretaker, often labeled the "left-behind parent." This petitioner typically seeks the return of a child whom the respondent is alleged wrongfully to have removed to or retained in the United States. On the required showing, the court generally will order the child returned to the country where he or she used to live[19] – the state of habitual residence, a term discussed *infra* § III.B.3.g.i.2 – unless the respondent establishes one of the handful of enumerated exceptions to return.

A petitioner also might endeavor to secure access, or visitation, rights. As detailed *infra* § III.B.3.f.i, federal courts routinely rejected such a request on jurisdictional grounds, but a 2013 decision has created a circuit split on the question.

Designated as the "U.S. Central Authority" is the Office of Children's Issues in the State Department's Bureau of Consular Affairs. *See* 22 C.F.R. § 94.2 (2013); *infra* § III.B.3.a.iii.

[19] In disputes of this nature, documents following Convention terminology may refer to the United States as "the requested state" and the foreign country as "the requesting state."

Hague Abduction Convention litigation poses challenges to judges. First, the cases must be resolved within short time frames. In addition, the international nature of the litigation – courts must look both to the federal implementing statute and to Convention provisions that the statute explicitly incorporates – presents an interpretive challenge. These and other matters are discussed below, as follows:

- Prompt adjudication requirement and purposes of litigation
- Interpretation
- Petition of left-behind parent
- Concurrent federal and state jurisdiction
- Federal civil actions for access, or visitation, rights
- Prima facie case for return
- Rights of custody
- Defenses – exceptions to return
- Nature and timing of return remedy

c. Prompt Adjudication Requirement and Purposes of Hague Abduction Convention Litigation

A hallmark of Hague Abduction Convention litigation is the speed with which initial proceedings must occur. As Chief Justice John G. Roberts, Jr., wrote in a recent opinion for the Court:

> Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation.

Chafin v. Chafin, __ U.S. __, __, 133 S. Ct. 1017, 1027 (2013). *See also* Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 Fam. L.Q. 99, 110 (1980-81) (stating, in an article by a member of the U.S. delegation that took part in Convention negotiations, that drafters intended Hague Abduction Convention litigation "to be summary proceedings").

The promptness norm is examined below, by reference to the Convention, the implementing legislation, and case law.

i. Convention Provisions

States parties pledged, in the first paragraph of Article 11 of the Convention, that their countries "shall act expeditiously in proceedings for the return of children." The same article then set a presumptive deadline of six weeks for such proceedings:

> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a

> statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Convention, art. 11, para. 2.

This deadline is intended to serve the Convention's express purposes; specifically:

> *a)* to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> *b)* to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Convention, art. 1; *see also id*., preamble, *quoted supra* § III.B.3.

ii. Implementing Legislation Provisions

Congress endorsed the expressed purposes of the Convention, and the requirement of prompt adjudication, when it enacted implementing legislation. The International Child Abduction Remedies Act, 42 U.S.C. § 11601(a), thus provides:

> The Congress makes the following findings:
>
> > **(1)** The international abduction or wrongful retention of children is harmful to their well-being.
> >
> > **(2)** Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
> >
> > **(3)** International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
> >
> > **(4)** The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

Congress proceeded, by way of the same Act, 42 U.S.C. § 11601(b), to make certain declarations about the interrelation of the Convention and the statute:

> The Congress makes the following declarations:
>
> > **(1)** It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.
> >
> > **(2)** The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.
> >
> > **(3)** In enacting this chapter the Congress recognizes –
> >
> > > **(A)** the international character of the Convention; and
> > >
> > > **(B)** the need for uniform international interpretation of the Convention.
> >
> > **(4)** The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

iii. Case Law

Federal jurisprudence has underscored not only the existence of the promptness norm in Hague Abduction Convention litigation, but also the rationale underlying that norm. By way of example, the U.S. Court of Appeals for the Eleventh Circuit recently wrote, in a judgment issued following remand of the case by the Supreme Court:

> Prompt proceedings are advantageous because: (1) they 'will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child,' and (2) they will allow the jurisdiction of habitual residence to resolve the custody dispute between the parties.

Chafin v. Chafin, ___ F.3d ___, ___, 2013 WL 6654389, at *2 (11th Cir. Dec. 18, 2013) (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1028 (2013), a decision discussed *infra* § III.B.3.j.ii). *Accord Abbott v. Abbott*, 560 U.S. 1, 9 (2010) ("The Convention's central operating feature is the return remedy."); *Danaipour v. McLarey*, 286 F.3d 1, 13 (1st Cir. 2002) ("The Convention establishes a strong presumption favoring return of a wrongfully removed child."); Hague Conf. on Private Int'l L., *Outline: Hague Abduction Convention* 1 (July 2012) (same), *available at* http://www.hcch.net/upload/outline28e.pdf.

d. Interpretation of Hague Abduction Convention Provisions

No provision of the Hague Abduction Convention specifies an interpretive methodology for courts to follow. In this sense, the Convention differs from another treaty to which the United States belongs – the treaty on sales of goods, which expressly requires courts to pay heed "to its international charter and to the need to promote uniformity in its application."[20] That said, the U.S. law implementing the Hague Abduction Convention mandates a similar interpretive approach:

> **(3)** In enacting this chapter the Congress recognizes –
>
> **(A)** the international character of the Convention; and
>
> **(B)** the need for uniform international interpretation of the Convention.

International Child Abduction Remedies Act, 42 U.S.C. § 11601(b), *quoted in full supra* § III.B.3.b.ii. *See also id*. § 11603(d) (stating that a court adjudicating a petition for return "shall decide the case in accordance with the Convention").

The Supreme Court has quoted these subsections of the Act in its initial considerations of Hague Abduction Convention litigation. *Abbott v. Abbott*, 560 U.S. 1, 16 (2010). In *Abbott*, the Court consulted a range of sources in the course of construing a critical Convention term. *See* Linda J. Silberman, *International Decision: Abbott v. Abbott*, 105 Am. J. Int'l L. 108, 110 (2011). *See generally* Hague Conf. on Private Int'l L., "Case Comments and Perspectives," in 17 *Judges' Newsletter on Int'l Child Protection* (2011) (containing comments on the decision in *Abbott* by Justice James Garbolino and Professors Barbara Stark and Peter McEleavy), *available at* http://www.hcch.net/upload/newsletter/JN17_Case_Comments_E.pdf. The Court paid heed to some of the same sources in *Lozano v. Montoya Alvarez*, __ U.S. __, 2014 WL 838515, at *9 (Mar. 5, 2014), and *Chafin v. Chafin*, __ U.S. __, 133 S. Ct. 1017 (2013).

The sections that follow discuss the types of sources cited in these decisions.

i. Supreme Court's Interpretive Methodology

To determine whether a child had been wrongfully taken from a foreign country to the United States, the Supreme Court in *Abbott v. Abbott*, 560 U.S. 1, 9-10 (2010), considered the following sources, in the order listed:

(1) Text of the Convention;

(2) Views of the U.S. Department of State;

[20] U.N. Convention on Contracts for the International Sale of Goods, art. 7(1), Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3, *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf. The entire provision is quoted in full, and the applicable interpretive methodology discussed, in the *Benchbook* chapter on this treaty. *See infra* § III.C.1.d.

(3) Judicial decisions in other contracting states, negotiating history, scholarly commentary, and a report written at the time the Convention was adopted; and

(4) Objects and purposes of the Convention.

The judgment in *Lozano v. Montoya Alvarez*, __ U.S. __, 2014 WL 838515 (Mar. 5, 2014), cited many of the same sources. *See id*. at *7-*8, *10-*11; *see also id*. at *12-*15 (Alito, J., joined by Breyer and Sotomayor, JJ., concurring).

Although the Court did not so mention in either decision, the list includes sources specified in the principal international treaty setting forth rules of treaty interpretation. *See infra* § IV.A.1 (quoting and discussing Vienna Convention on the Law of Treaties, arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://www1.umn.edu/humanrts/instree/viennaconvention.html).

Each interpretive source is discussed in turn below.

i.1. Text of the Convention

"'The interpretation of a treaty, like the interpretation of a statute, begins with its text,'" Justice Kennedy wrote for the Court in *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)); *see also Lozano v. Montoya Alvarez*, __ U.S. __, __, 2014 WL 838515, at *7 (Mar. 5, 2014). In order to construe a Convention term, the Court in *Abbott*, 560 U.S. at 10, first determined the scope of the foreign court order at issue, by reference to the laws of the foreign country and to a description of those laws by an official from the country's Central Authority. *See supra* § III.B.3.a.iii (discussing "Central Authority"). In deciding whether the rights granted in the court order constituted one of the "rights of custody" subject to the Convention's return remedy, the Court in *Abbott* drew on the Convention's own definition of that term. *See* 560 U.S. at 11 (construing Hague Abduction Convention, arts. 3, 5(a)), *quoted infra* §§ III.B.3.g, III.B.3.g.ii.1. Similarly, in *Lozano*, the Court stressed the absence of any textual equitable tolling provision in the course of its decision. __ U.S. __, __, 2014 WL 838515, at *7-*8, *10.

i.2. Views of the U.S. Department of State

As a second-named source, the Court in *Abbott v. Abbott*, 560 U.S. 1, 9, 15 (2010), considered to the views of the Executive Branch; to be specific, the views of the U.S. Department of State, whose Office of Children's Issues has been designated the U.S. Central Authority respecting the Hague Abduction Convention. *See supra* § III.B.3.a.iii.

Justice Kennedy wrote for the Court in *Abbott*: "It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" 560 U.S. at 15 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). Kennedy found "no reason to doubt that this well-established canon of deference is appropriate here," noting that "[t]he Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation

of 'rights of custody,' including the likely reaction of other contracting states and the impact on the State Department's ability to reclaim children abducted from this country." *Id*. at 15.

In *Lozano v. Montoya Alvarez*, __ U.S. __, 2014 WL 838515 (Mar. 5, 2014), the concurring opinion stressed the views of the State Department. *See id*. at *13 (Alito, J., joined by Breyer and Sotomayor, JJ., concurring) (writing that a court retains "equitable discretion" regarding the return remedy). The opinion for the Court by Justice Clarence Thomas considered the issue to which the Department's views pertained "beyond the scope of the question presented," *id*. at *9 n.5.

i.3. Case Law in Other Countries, Negotiating History, Expert Commentary, and the Pérez-Vera Report on the Convention

The opinion for the Court in *Abbott v. Abbott*, 560 U.S. 1, 9-10 (2013), described the third source for interpretation of the Hague Abduction Convention as "decisions ... in courts of other contracting states ..." But its discussion at this juncture ranged more widely, including as well negotiating history, expert commentary, and a report written at the time the Convention was adopted. *See id*. at 16-20. All of these sources – as well as databases where they may be found – are described below.

i.3.a. Decisions of Foreign Courts

With respect to the decisions of foreign courts, Justice Kennedy wrote for the Court in *Abbott v. Abbott* that "the opinions of our sister signatories[21] are entitled to considerable weight." 560 U.S. 1, 16 (2013) (internal quotations, brackets, ellipsis, and citations omitted). He added:

> The principle applies with special force here, for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework.

Id. (quoting International Child Abduction Remedies Act, 42 U.S.C. § 11601(b)(3)(B), *quoted supra* § III.B.c.ii); *see Lozano v. Montoya Alvarez*, __ U.S. __, __, 2014 WL 838515, at *8 (Mar. 5, 2014) (quoting same provision). Kennedy proceeded to examine decisions by courts in Australia, Austria, Britain, Canada, France, Germany, Israel, Scotland, and South Africa. *Id.* at 16-18.

The Court likewise looked to foreign decisions in its later cases arising out of the Hague Abduction Convention. *See Lozano v. Montoya Alvarez*, __ U.S. __, __, 2014 WL 838515, at *8, *10-*11 (Mar. 5, 2014); *id*. at *14 (Alito, J., joined by Breyer and Sotomayor, JJ., concurring). *See also Chafin v. Chafin*, __ U.S. __, __ n.1, 133 S. Ct. 1017, 1024 n.1 (2013) (citing decision of court

[21] To be precise, the United States and other countries that have fully joined the Hague Abduction Convention are not "signatories," but rather "states parties" or, in the parlance of this particular treaty, "contracting states." *See supra* § III.B.3.a. Notwithstanding the contrary use in some U.S. opinions, the term "signatory" is to be used only with reference to countries that have signed but not yet fully joined the treaty. *See supra* § I.B.1.a.i.7.

in Scotland); *id.* at__ n.1, __, 133 S. Ct. at 1029 n.1, 1030 (2013) (Ginsburg, J., joined by Scalia and Breyer, JJ., concurring) (same).

U.S. courts may consult foreign case law through databases such as LexisNexis and Westlaw, which compile decisions from many countries in addition to those from the United States. Another useful source is Trevor Buck, Alisdair A. Gillespie, Lynne Rosse & Sarah Sargent, *International Child Law* 212-42 (2d ed. 2010). Moreover, the Hague Conference on Private International Law maintains a database of decisions under the Hague Abduction Convention. The English-language version of this International Child Abduction Database, known by its acronym INCADAT, is available at http://www.incadat.com/index.cfm?act=text.text&lng=1 (last visited Mar. 13, 2014). INCADAT provides summaries – and sometimes, the full text – of more than a thousand decisions from various national courts as well as international courts operating in regions such as Europe.[22] Decisions may be searched by keyword, legal issue, case name, case number, country, or court.

Respecting the International Hague Network of Judges, aimed at fostering direct judicial communications, see *infra* § III.B.5.b.ii.

i.3.b. Negotiating History

Having discussed foreign court decisions, the Court in *Abbott v. Abbott*, 560 U.S. 1, 19 (2013), then referred to negotiating history, known to international lawyers as *travaux préparatoires*, or preparatory works. To be precise, Justice Kennedy's opinion for the Court referred to comments made by delegates while the Convention was being drafted – comments that may be found in the third volume of *Actes et documents de la Quatorzième session* [*Acts and documents of the Fourteenth Session*] (1980), a bilingual document published in 1982. *See* Hague Conf. on Private Int'l L., *Publications*, http://www.hcch.net/index_en.php?act=publications.details&pid=30 (last visited Feb. 23, 2014).

i.3.c. Expert Commentary

In addition to the 1982 document cited in the section immediately above, the opinion for the Court in *Abbott v. Abbott*, 560 U.S. 1, 18-20 (2010), consulted other publications of the Hague Conference on Private International Law (described *supra* § III.B.1), as well as law review articles.

Among the Hague Conference documents cited was one of the group's guides to good Convention practices. *Abbott*, 560 U.S. at 18 (citing Hague Conf. on Private Int'l L., *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice* (2008)). Other guides were cited in a subsequent Supreme Court opinion. *Chafin v. Chafin*, __ U.S. __, __, 133 S. Ct. 1017, 1028-30 (2013) (Ginsburg, J., joined by Scalia and Breyer, JJ., concurring) (citing Hague Conf. on Private Int'l L., *Guide to Good Practice under the Hague Convention of 25 October 1980*

[22] Notably, the Hague Abduction Convention has been the subject of a number of recent decisions in the European Court of Human Rights. For an overview, see Eur. Ct. Hum. Rts., *Factsheet – International Child Abductions* (Nov. 2013), http://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf.

on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice (2003), *available at* http://www.hcch.net/upload/abdguide_e.pdf; Hague Conf. on Private Int'l L., *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (2010), *available at* http://www.hcch.net/upload/guide28enf-e.pdf). For more information on these guides, as well as others covering implementing and preventive measures, see *infra* § III.B.5.a.ii.

Also cited in *Abbott* was a Hague Conference publication known as the Explanatory Report or the Pérez-Vera Report; it is discussed in the section immediately following.

i.3.d. Pérez-Vera Explanatory Report

As a final matter, Justice Kennedy's opinion for the Court in *Abbott v. Abbott* turned to a document written, at the time the Convention was adopted, by the University of Madrid law professor who served as Reporter to the negotiating commission. 560 U.S. 1, 19-20 (2010) (discussing Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention*, para. 30, at 433, in 3 Hague Conf. on Private Int'l L., *Acts and documents of the Fourteenth Session* (1980) [hereinafter Pérez-Vera Report], *available at* http://www.hcch.net/upload/expl28.pdf). Kennedy cited authorities that identified this Pérez-Vera Report as, on the one hand, an official history providing background on the meaning of Convention terms, and, on the other hand, a document, not officially approved, that at times reflected the author's subjective viewpoint. *See id*. at 19.

This description contrasts with that provided by one scholar:

> Mlle. Elisa Pérez-Vera of Spain, then Professor of International Law at the Université autonome de Madrid, was the Reporter to the Special Commission that negotiated the 1980 Abduction Convention. The Report was prepared from the Reporter's notes and from the procès-verbaux after the Diplomatic Session and, thus, did not have formal approval from the Conference. Nonetheless, the Report has been a significant tool for interpretation since its purpose was to explain the principles that form the basis of the Convention and to offer detailed commentary on its provisions in aid of interpretation of the Convention.

Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1061 n.54 (2005) (citing Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 234 (1999)).

In any event, Justice Kennedy wrote in *Abbott* that the Court "need not decide whether this Report should be given greater weight than a scholarly commentary," for the reason that the Pérez-Vera Report was "fully consistent with" the majority's conclusion. 560 U.S. at 19-20. The dissent also cited the report, even as it arrived at a contrary conclusion. *See id*. at 24, 28, 30, 38, 40, 46 (Stevens, J., joined by Thomas and Breyer, JJ., dissenting).

In the second Supreme Court case arising out of Hague Abduction Convention litigation, a separate opinion once again consulted the Pérez-Vera Report. *Chafin v. Chafin*, __ U.S. __, __, 133 S. Ct. 1017, 1029 (2013) (Ginsburg, J., joined by Scalia and Breyer, JJ.). Federal appellate courts have done so as well. *See, e.g.*, *Reyes v. Jeffcoat*, __ Fed. Appx. __, __, 2013 WL 6698603, at *3 (4th Cir. Dec. 20, 2013); *Guzzo v. Cristofano*, 719 F.3d 100, 106 & n.4 (2d Cir. 2013).

i.4. Objects and Purposes of the Convention

Turning finally to the Convention's "objects and purposes," the opinion for the Court in *Abbott v. Abbott* stated:

> The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. Ordering a return remedy does not alter the existing allocation of custody rights, but does allow the courts of the home country to decide what is in the child's best interests. It is the Convention's premise that courts in contracting states will make this determination in a responsible manner.

560 U.S. 1, 20 (2010) (citing Hague Abduction Convention, preamble, *quoted supra* § III.B.3; *id.*, art. 19). *See also* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005) ("The 'return' remedy can be thought of as a 'provisional' remedy because it does not dispose of the merits of the custody case – additional proceedings on the merits of the custody dispute are contemplated in the State of the child's habitual residence once the child is returned there."), *quoted in Chafin v. Chafin*, __ U.S. __, __, 133 S. Ct. 1017, 1029 n.1 (2013) (Ginsburg, J., joined by Scalia and Breyer, JJ., concurring).

In *Lozano v. Montoya Alvarez*, __ U.S. __, 2014 WL 838515 (Mar. 5, 2014), the Court did not use the term "objects and purposes" expressly. Rather, it examined the "objectives" of the Convention in arriving at its decision. *Id*. at *3, *11.

Having discussed the interpretive challenges posed by Hague Abduction Convention litigation, this chapter now sets out how federal courts in fact adjudicate such cases.

e. Left-Behind Parent's Petition

Judicial proceedings seeking the return of a child begin with the left-behind parent's filing of a petition in a court located in the same place as the child. The International Child Abduction Remedies Act of 1988, 42 U.S.C. § 11603(b), provides:

> Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such

> action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

The Act further specifies which courts have jurisdiction, as discussed in the section immediately following.

f. Concurrent Federal and State Jurisdiction

U.S. implementing legislation makes clear that Hague Abduction Convention matters may be litigated both in federal courts and in state courts:

> The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

International Child Abduction Remedies Act of 1988, 42 U.S.C. §§ 11603(a) (2006). The respondent, however, may seek to remove the matter to federal court pursuant to 28 U.S.C. § 1441 (2006).

A Westlaw search in January 2014 retrieved nearly 300 reported state decisions mentioning the Convention.

This edition of the *Benchbook* concentrates on the application of the Convention and implementing legislation in federal courts; full discussion of state courts' application of the Convention awaits a future edition.

i. Federal Civil Actions for Access, or Visitation, Rights: Circuit Split

In *Abbott v. Abbott*, 560 U.S. 1, 9 (2010), the Supreme Court wrote:

> The Convention also recognizes 'rights of access,' but offers no return remedy for a breach of those rights.

The opinion cited two provisions of the Hague Abduction Convention. First cited was Article 5(b), which states:

> For purposes of this Convention –
> ….
> *b)* "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

See Abbott, 560 U.S. at 9; *see also infra* § III.B.3.i.ii.1 (quoting and discussing definition of "right of custody" in Article 5(a) of the Convention). Also cited in the above-quoted passage in *Abbott* was Article 21 of the Convention, the first paragraph of which states:

> An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.[23]

Until recently, federal courts rejected petitions seeking relief based on denials of access, or visitation, rights. But a circuit split recently emerged on this issue. One appellate court dismissed an access claim as recently as 2006, but in 2013 another appellate court disagreed, and thus affirmed the visitation order issued by the court below. The conflicting decisions are:

- *Cantor v. Cohen*, 442 F.3d 196 (4th Cir. 2006). In this two-to-one panel decision, the U.S. Court of Appeals for the Fourth Circuit rejected a request for federal relief based on a violation of access rights. The court acknowledged that the International Child Abduction Remedies Act of 1988, 42 U.S.C. § 11603(b), *quoted* in full *supra* § III.B.3.e, mentions "arrangements for organizing or securing the effective exercise of rights of access to a child" among the reasons that a person may file a civil suit "under the Convention … in any court which has jurisdiction …." Interpreting that provision to refer only to State Department handling of access claims, the panel majority relied on: congressional declarations in the same Act, 42 U.S.C. § 11601, *quoted supra* § III.B.3.c.ii, which limited the court's power to rights available under the Convention; Article 21 of the Convention, *quoted* above; legislative history; rulings by five district courts; and the longstanding practice of leaving most child custody matters in state rather than federal courts. *See Cantor*, 442 F.3d at 199-205. The court noted that its ruling did not preclude the left-behind parent's either from filing an action in state court or from filing a claim with the State Department, acting as the Central Authority for the Convention. *See id.* at 206.

- *Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013). In this opinion, a Second Circuit panel unanimously held that left-behind parents may file civil suits seeking access rights in federal as well as in a state court. *Id.* at 371-74. The court grounded its holding in the text of 42 U.S.C. § 11603; in particular, Section 11603(a), *quoted* in full *supra* § III.B.3.f, Section 11603(b), *quoted* in full *supra* § III.B.3.e, and Section 11603(e)(1)(B), which specifies that "in the case of an action for arrangements for organizing or securing the effective exercise of rights of access," proof "that the petitioner has such rights" must be established by a preponderance of evidence. *See Ozaltin*, 708 F.3d at 372.

[23] Article 21 of the Convention continues, in its final two paragraphs, as follows:

> The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
>
> The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and security respect for the conditions to which the exercise of these rights may be subject.

A court presented with an access-rights claim will study with care the above opinions and the authorities on which they rely.

g. Petitioner's Prima Facie Case for Return

Petitioner establishes a prima facie case of wrongful removal through proof by a preponderance of evidence that:

(1) At the time of the alleged wrongful removal or retention, the child's habitual residence was in a foreign country;[24]

(2) Respondent's removal or retention of the child in the United States breached the petitioner's rights of custody under the foreign country's law; and

(3) At the time of the alleged wrongful removal or retention, petitioner was exercising rights of custody with respect to the child.

See Hirst v. Tiberghien, 947 F. Supp. 2d 578, 593 (D.S.C. 2013) (quoting the Convention's definition of wrongful removal, and then setting forth a version of the above three elements of petitioner's prima facie case "under the Hague Convention and ICARA," citing *inter alia* the Supreme Court's description of the legal framework in *Abbott v. Abbott*, 560 U.S. 1, 7-9 (2010), and the appellate court's listing of elements in *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001)). To similar effect, see, *e.g.*, *Chafin v. Chafin*, ___ F.3d ___, ___, 2013 WL 6654389, at *2 (11th Cir. Dec. 18, 2013); *Gitter v. Gitter*, 396 F.3d 124, 130-31 (2d Cir. 2005), *cited in* In re *D.T.J.*, 956 F.Supp.2d 523, __, 2013 WL 3866636, at *2 (S.D.N.Y. July 26, 2013); Hague Conf. on Private Int'l L., *Outline: Hague Abduction Convention* 2 (July 2012), *available at* http://www.hcch.net/upload/outline28e.pdf; Barbara Stark, *The Internationalization of American Family Law*, 24 J. Am. Acad. Matrimonial L. 467, 470-71 (2012).

This formulation tracks both the International Child Abduction Remedies Act and provisions of the Hague Abduction Convention that the Act incorporates. To be precise, 42 U.S.C. § 11603(e)(1) states:

> A petitioner shall establish by a preponderance of the evidence –
>
> > **(A)** in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; …[25]

[24] As explained *supra* § III.B.3.a, the foreign country must have a reciprocal Convention relationship with the United States.

[25] The Act further specifies that

> the terms 'wrongful removal or retention' and 'wrongfully removed or retained', as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child ....

42 U.S.C. § 11603(f)(2).

See also id. § 11603(d) (providing that courts "shall decide the case in accordance with the Convention"), *discussed supra* § III.B.3.d. Setting forth the definition of wrongful removal or retention is Article 3 of the Hague Abduction Convention, which provides in full:

> The removal or the retention of a child is to be considered wrongful where –
>
> *a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> *b)* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Evaluation of the prima facie case thus depends on interpretation of terms such as:

- Child
- Habitual residence
- Rights of custody
- Exercise of custody rights

Each is discussed below.

i. First Element of Prima Facie Case: Child's Habitual Residence

The first element of the petitioner's prima facie case, detailed *supra* § III.B.3.g, requires a court to determine what – for purposes of Hague Abduction Convention litigation – is a "child" and what is a "habitual residence." Each is discussed in turn below.

i.1. Child

The return remedy is available only with respect to children fifteen years old or younger. Article 4 of the Convention, incorporated domestically via 42 U.S.C. § 11603(e)(1), states:

> The Convention shall cease to apply when the child attains the age of 16 years.

i.2. Habitual Residence

Whether the left-behind parent's rights of custody have been breached is to be determined according to the law of the country where "the child was habitually resident immediately before the removal or retention." Hague Abduction Convention, art. 3(a); 42 U.S.C. § 11603(e)(1) (incorporating the Convention's meaning of wrongful removal). This principle is repeated in Article 4, which states: "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody ... rights."

Neither the Convention nor federal implementing laws define "habitual residence." *See* Barbara Stark, *The Internationalization of American Family Law*, 24 J. Am. Acad. Matrimonial L. 467, 471 (2012). Given the statutory mandate in favor of uniform interpretation, courts should endeavor to apply an "autonomous" interpretation; that is, one tailored to the Convention, and not simply borrowed from a domestic legal source. *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1065 (2005).

In particular, the Convention term "habitual residence" is not to be equated with a term used in other U.S. family law contexts, "domicile." *See Valenzuela v. Michel*, 736 F.3d 1173, 1176 (9th Cir. 2013) (quoting Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention*, para. 66, at 433, in 3 Hague Conf. on Private Int'l L., *Acts and documents of the Fourteenth Session* (1980), *available at* http://www.hcch.net/upload/expl28.pdf, *discussed supra* § III.B.3.d.i.3.d). *See also, e.g., Kijowska v. Haines*, 463 F.3d 583, 586-87 (7th Cir. 2006).

i.2.a. Federal Courts' Different Approaches to Habitual Residence Question

In the United States, most federal courts have agreed that determination of a child's habitual residence before the challenged removal or retention entails a fact-intensive inquiry. *See Nicolson v. Pappalardo*, 605 F.3d 100, 104 & n.2 (1st Cir. 2010) (citing cases)). Looking to the interpretive sources and methodology discussed *supra* § III.B.3.d, U.S. Courts of Appeals have divided on how to structure this inquiry:

- Several circuits have emphasized parental intent. This approach asks, first, whether the parents shared an intention to abandon the previous habitual residence; and second, whether the change in location has lasted long enough for the child to have become acclimatized. *See Nicolson v. Pappalardo*, 605 F.3d 100, 104-05 (1st Cir. 2010); *Koch v. Koch*, 450 F.3d 703, 715 (7th Cir. 2006); *Gitter v. Gitter*, 396 F.3d 124, 132-34 (2d Cir. 2005); *Ruiz v. Tenorio*, 392 F.3d 1247, 1253 (11th Cir. 2004); *Mozes v. Mozes*, 239 F.3d 1067, 1975-78 (9th Cir. 2001).

- Other circuits have placed focus on the degree of settlement, in a determination that takes into greater account the child's experience and perspectives. *See Stern v. Stern*, 639 F.3d 449, 451-53 (8th Cir. 2011); *Robert v. Tesson*, 507 F.3d 981, 988-945 (6th Cir. 2007); *Karkkainen v. Kovalchuck*, 445 F.3d 280, 292-98 (3d Cir. 2006).

ii. Second Element of Prima Facie Case: Breach of Custody Rights

The second element of the petitioner's prima facie case requires proof by a preponderance of evidence that respondent's removal to or retention of the child in the United States breached petitioner's rights of custody under the laws of the country of habitual residence. *See supra* § III.B.3.g. This element derives from the first prong of the Convention's definition of wrongful removal or retention; that prong states:

> The removal or the retention of a child is to be considered wrongful where –
>
> *a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention ....

Hague Abduction Convention, art. 3(a) (incorporated domestically via 42 U.S.C. § 11603(e)(1)); *see supra* § III.B.g (quoting Article 3 of the Convention in full).

The sections immediately following discuss how federal courts have determined custody rights in Hague Abduction Convention litigation; in particular, how the Supreme Court addressed whether an order labeled "*ne exeat*" in some countries is, or is not, a right of custody.

ii.1. Rights of Custody

The last paragraph of Article 3 of the Hague Abduction Convention makes clear that "rights of custody" – rights the breach of which may trigger the remedy of prompt return – "may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." A subsequent article further defines the term, as follows:

> For purposes of this Convention –
>
> *a)* "rights of custody" shall include rights relating to the care of the person and, in particular, the right to determine the child's place of residence ....

Hague Abduction Convention, art. 5 (incorporated domestically via 42 U.S.C. § 11603(e)(1)); *see supra* § III.B.3.f.i (discussing *id.*, art. 5(b), which defines rights of access).

In light of these articles, one scholar has observed: "Notwithstanding the reference to 'Abduction' in its title, the Convention covers violations of custody rights more generally ...." Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1053 (2005).

In particular, the Article 3 reference to "operation of law" means that "rights of custody" may arise even if there is no formal custody order. *See id.* at 1054. Thus the U.S. Court of Appeals,

taking care not to "impos[e] American legal concepts on another legal culture," concluded that Mexican law accorded custody rights under the Convention to an unwed father. *Whallon v. Lynn*, 230 F.3d 450, 456-59 (1st Cir. 2000).

ii.1.a. Determining Foreign Law

Determining whether a right asserted is a "right of custody" for purposes of the Convention necessarily entails consideration of a foreign country's laws. Pursuant to Article 14 of the Hague Abduction Convention, a court

> may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

In turn, Rule 44.1 of the Federal Rules of Civil Procedure, entitled "Determining Foreign Law," states:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Courts have accepted as evidence of foreign law, *inter alia*:

- A letter from an official in the foreign country's Central Authority. *Abbott v. Abbott*, 560 U.S. 1, 10 (2010), *discussed supra* § III.B.d.i. *See* Hague Abduction Convention, art. 7(e) (stating that Central Authorities shall "provide information of a general character as to the law of their State in connection with the application of the Convention").

- An affidavit from an attorney in the foreign country. *Whallon v. Lynn*, 230 F.3d 450, 458 (1st Cir. 2000)

ii.2. *Ne Exeat* Orders and "Rights of Custody"

Frequently litigated is whether a "*ne exeat* order," used in some civil law countries, confers a "right of custody" for purposes of the Hague Abduction Convention. One federal court recently elaborated on this term:

> A *ne exeat* clause is 'An equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction. A *ne exeat* is often issued to prohibit a person from removing a child or property from the jurisdiction....' Black's Law Dictionary (8th ed. 2004). In the United States, these orders are

> routinely referred to as 'restraining orders,' which prohibit removal of a child from a state or local jurisdiction.

East Sussex Children Services v. Morris, 919 F. Supp. 2d 721, 730 n.9 (N.D. W.Va. 2013).

The sections immediately following discuss, first, the Supreme Court's ruling on such an order, and second, federal decisions in the wake of that ruling.

ii.2.a. Supreme Court in *Abbott*: *Ne Exeat* Order Requiring Both Parents' Consent Is a "Right of Custody"

In its first-ever consideration of the Hague Abduction Convention, the Supreme Court held that the "*ne exeat* right" at issue – the left-behind parent's "authority to consent before the other parent may take the child to another country" – constitutes one of the "rights of custody" the breach of which may trigger the civil remedy of prompt return. *Abbott v. Abbott*, 560 U.S. 1, 5, 15 (2010). The opinion for the Court by Justice Anthony M. Kennedy, in which five other Justices joined, resolved a circuit split on the question. *Id*. at 4, 7.

The decision in *Abbott* turned on a court order issued in Chile, the foreign country where the child and his parents resided from his birth in 1995 until 2005, when his mother removed him to the United States and soon filed for divorce. *See id*. at 5-6. Examining the Chilean law, Kennedy's opinion for the Court construed the *ne exeat* order to grant both parents a "right to determine the child's place of residence"[26] – a right expressly included among the "rights of custody" protected in the Convention. *See id*. at 10-12 (quoting Hague Abduction Convention, arts. 3, 5(a), *quoted infra* §§ III.B.3.g, III.B.3.g.ii.i). The Court then followed the additional interpretive steps detailed *supra* § III.B.3.d, eventually ruling, by a six-to-three vote, that a breach of the *ne exeat* right was subject to the Convention's return remedy. *See Abbott*, 560 U.S. at 9-22.

ii.2.b. Federal *Ne Exeat* Decisions Post-*Abbott*

As described in the section immediately above, the decision in *Abbott v. Abbott*, 560 U.S. 1 (2010), held that a *ne exeat* order granting both parents the right to determine the country where their child lives constituted a custody right protected by the Hague Abduction Convention. One scholar observed that the opinion did not resolve all issues respecting such orders:

---

[26] "Place" means "country," the Supreme Court wrote:

> The phrase 'place of residence' encompasses the child's country of residence, especially in light of the Convention's explicit purpose to prevent wrongful removal across international borders.

Abbott, 560 U.S. at 11 (citing Hague Abduction Convention, preamble). *Cf.* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1055 (2005) (writing in the context of exceptions, discussed *infra* § III.B.3.h, that "[r]eturn of the child is to the country – not to a particular parent").

> There can, of course, be various types of *ne exeat* rights, and the majority left open the question of whether a *ne exeat* restriction would be considered a 'right of custody' in the absence of a requirement of parental consent.

Linda J. Silberman, *International Decision: Abbott v. Abbott*, 105 Am. J. Int'l L. 108, 111 (2011).

Federal decisions issued since the Court's judgment in *Abbott* have held that absent such a consent requirement, a court order does not grant "rights of custody" within the meaning of the Convention. *See, e.g.*, *White v. White*, 718 F.3d 300, 304 n.4 (4th Cir. 2013) (ruling against a father who relied on a court order that did not require his consent, on ground that in the cases on which the father sought to rely, "the petitioning parent had a *ne exeat* right to *prohibit* the other parent from removing the child") (emphasis in original)); *Radu v. Toader*, 463 Fed. Appx. 29, 31 (2d Cir. 2011) (construing a court order according to the laws of the foreign country where it was issued, and holding that the father possessed "no *ne exeat* right" to block the mother from changing their child's place of residence). *Cf. Chafin v. Chafin*, __ U.S. __, __ n.2, 133 S. Ct. 1017, 1025 n.2 (2013) (noting that a *ne exeat* order constrained only one, not both, parents).

Indeed, notwithstanding the passage block-quoted above, there is a post-*Abbott* tendency to equate the term "*ne exeat*" with a requirement of both parent's consent. *See, e.g.*, *Font Paulus* ex rel. *P.F.V. v. Vittini Cordero*, 2012 WL 2524772, at *4 (M.D. Pa., June 29, 2012).

iii. Third Element of Prima Facie Case: Exercise of Custody Rights

The third and final element of the prima facie case requires proof by a preponderance of evidence that when the removal or retention occurred, petitioner was exercising rights of custody with respect to the child. *See supra* § III.B.3.g. This element derives from the second prong of the Convention's definition of wrongful removal or retention; that prong states:

> The removal or the retention of a child is to be considered wrongful where –
> ....
> *b)* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Hague Abduction Convention, art. 3(b) (incorporated domestically via 42 U.S.C. § 11603(e)(1)); *see supra* § III.B.3.g (quoting Article 3 of the Convention in full). The Convention makes clear that if the left-behind parent "was not actually exercising the custody rights at the time of removal or retention," the court need not return the child. Hague Abduction Convention, art. 13(a); *see infra* § III.B.3.h.ii (discussing defenses; that is, exceptions to return).

In the United States, federal courts have tended to interpret this element of the prima facie case "liberally"; that is, in favor of the left-behind parent. The quoted word is drawn from this oft-cited passage, in which a federal appellate court took note of the international character of Convention terms:

> Enforcement of the Convention should not to be made dependent on the creation of a common law definition of 'exercise.' The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.

Friedrich v. Friedrich, 78 F.3d 1060, 1065 (6th Cir. 1996), *quoted in*, e.g. *Baxter v. Baxter*, 423 F.3d 363, 370 (3d Cir. 2005); *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 345 (5th Cir. 2004). *See infra* § III.B.3.d (discussing interpretative methodology).

h. Defenses: Exceptions to Return

If the petitioner establishes all the elements of the prima facie case detailed *supra* § III.B.3.g, return is generally appropriate, within the bounds of time-contingent provisions detailed *infra* § III.B.3.i. Nevertheless, a court has the discretion to refuse to order the child's return if the respondent establishes one of the exceptions to return enumerated in the Hague Abduction Convention.[27]

Pursuant to the U.S. implementing legislation, the respondent must adduce proof by preponderance of evidence in order to prevail on two of the enumerated exceptions; specifically, that the:

(1) Petitioner consented to or acquiesced in the removal or retention; or

(2) Child objects to return and is of sufficient age and maturity to do so.

See International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(B) (incorporating Hague Abduction Convention, arts. 13(a), 13 para. 2, *quoted infra* §§ III.B.3.h.ii, III.B.3.h.iii).[28]

In contrast, the respondent must adduce clear and convincing evidence in order to prevail on two other enumerated exceptions; specifically, that return would:

(3) Expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation; or

(4) Contravene human rights deemed fundamental in the United States.

---

[27] *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1055 (2005) (stating with regard to the Article 13(b) "grave risk" exception, discussed *infra* § III.B.h.iv, that the provision "does not mandate non-return").

[28] This subsection of the International Child Remedies Abduction Act, 42 U.S.C. § 11603(e)(2)(B), also imposes the preponderance of evidence burden with respect to a respondent's claim that the removed "child is now settled in its new environment" – a potential ground for refusing return, if the petition was filed more than a year after the date of the contested removal or retention. Hague Abduction Convention, art. 12. This means of avoiding the return of the child is addressed in the *Benchbook* section entitled "Nature and Timing of the Return Remedy," *infra* § III.B.3.i.

See International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A) (incorporating Hague Abduction Convention, arts. 13(b), 20, *quoted infra* §§ III.B.3.h.iv, III.B.3.h.v).

In determining all but the last of the four exceptions above, the Convention specifies that the court

> shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Hague Abduction Convention, art. 13 (final paragraph). *See supra* § III.B.3.a.iii (discussing "Central Authority").

i. Narrow Construction of Exceptions

As a general rule, "numerous interpretations of the Convention caution that courts must narrowly interpret the exceptions lest they swallow the rule of return." *Asvesta v. Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009); *see Acosta v. Acosta*, 725 F.3d 868, 875 (8th Cir. 2013); *Nicolson v. Pappalardo*, 605 F.3d 100, 105 (1st Cir. 2010); *Baran v. Beaty*, 526 F.3d 1340, 1345 (11th Cir. 2008); *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 271 (3d Cir. 2007); *de Silva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996). This interpretation of the Hague Abduction Convention comports with the International Child Remedies Abduction Act, in which Congress found that wrongfully removed children should "be promptly returned unless one of the narrow exceptions set forth in the Convention applies." 42 U.S.C. § 11601(a)(4), *quoted in Blondin v. Dubois*, 238 F.3d 153, 156 (2d Cir. 2001).

With that rule of construction in mind, each of the four exceptions listed *supra* § III.B.3.h is discussed in turn below.

ii. Exception Based on Petitioner's Consent or Acquiescence

Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(B), proof by a preponderance of evidence that the petitioner consented to or acquiesced in the child's removal constitutes an exception to return. This statutory provision expressly incorporates Article 13(a) of the Hague Abduction Convention, which states that a court

> is not bound to order the return of the child if the person, institution or body which opposes its return establishes that –
>
> *a)* the person, institution or body having the care of the person of the child ... had consented to or subsequently acquiesced in the removal or retention ....[29]

[29] Omitted from this quote is an alternative factor, that the petitioner "was not actually exercising the custody rights at the time of removal or retention." Hague Abduction Convention, art. 13(a). This ground for refusal of return is discussed within the context of the petitioner's prima facie case *supra* § III.B.3.g.iii.

Evaluating assertions of this exception in the United States, courts have considered evidence of statements and conduct in order to determine the left-behind parent's intent before the removal or retention of the child. *See Nicolson v. Pappalardo*, 605 F.3d 100 (1st Cir. 2010); *Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005); *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 793-94 (9th Cir. 2001).

Evidence that the left-behind parent agreed to let the child stay in the United States with the other parent, without specifying a time limit on the stay, was held to amount to consent or acquiescence. In re *Kim*, 404 F. Supp. 2d 495, 516-17 (S.D.N.Y. 2005). In contrast, evidence that a left-behind parent placed conditions on the child's removal to the United States, but the other parent disregarded those conditions, will defeat an assertion of this exception. *Tsai-Yi Yang v. Fu-Chiang Tsui*, 2006 WL 2466095, at *14 (W.D. Pa. Aug. 25, 2006), *aff'd on other grounds*, 499 F.3d 259, 271 (3d Cir. 2007).

iii. Exception Based on Child's Objection

Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(B), proof by a preponderance of evidence that the child, when sufficiently mature, objects to return constitutes an exception to return. This statutory provision expressly incorporates the middle paragraph of Article 13 of the Hague Abduction Convention, which states that a court

> may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

The provision applies to a child fifteen years and younger, given that the Convention does not cover children who have reached their sixteenth birthday. *See supra* § III.B.3.g.i.1 (quoting Convention, art. 4).

A report prepared when the 1980 Hague Abduction Convention was adopted explained the rationale behind this provision:

> [T]he fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will.

Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention*, para. 30, at 433, in 3 Hague Conf. on Private Int'l L., *Acts and documents of the Fourteenth Session* (1980), available at http://www.hcch.net/upload/expl28.pdf, *discussed supra* § III.B.3.d.i.3.d. *See, e.g.*, In re *D.T.J.*, 956 F. Supp. 2d 523, __2013 WL 3866636, at *13-*16 (S.D.N.Y., July 26, 2013) (following "several hours" of conversation with child described, *id*. at *8, as "just a few weeks shy of 15 years old," ruling that her objections constituted an independent ground for nonreturn).

Notwithstanding this statement, a number of federal courts have ordered return despite objections from children in their midteens. *E.g.*, *England v. England*, 234 F.3d 268, 272-73 (5th

Cir. 2000) (holding, by a vote of two to one, that a thirteen-year-old child who had "four mothers in twelve years" and took medication for an attention deficit disorder did not meet the maturity standard); *Trudrung v. Trudrung*, 686 F. Supp. 2d 570, 576-79 (M.D.N.C. 2010) (concluding after an *in camera* examination that a fifteen-and-a-half-year-old child was of sufficient age and maturity to register his objections, yet ordering return nevertheless); *Barrera Casimiro v. Pineda Chavez*, 2006 WL 2938713, at *5-*7 (N.D. Ga. 2006) (ruling, after hearing in-chambers testimony from a fifteen-year-old child, in the presence of her guardian *ad litem*, that the child was "mature and intelligent," yet ordering return based on other factors).

Indeed, research indicates that regardless of the child's age, the respondent parent seldom prevails if this is the only exception that he or she has asserted in his or her defense. One federal decision attributed what it called "a demonstrated disinclination among courts to defer to a child's objection as a basis to deny a petition" to a variety of factors, including the:

- Rule of narrow construction discussed *supra* § III.B.3.h.i;
- Frequency with which examination reveals that the child simply prefers the United States, rather than truly objecting to the other country; and
- Fact that denying return undercuts the Hague Abduction Convention's purpose, "to preserve the status quo of the 'habitual residence' rather than to reward the wrongful retention."

Trudrung, 686 F. Supp. 2d at 578-79 (internal quotations and citations omitted).

iv. Exception Based on Grave Risk of Harm

Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A), proof by clear and convincing evidence that return would expose the child to a grave risk of harm constitutes an exception to return. This statutory provision expressly incorporates Article 13(b) of the Hague Abduction Convention, which states:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> *b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Note that the inquiry focuses on the country to which the child would be returned; courts concerned about a left-behind parent will examine child-protective measures that may be put in place in the country of return. *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1073-79 (2005)

(discussing cases, and stressing, on page 1074 that "the obligation of the State to which the child is abducted is the remedy of return, usually to the country of habitual residence, and not to the left-behind parent").

Key terms in Article 13(b), "grave risk" and "intolerable situation," are discussed below.

iv.1. Defining "Grave Risk" and "Intolerable Situation"

No definition of "grave risk" or "intolerable situation" appears either in the Convention or in the implementing legislation.

Federal courts have construed "grave risk" to apply to situations in which the:

- "[P]otential harm to the child" is "severe, and the level of risk and danger" is "very high." *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013), *quoted in West v. Dobrev*, 735 F.3d 921, 931 (10th Cir. 2013).

- "[C]hild faces a real risk of being hurt, physically or psychologically, as a result of repatriation" – but not to "those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences." *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001), *quoted in Baxter v. Baxter*, 423 F.3d 363, 373 (3d Cir. 2005).

In interpreting "intolerable situation," meanwhile, courts have consulted the views of the U.S. Department of State, designated the country's Central Authority on Convention matters. *E.g.*, *Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008); *Baxter v. Baxter*, 423 F.3d 363, 373 n.7 (3d Cir. 2005). *See supra* §§ III.B.3.a.iii, III.B.3.d.i.2 (discussing, respectively, the State Department's role as Central Authority and courts' use of State Department views in interpreting Hague Abduction Convention).

iv.2. Federal Adjudication of Grave Risk Exception

Courts frequently have concluded that the high threshold of the Article 13(b) exception – a threshold created by words like "grave" and "intolerable," by the statutory requirement of proof by clear and convincing evidence, and by the overall rule that Convention exceptions be narrowly construed. *E.g.*, *West v. Dobrev*, 735 F.3d 921, 931 (10th Cir. 2013) (holding that a proffered psychologist's letter recounting a young child's nonspecific account of "what may or may not amount to child abuse"); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067-68 (6th Cir. 1996) (determining that the grave risk threshold was not established by evidence of "nothing more than *adjustment* problems that would attend the relocation") (emphasis in original).

Nevertheless, courts have accepted the grave risk exception in the following circumstances:

(1) Return would place the child in "a zone of war, famine, or disease"; or

(2) "[I]n cases of serious abuse or neglect, or extraordinary emotional dependence," on return, "the country of habitual residence for whatever reason may be incapable or unwilling to give the child adequate protection."[30]

West, 735 F.3d at 931 n.8; *see Baxter v. Baxter*, 423 F.3d 363, 373 (3d Cir. 2005) (same); *Blondin v. Dubois*, 238 F.3d 153, 163 (2d Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (same). *Cf.* Jeremy D. Morley, *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers* 167 (Am. Bar Ass'n 2012) (citing these two fact patterns, and adding, "[h]owever, there is no bright-line definition of grave risk beyond these extreme examples").

Denying return based on the second circumstance, the U.S. Court of Appeals for the Seventh Circuit wrote that a "court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody." *Van De Sande v. Van De Sande*, 431 F.3d 567, 571 (7th Cir. 2005) (refusing return). *See Baran v. Beaty*, 526 F.3d 1340, 1348 (11th Cir. 2008) (upholding district court's refusal to return); *Simcox v. Simcox*, 511 F.3d 594, 609-11 (6th Cir. 2007) (rejecting order of district court as insufficient to protect children on return). *See also supra* § III.B.3.h.iv (noting that a requested state's obligation to return pertains to the requesting state, and not to the left-behind parent).

Additional federal appellate decisions denying return on this ground include: *Danaipour v. McLarey*, 286 F.3d 1 (1st Cir. 2002); *Walsh v. Walsh*, 221 F.3d 204, 219-20 (1st Cir. 2000), *cert. denied*, 531 U.S. 1159 (2001).

iv.3. Whether Proof of Harm to Parent Satisfies Grave Risk Exception

By its terms, the exception under review concerns "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Abduction Convention, art. 13(b), *quoted in full supra* § III.B.h.iv. Federal appellate courts have split on whether the exception applies absent evidence of harm to the specific child, as opposed to the child's parent, caregiver, or other family member. Specifically, courts have held:

[30] One scholar explained the rationale behind the second prong:

> [T]he Convention is quite clear that this defense should not serve as a pretext for inquiring into the merits of the custody issue and is not to be equated with a 'best interests of the child' standard. Return of the child is to the country – not to a particular parent – and thus only if return would somehow expose a child to serious harm because the court in that country cannot provide sufficient protection should the defense be satisfied.

Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1055 (2005).

- On the one hand, that evidence of harm to the child's parent or sibling is insufficient to establish the Article 13(b) exception. *E.g.*, *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 376-77 (8th Cir. 1995); *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000).

- On the other hand, that proof one parent had beaten the other in front of the child's siblings, along with other evidence of violence and law-breaking, did establish the grave risk exception. *Walsh v. Walsh*, 221 F.3d 204, 219-20 (1st Cir. 2000).

Some courts have skirted this divide. For example, the Eleventh Circuit in *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008), cited evidence that a child's father had abused the pregnant mother, thus putting the unborn child "in harm's way," and that the father had verbally abused the mother in the newborn child's presence, and thus affirmed a finding of grave risk. The court's reasoning appeared to turn on the term "risk"; it stressed that the issue was not whether the child "had previously been physically or psychologically harmed," but rather whether return "would expose him to a present grave risk of physical or psychological harm, or otherwise place him in an intolerable situation." *Id*. *See also Simcox v. Simcox*, 511 F.3d 594, 609 (6th Cir. 2007).

iv.4. Additional Resources on the Grave Risk Exception

Respecting a newly launched project on the grave risk exception, intended as an aid to judges, see *infra* § III.B.5.b.ii.

v. Exception Based on Contravention of Fundamental Human Rights Principles

Pursuant to the International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A), proof by clear and convincing evidence that return would run counter to human rights principles deemed fundamental in the United States constitutes an exception to return. This statutory provision expressly incorporates Article 20 of the Hague Abduction Convention, which states that return

> may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Research revealed no federal decision declining to return the child on this ground. Indeed, the U.S. Court of Appeals for the Second Circuit wrote in 2013:

> We note that this defense has yet to be used by a federal court to deny a petition for repatriation.

Souratgar v. Lee, 720 F.3d 96, 108 (2d Cir. 2013) (citing James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 85 (Fed. Judicial Ctr. 2012)), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf. In keeping with this trend, the Second Circuit in *Souratgar* rebuffed an assertion of this exception. *See id*. at

108-09 (concluding that the court below "did not err in rejecting" the contention that the existence of Islamic courts in a foreign country, to which the child would be returned if the challenged court order were given effect, meant that adjudication of the custody dispute in that country would violate fundamental due process principles).

i. Nature and Timing of the Return Remedy

Subject to consideration of the exceptions discussed *supra* § III.B.3.h, return of the child is required for any petition filed within a year of a wrongful removal. To be precise, the first paragraph of Article 12 of the Convention states:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

A different rule applies after the lapse of one year, as stated in the second paragraph of Article 12:[31]

> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.[32]

These provisions raise a number of issues, among them:

- When proceedings commence;
- Whether equitable tolling applies to the time period; and
- How to determine whether the child is settled in his or her new environment.

Each is discussed in turn below.

---

[31] The final paragraph applies when a child alleged to have been removed to the United States is transported to another country:

> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

1980 Hague Abduction Convention, art. 12, para. 3.

[32] The final paragraph of this article states:

> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Hague Abduction Convention, art. 12, para. 4.

i. Commencement of Proceedings

As quoted in the section immediately above, prompt return is mandatory if "the commencement of proceedings" occurred within a year of the removal or retention; if that time period was exceeded, however, return may be avoided by application of the additional exception discussed *infra* § III.B.i.iii. U.S. implementing legislation equates "commencement of proceedings" with the filing of the requisite petition, discussed *supra* § III.B.3.e. *See* International Child Abduction Remedies Act, 42 U.S.C. § 11603(f)(3).

ii. No Equitable Tolling

Neither the Hague Abduction Convention nor the U.S. implementing statute addresses whether the one-year time period discussed in the sections above should be subject to equitable tolling when, for example, concealment of the child by the taking parent precluded the left-behind parents from filing the petition in a timely fashion. In *Lozano v. Montoya Alvarez*, __ U.S. __, 2014 WL 838515 (Mar. 5, 2014), the Supreme Court interpreted the Convention and implementing legislation to bar such tolling. *See supra* III.B.3.d. A concurrence maintained that judges retain "equitable discretion" to grant or deny return at any time in Convention proceedings. *Lozano*, __ U.S. at __, 2014 WL 838515, at *12-*15 (Alito, J., joined by Breyer and Sotomayor, JJ., concurring); *cf. id*. at *9 n.5 (stating that the question was not presented in the case at bar). *See also infra* III.B.3.i.iii.2.

iii. Whether Child Is Settled in New Environment

Even if the petition was filed more than a year after the date of wrongful removal or retention, return is appropriate if the respondent fails to establish one of the enumerated exceptions discussed *supra* § III.B.3.h – unless, that is, the respondent proves by a preponderance of evidence that the child has become settled. *See* 42 U.S.C. § 11603(e)(2)(B). This statutory provision expressly incorporates Article 12 of the Convention, the middle paragraph of which provides:

> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

As with many other terms, neither the Convention nor the U.S. implementing legislation defines what it means for a child to be "settled" in his or her "new environment." A number of federal courts have given weight to an interpretation put forward by the U.S. Department of State, designated the country's Central Authority on Convention matters, *see supra* § III.B.3.a.iii; to be precise, courts have quoted the following passage:

> To this end, nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof.

U.S. Dep't of State, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494, 10509 (1986), *quoted in, e.g.*, *Lozano v. Alvarez*, 697 F.3d 41, 56 (2d Cir. 2012), *aff'd sub nom. Lozano v. Montoya Alvarez*, __ U.S. __, 2014 WL 838515 (Mar. 5, 2014), *discussed infra* § III.B.3.i.ii; In re *B. Del C.S.B.*, 559 F.3d 999, 1003 (9th Cir. 2009). *See supra* § III.B.3.d.i.2 (discussing use of State Department views in interpreting Hague Abduction Convention).

Furthermore, federal courts have articulated an array of factors to be taken into account in determining whether the "now settled" exception has been met. Factors include, but are not limited to:

- Age of the child
- Stability of the child's residence in the new environment
- Presence or absence of regular attendance at school or day care
- Presence or absence of regular attendance at a religious establishment
- Degree to which the child has friends and relatives in the new environment

See In re *D.T.J.*, 956 F. Supp. 2d 523, __, 2013 WL 3866636, at *8 (S.D.N.Y., July 26, 2013) (setting forth a version of the list above, quoting *In re Koc*, 181 F. Supp. 2d 136, 152 (E.D.N.Y. 2001)) *See also* James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 69 (Fed. Judicial Ctr. 2012) (setting forth additional factors in elaboration of the stability issue, and citing cases in support), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf.

As have others, the court in *D.T.J.* decided whether the child was sufficiently settled based on its analysis of all factors in combination. *See* 956 F. Supp. 2d at __, 2013 WL 3866636, at *8-*14.

iii.1. Immigration Status

Two U.S. Courts of Appeals have rejected the contention that the absence of lawful immigration status precludes holding that a child is "now settled" in the United States for purposes of Article 12 of the Convention. *Lozano v. Alvarez*, 697 F.3d 41, 57 (2d Cir. 2012), *aff'd on other ground sub nom. Lozano v. Montoya Alvarez*, __ U.S. __, 2014 WL 838515 (Mar. 5, 2014); In re *B. Del C.S.B.*, 559 F.3d 999, 1001-02 (9th Cir. 2009). The Second Circuit explained:

> While courts have consistently found immigration status to be a factor when deciding whether a child is settled, no court has held it to be singularly dispositive.

Lozano, 697 F.3d 57; *Demaj v. Sakaj*, 2013 WL 1131418, at *22-*23 (D. Conn. Mar. 18, 2013) (following *Lozano*); *Aranda v. Serna*, 911 F. Supp. 2d 601, 614 (M.D. Tenn., 2013) (same). *Accord* In re *D.T.J.*, 956 F. Supp. 2d 523, __, 2013 WL 3866636, at *11-*13 (S.D.N.Y., July 26, 2013) (considering immigration status as just one factor pursuant to *Lozano*, ruling that the factor cut in favor of return, but that on the whole, factors compelled conclusion that child was "settled" and should not be returned).

iii.2. Discretion of the Court

As noted *supra* III.B.3.i.ii, concurring Justices in *Lozano v. Montoya Alvarez* stated that judges retain "equitable discretion" to grant or deny return at any time in Convention proceedings. __ U.S. __, __, 2014 WL 838515 at *12-*15 (Mar. 5, 2014) (Alito, J., joined by Breyer and Sotomayor, JJ., concurring). The Court's majority considered the question not to have been presented. *See id*. at *9 n.5. The position of the concurrence is consistent with that of other authorities. *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1055 (2005) ("Even when a child is found to be so settled, the authorities appear to have discretion to order return.") (citing Elisa Pérez-Vera, *Explanatory Report on the 1980 Child Abduction Convention* 426, 460, in 3 Hague Conf. on Private Int'l L., *Acts and documents of the Fourteenth Session* (1980), *available at* http://www.hcch.net/upload/expl28.pdf), *discussed supra* § III.B.3.d.i.3.d).

j. Final Civil Remedy Considerations

Final considerations respecting Hague Abduction Convention litigation include issues relating to fees and appeals. Each is discussed in turn below.

i. Fees in Civil Remedy Proceedings

The International Child Abduction Remedies Act, 42 U.S.C. § 11607(b), states that travel, counsel, and court costs are petitioner's responsibility, unless the court orders the child's return, in which case the court shall order respondent to pay reasonable expenses of that nature. This provision tracks a U.S. reservation to ratification of the Hague Abduction Convention, quoted *supra* § III.B.3.a.i. Decisions applying the provision include:

- *Aldinger v. Segler*, 157 Fed. Appx. 317 (1st Cir. 2005) (reducing fee request as excessive)
- *Cuellar v. Joyce*, 603 F.3d 1142 (9th Cir. 2010) (approving fee request)

ii. Appeal of District Court Order: Question of Mootness

The return of a child to a foreign country, pursuant to a U.S. District Court order in Hague Abduction Convention litigation, does not preclude appeal of that order. *Chafin v. Chafin*, __ U.S. __, 133 S. Ct. 1017, 1028 (2013). In so ruling, the Supreme Court explained in *Chafin*:

> The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties' respective claims.

Id.; *see id.* at 1023-24 (describing dispute over return order and order that father pay mother $94,000 in fees). On remand, the U.S. Court of Appeals for the Eleventh Circuit affirmed the return order on the ground that the finding below, with regard to the child's place of habitual residence, was not clearly erroneous. *Chafin v. Chafin*, ___ F.3d ___, ___, 2013 WL 6654389, at *2 (11th Cir. Dec. 18, 2013).

Having concluded discussion of the civil return remedy, this chapter now turns to a criminal sanction made available by a federal statute.

4. Criminal Aspects of Cross-Border Child Abduction: Federal Prosecution

In the United States, parental child abduction may be subject not only to the civil return remedy discussed *supra* § III.B.3, but also to felony prosecution. The federal criminal sanction for the cross-border abduction of a child by a parent first was enacted in 1993, via the International Parental Kidnapping Crime Act, Pub. L. 103-173, § 2(a), 107 Stat. 1998, codified as amended at 18 U.S.C. § 1204 (2006).

The ensuing sections discuss this statute, as follows:

- Interrelation of U.S. civil and criminal laws respecting child abduction
- Text of the International Parental Kidnapping Crime Act
- Elements of the offense
- Defenses
- Penalties

The Supreme Court has not reviewed any case arising out of this 1993 Act. This discussion relies on jurisprudence in the lower federal courts and other authorities.

a. Interrelation of the United States' Civil and Criminal Laws on Child Abduction

Numerous sources indicate that the federal criminal sanction for child abduction is intended to complement the civil return remedy.

According to a legislative report on H.R. 3378, the bill that would become the International Parental Kidnapping Act, in 1993 parental child abduction was a crime in all fifty states of the United States, but it was not a federal offense. H. Rep. 103-390, 103d Cong., 1st Sess., at 2 (Nov. 20, 1993). The report maintained that only the enactment of a federal criminal prohibition would "in international practice provide an adequate basis for effective pursuit and extradition." *Id.*

The report recognized that the Hague Convention on the Civil Aspects of International Child Abduction and federal implementing laws, discussed *supra* § III.B.3, provided a civil remedy for many cross-border abductions. It noted, however, that as of 1993 many countries had not ratified the Convention, "thus leaving individual countries to take whatever legal unilateral action they can to obtain the return of abducted children." H. Rep. 103-390, *supra*, at 3. (On the countries now party to the Convention, see *supra* § III.B.3.a.)

Section 2(b) of the 1993 Act, Pub. L. 103-373, set forth "the sense of the Congress" that the Hague Abduction Convention "should be the option of first choice for a parent who seeks the return of a child who has been removed from the parent." The phrase was repeated in the Presidential statement issued when the bill was signed into law.[33]

Congress' intent that the criminal sanction should complement the federal civil remedies also is reflected in the text of the statute: 18 U.S.C. § 1204(d) expressly provides that the 1993 Act "does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980."

A Justice Department guide stresses that "[t]he return of internationally kidnapped children is often settled through negotiation," particularly when both countries involved are states parties to the 1980 Hague Abduction Convention. U.S. Dep't of Justice, *Citizens' Guide to U.S. Federal Law on International Parental Kidnapping*, http://www.justice.gov/criminal/ceos/citizensguide/citizensguide_parentalkidnapping.html (last visited Mar. 13, 2014).

Despite these statements of preference for civil resolution, the fact that a child was returned pursuant to the Hague Abduction Convention has been held not to preclude prosecution under the International Parental Kidnapping Crime Act. *United States v. Ventre*, 338 F.3d 1047, 1048-49, 1052 (9th Cir.) (affirming a conviction in such an instance, on the ground that criminal prosecution "does not detract from" the Convention's civil remedial framework, and thus does not violate 18 U.S.C. § 1204(d)), *cert. denied*, 540 U.S. 1085 (2003).[34] *See* "Instruction 42-16 The Indictment

---

[33] The statement read in full:

> H.R. 3378 recognizes that the international community has created a mechanism to promote the resolution of international parental kidnapping by civil means. This mechanism is the Hague Convention on the Civil Aspects of International Child Abduction. H.R. 3378 reflects the Congress' awareness that the Hague Convention has resulted in the return of many children and the Congress' desire to ensure that the creation of a Federal child abduction felony offense does not and should not interfere with the Convention's continued successful operation.
>
> This Act expresses the sense of the Congress that proceedings under the Hague Convention, where available, should be the "option of first choice" for the left-behind parent. H.R. 3378 should be read and used in a manner consistent with the Congress' strong expressed preference for resolving these difficult cases, if at all possible, through civil remedies.

William J. Clinton, *Statement on Signing the International Parental Kidnapping Crime Act of 1993* (Dec. 2, 1993), 29 WEEKLY COMP. PRES. DOC. 2493 (1993).

[34] Discussing the interrelation of civil and criminal remedies at an international meeting the same year that the International Parental Kidnapping Crime Act took effect, experts affirmed the preference for the civil remedy, although several "experts recognized that criminal proceedings might be appropriate where the crime went further than simple abduction." Hague Conf. on Private Int'l L., *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention (18-21 January 1993)*, *reprinted at* 33 I.L.M. 225, 249 (1994), *cited in* James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 98 & n.376 (Fed. Judicial Ctr. 2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf.

and the Statute," in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013) (discussing *Ventre* in commentary following instruction), *available in* Lexis. *Cf.* International Child Abduction Remedies Act of 1988, 42 U.S.C. § 11603 (providing, in statute described *supra* § III.B.3.a.ii, that civil remedy is "not exclusive").

b. Text of the International Parental Kidnapping Crime Act

Codified as amended at 18 U.S.C. § 1204 (2006), the International Parental Kidnapping Crime Act of 1993 states in full:

> **(a)** Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.
>
> **(b)** As used in this section—
>
> > **(1)** the term "child" means a person who has not attained the age of 16 years; and
> >
> > **(2)** the term "parental rights", with respect to a child, means the right to physical custody of the child—
> >
> > > **(A)** whether joint or sole (and includes visiting rights); and
> > >
> > > **(B)** whether arising by operation of law, court order, or legally binding agreement of the parties.
>
> **(c)** It shall be an affirmative defense under this section that—
>
> > **(1)** the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;
> >
> > **(2)** the defendant was fleeing an incidence or pattern of domestic violence; or
> >
> > **(3)** the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

> **(d)** This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

Discussed in turn below are the elements of the offense, defenses, and penalties.

c. Elements of the Parental Kidnapping Offense

To secure conviction under the International Parental Kidnapping Act, the prosecution must prove beyond a reasonable doubt three elements; specifically, that the:

- Child previously had been in the United States;
- Defendant either
  - Took the child out of the United States; or
  - Kept the child from returning to the United States from another country; and
- Defendant acted with the intent to obstruct the left-behind parent's lawful exercise of parental rights.

See "Instruction 42-17 Elements of the Offense," in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), *available in* Lexis, *cited in United States v. Miller*, 626 F.3d 682, 687 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 379 (2011). *See also United States v. Huong Thi Kim Ly*, 798 F. Supp. 2d 467, 473 (E.D.N.Y. 2011) (listing same three elements), *aff'd*, 507 Fed. Appx. 12 (2d Cir. 2013).

Aspects of each of these three elements are discussed in turn below.

i. "Child"

By the terms of the statute, quoted in full *supra* § III.B.4.b, the child must not yet have reached his or her sixteenth birthday at the time of removal from the United States. *See* 18 U.S.C. § 1204(b)(1); "Instruction 42-19 Second Element – Taking Child From United States," in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), *available in* Lexis.

ii. Removal or Retention of Child

The offense "is complete as soon as a child is removed from the United States or retained outside the United States with an intent to obstruct the law"; the subsequent return of the child does not preclude prosecution. *United States v. Dallah*, 192 Fed. Appx. 725, 728 n.3 (10th Cir. 2006).

iii. Intent to Obstruct Parental Rights

Analysis of the third statutory element, that the defendant acted with the intent to obstruct the left-behind parent's lawful exercise of parental rights, has included determination of two components:

- What constitutes the requisite intent; and
- What are "parental rights" within the meaning of 18 U.S.C. § 1204.

Each is discussed in turn below.

iii.1. Requisite Intent

In *United States v. Sardana*, 101 Fed. Appx. 851, 854 (2d Cir.), *cert. denied*, 543 U.S. 959 (2004), the U.S. Court of Appeals for the Second Circuit held that the requisite intent to obstruct was established by proof that a defendant father removed his child to a country other than the United States because he expected that the latter country would accord the left-behind mother fewer rights than she enjoyed in the United States. The Second Circuit further held that the defendant's post-removal initiation of custody proceedings in the foreign country was not a defense to prosecution under the U.S. statute. *Id*.

As long as the evidence at trial supports an inference that the defendant acted with the requisite statutory intent, proof that a defendant also had other intentions presents no bar to prosecution. *See United States v. Shabban*, 612 F.3d 693, 696 (D.C. Cir. 2010) (rejecting the defendant's argument that the removal of his child from the United States was justified because his "intention was to place the child in an environment" where the child "could improve his speech by hearing only one language").[35]

A district court wrote that the requisite intent to obstruct may exist even if the defendant's conduct did not amount to a violation of family law:

> [W]henever a parent with physical custody rights is unwillingly cut off from her child, that parent's rights to physical custody are 'obstructed.'

United States v. Homaune, 898 F. Supp. 2d 153, 162 (D.D.C. 2012).

---

[35] In *Shabban*, jurors had received the following instruction, which the defendant did not challenge on appeal:

> '[Y]ou may infer the defendant's intent from the surrounding circumstances. You may consider any statement made or acts done or omitted by the defendant [a]nd all other facts and circumstances received in evidence which indicate the defendant's intent. You may infer, but are not required to, that a person intended the natural and probabl[e] consequences of acts knowingly done or omitted.'

612 F.3d at 696 n.2 (quoting trial transcript). A pattern instruction may be found at "Instruction 42-20 Third Element – Intent to Obstruct Parental Rights," in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), *available in* Lexis.

iii.2. "Parental Rights"

The 1993 Act, quoted in full *supra* § III.B.4.b, defines "parental rights" as "the right to physical custody of the child." 18 U.S.C. § 1204(b)(2). This right to physical custody may be "joint or sole (and includes visiting rights)." *Id.* § 1204(b)(2)(A). The right may "aris[e] by operation of law, court order, or legal binding agreement of the parties." *Id.* § 1204(b)(2)(B).

Given that family law is largely adjudicated in state courts, the statutory term "parental rights" may "be determined by reference to state law ...." H. Rep. 103-390, *supra*, at 4, *quoted in U.S. v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 45 (1st Cir.), *cert. denied*, 543 U.S. 856 (2004). *See also United States v. Sardana*, 101 Fed. Appx. 851, 853-54 (2d Cir.), *cert. denied*, 543 U.S. 959 (2004).

Nevertheless, a defendant may be convicted under the federal criminal statute even if the state that has accorded parental rights has not made the violation of those rights a crime. *Fazal-Ur-Raheman-Fazal*, 355 F.3d at 45-46 (affirming father's conviction for removing children from the United States notwithstanding mother's right of custody by operation of state law).

iv. Rights-Holder Other Than a Parent

A person other than a parent has "parental rights" under the statutory definition if, by applicable law, that person enjoys custodial or visiting rights. *See United States v. Alahmad*, 211 F.3d 538, 541 (10th Cir. 2000) (holding that the Act applied to a defendant who had removed a child from the United States in contravention of visiting rights accorded the child's grandmother by state court order), *cert. denied*, 531 U.S. 1080 (2001).

d. Defenses

As discussed below, the 1993 Act enumerates three affirmative defenses; additionally, defendants have attempted to assert defenses not stated in the Act.

i. Enumerated Affirmative Defenses

The International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2006), explicitly provides:

> **(c)** It shall be an affirmative defense under this section that—
>
> > **(1)** the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act[36] and was in effect at the time of the offense;

[36] The Uniform Child Custody Jurisdiction and Enforcement Act (1997) – text *available at* http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf – was promulgated by the

> **(2)** the defendant was fleeing an incidence or pattern of domestic violence; or
>
> **(3)** the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

Only two reported cases have mentioned a defendant's assertion of one of these statutory defenses. The earlier reported case stated only that "[t]he jury rejected those defenses." *United States v. Miller*, 626 F.3d 682, 687 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 379 (2011). The later reported case, which granted a new trial based on a faulty jury charge respecting the domestic violence defense, is discussed in the section immediately following.

For further discussion of the other two statutory defenses, see "Instruction 42-21 Affirmative Defense – Acting Under Valid Court Order" and "Instruction 42-23 Affirmative Defense – Circumstances Beyond Defendant's Control," in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), *available in* Lexis.

i.1. Domestic Violence

The second affirmative defense enumerated in the 1993 Act applies when "the defendant was fleeing an incidence or pattern of domestic violence." 18 U.S.C. § 1204(c)(2).

In *United States v. Huong Thi Kim Ly*, 798 F. Supp. 2d 467, 480 (E.D.N.Y. 2011), the court granted a motion for a new trial, finding error in its own rejection of a proffered supplemental jury instruction that would have "advised the jury that domestic violence involves more than physical injury, including emotional and sexual violence." The U.S. Court of Appeals for the Second Circuit affirmed on the ground that "failure to explain the term 'domestic violence' to the jury could well have prejudiced the defense." *United States v. Huong Thi Kim Ly*, 507 Fed. Appx. 12, 13 (2d Cir. 2013).[37] But the appellate court cautioned:

National Conference of Commissioners on Uniform State Laws, a group now known as the Uniform Law Commission. *See* Uniform L. Comm'n, *Acts: Uniform Child Custody Jurisdiction and Enforcement Act*, http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (last visited Mar. 13, 2014). In 2013, the Commission approved amendments to this uniform law, but it has not presented those amendments for enactment within the United States. *See* Uniform L. Comm'n, *Acts: Child Custody Jurisdiction and Enforcement Act (2013)*, http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act%20%282013%29 (last visited Mar. 13, 2014).

[37] A pattern jury instruction does not define this term, either. *See* "Instruction 42-22 Affirmative Defense – Flight from Domestic Violence," in 2-42 *Modern Federal Jury Instructions – Criminal* § 42.03 (2013), *available in* Lexis.

> It is by no means clear to us that Congress intended by § 1204 to make a spouse's flight from purely emotional abuse (such as, calling one's spouse 'stupid,' for example), unaccompanied by any incidence or threat of physical force, a defense to kidnapping.

Id. at n.1. The Second Circuit declined to decide the question, however, and research retrieved no further reported opinions on the matter.

ii. Other Defenses

Courts generally have turned aside assertions of defenses other than those enumerated in the Act, *quoted supra* § III.B.4.d. Rejected were defenses alleging that the other parent was unfit, as well as defenses based on constitutional provisions.

ii.1. Rejected Defense Impugning the Left-Behind Parent

Courts have refused to entertain defenses based on the asserted unfitness of the left-behind parent.

The U.S. Court of Appeals for the Second Circuit ruled that the defendant could not rely on a defense of grave risk to the child – a defense enumerated in the 1980 Hague Abduction Convention,[38] but not in the 1993 International Parental Kidnapping Crime Act. *United States v. Amer*, 110 F.3d 873, 880-82 (2d Cir.), *cert. denied*, 522 U.S. 904 (1997). Citing this holding in a subsequent case, the same court wrote that although evidence of unfitness might have a bearing on custody proceedings, such evidence did not justify the defendant father's removal of a child from the United States "in order to obstruct his wife's exercise of parental rights." *United States v. Sardana*, 101 Fed. Appx. 851, 855 (2d Cir.), *cert. denied*, 543 U.S. 959 (2004).

ii.2. Rejected Defenses Based on the U.S. Constitution

Numerous constitutional provisions have been asserted as defenses to prosecution under the International Parental Kidnapping Crime Act; research has revealed no such assertion that prevailed, however. Examples of rejected defenses are discussed below (omitted is any discussion of vagueness and overbreadth challenges, all of which were rejected based on domestic jurisprudential reasoning).

ii.2.a. Foreign Commerce Clause

The decision in *United States v. Cummings*, 281 F.3d 1046 (9th Cir.), *cert. denied*, 537 U.S. 895 (2002), affirmed a wrongful-retention conviction under the Act notwithstanding the defendant's argument that his prosecution violated the Foreign Commerce Clause, the constitutional provision that authorizes "Congress [t]o regulate Commerce with foreign Nations." U.S. Const., art. I, § 8[3]. The Ninth Circuit reasoned in *Cummings* that a wrongfully retained child

[38] *See supra* § III.B.h.iv (discussing the grave risk exception set out in Article 13(b) of the Hague Abduction Convention).

both has traveled via foreign commerce and is hindered from traveling via foreign commerce back to the United States. 281 F.3d at 1048-51. *See also United States v. Homaune*, 898 F. Supp. 2d 153, 159-60 (D.D.C. 2012) (applying a similar rationale to deny a motion to dismiss based on the same asserted defense); *United States v. Shahani-Jahromi*, 286 F. Supp. 2d 723, 734-36 (E.D. Va. 2003) (same).

ii.2.b. Free Exercise of Religion

A father's assertion that his conviction under the Act violated the Free Exercise Clause of the First Amendment was rejected in *United States v. Amer*, 110 F.3d 873 (2d Cir.), *cert. denied*, 522 U.S. 904 (1997). The court in *Amer* reasoned that the Act is neutral, does not target religious beliefs, and is aimed at the harm caused without concern for the absence or presence of a religious motive. *Id.* at 879 (applying a plain error standard because the issue had not been raised below).

ii.2.c. Equal Protection

Opinions rejecting defenses grounded in the equal protection component of the Fifth Amendment include:

- *United States v. Alahmad*, 211 F.3d 538, 541-52 (10th Cir. 2000), *cert. denied*, 531 U.S. 1080 (2001), in which a federal appellate court sustained, under a rational-basis scrutiny, Colorado's decision to protect visitation rights shared by parents and grandparents "more forcefully" than it did rights held solely by grandparents.

- *United States v. Fazal*, 203 F. Supp. 2d 33, 35 (D. Mass. 2002), in which a federal district court upheld the International Parental Kidnapping Crime Act as "a rational tool" for assuring a federal remedy for the wrongful removal of children, even when the child is removed to a country not party to the 1980 Hague Abduction Convention, discussed *supra* § III.B.3.a.

e. Penalties

A person convicted under the International Parental Kidnapping Crime Act may be punished by fines and up to three years in prison. 18 U.S.C. § 1204(a). Sentences upheld by appellate courts have included:

- Three years in prison and a year of supervised release. *United States v. Dallah*, 192 Fed. Appx. 725, 726-31 (10th Cir. 2006).

- Two years in prison, plus "a one-year term of supervised release with the special condition that he effect the return of the abducted children to the United States." *United States v. Amer*, 110 F.3d 873, 876 (2d Cir.), *cert. denied*, 522 U.S. 904 (1997); *see id*. at 882-85.

- An order that the defendant pay the left-behind mother restitution of more than $14,000, the amount it cost her both to litigate a civil contempt proceeding in state court and to file,

pursuant to the 1980 Hague Abduction Convention, a return petition in a foreign country's court. *United States v. Cummings*, 281 F.3d 1046, 1051-55 (9th Cir.), *cert. denied*, 537 U.S. 895 (2002). *See United States v. Homaune*, 918 F. Supp. 2d 7 (D.D.C. 2013) (ordering restitution for similar costs).

- Five months in prison, plus five months of home detention. *United States v. Sardana*, 101 Fed. Appx. 851, 853, 855 (2d Cir.), *cert. denied*, 543 U.S. 959 (2004).

5. Research Resources

Many resources are available for additional research on cross-border legal matters involving families and children, as described below. For a general overview of all international law research and interpretive resources, see *infra* § IV.

a. Print Resources

Print resources respecting the 1980 Hague Abduction Convention, as well as other aspects of international law respecting children and families, include:

- Trevor Buck, Alisdair A. Gillespie, Lynne Rosse & Sarah Sargent, *International Child Law* 67 (2d ed. 2010)

- James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* (Fed. Judicial Ctr. 2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf

- Jeremy D. Morley, *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers* (Am. Bar Ass'n 2012)

- Rhona Schuz, *The Hague Child Abduction Convention* (2013)

- Barbara Stark, *International Family Law: An Introduction* (2005)

b. Online Resources

As described below, primary online resources respecting the Hague Abduction Convention include the websites of the State Department, the U.S. agency charged with overseeing domestic application of the Convention, and of the Hague Conference, the intergovernmental organization that monitors the Convention.

i. State Department's Office of Children's Issues

In the United States, the Office of Children's Issues in the State Department's Bureau of Consular Affairs is responsible for implementing the 1980 Hague Abduction Convention. *See* 22 C.F.R. §§ 94.2-94.8 (2013) (describing functions of this office, designated the United States"

"Central Authority" respecting the Convention); *supra* § III.B.3.a.iii. The department's online information may be found at:

- U.S. Dep't of State, *International Parental Child Abduction*, http://travel.state.gov/content/childabduction/english.html (last visited Mar. 13, 2014).

ii. Hague Conference on Private International Law

Hague Conference on Private International Law (http://www.hcch.net/index_en.php), a century-old intergovernmental organization, promulgated the Hague Abduction Convention and other multilateral treaties respecting family law matters. *See supra* § III.B.1. Its website contains a trove of texts, reports, and other information. Of particular use may be these Hague Conference webpages:

- *Welcome to the Child Abduction Section*, http://www.hcch.net/index_en.php?act=text.display&tid=21 (last visited Mar. 13, 2014), a portal to the organization's documents on the Convention;

- *Welcome to INCADAT*, http://www.incadat.com/index.cfm?act=text.text&lng=1 (last visited Mar. 13, 2014), the portal to the International Child Abduction Database, which, as described *supra* § III.B.3.d.i.3.a, compiles judicial decisions from many countries; and

- *Guides to Good Practices*, http://www.incadat.com/index.cfm?act=text.text&id=9&lng=1 (last visited Mar. 13, 2014), listing all volumes of the *Guide to Good Practices* promulgated by the organization – some of which the Supreme Court has cited, as discussed *supra* § III.B.3d.i.3.c.

Judges will want to take note of two additional initiatives:

- In 2012, the Hague Conference established a Working Group on the "grave risk" exception to return, set forth in Article 13(b) of the Hague Abduction Convention and discussed *supra* § III.B.3.h.iv. Drawn from many countries, Working Group members include judges, Central Authority officials, and practitioners. The group is charged with producing a *Guide to Good Practice*, like those discussed immediately above, which includes "a component to provide guidance specifically directed to judicial authorities." Hague Conf. on Private Int'l L., *Conclusions and Recommendations adopted by the Council*, para. 6 (2012), http://www.hcch.net/upload/wop/gap2012concl_en.pdf. Upon completion, the guide will be available at the Hague Conference webpage.

- The Hague Conference also convenes an International Hague Network of Judges in order to make it easier for judges from different countries to communicate and cooperate on issues of child and family law. *See* Hague Conf. on Private Int'l L., *Direct Judicial Communications* 6 (2013), *available at* http://www.hcch.net/upload/brochure_djc_en.pdf; *see generally* Philippe Lortie, *Background to the International Hague Network of Judges*, 15 Judges' Newsletter on Int'l Child Protection (autumn 2009), *available at*

http://www.hcch.net/upload/newsletter/JN15_Lortie.pdf. The current list of judges appointed to this network – a list that includes four judges from state and federal courts in the United States – may be found at Hague Conf. on Private Int'l L., *International Hague Network of Judges* (Dec. 2013), http://www.hcch.net/upload/haguenetwork.pdf.

Recommended citation:[1]

Am. Soc'y Int'l L., "International Sale of Goods," in
Benchbook on International Law § III.C (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/saleofgoods.pdf

C. International Sale of Goods

Cross-border contracts for the sale of goods are part and parcel of international trade. When a U.S. buyer or seller is involved in an international sale of goods, the court must consider how the sales contract relates to a particular treaty:

- 1980 U.N. Convention on Contracts for the International Sale of Goods[2]

This section refers to that treaty simply as the Convention, although many writings, some quoted below, also refer to it by the acronym CISG.

Other statements of international sales norms exist. For example, UNIDROIT, the Rome-based International Institute for the Unification of Private Law, promulgated the third edition of its Principles of International Commercial Contracts[3] in 2010. The Principles are influential, as nonbinding persuasive authority, in judicial and arbitral tribunals. *See infra* § III.C.1.d.4. But as the Convention is the principal source of binding international sales law in U.S. tribunals, it is the focus here.

This chapter outlines the status and contents of the Convention, with specific reference to issues of applicability and interpretation. The chapter does not discuss other issues, such as formation of the contract, obligations of the parties, breach of contract, risk of loss, and remedies. Print and online resources for researching such issues are included *infra* § III.C.2.

---

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

[2] U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1983), 1489 U.N.T.S. 3, *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf (last visited Dec. 16, 2013). This treaty, which entered into force on Jan. 1, 1988, has 80 states parties, among them the United States, for which it entered into force on Jan. 1, 1988. U.N. Comm'n Int'l Trade L., *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Dec. 16, 2013). For U.S. citation purposes, the U.N.-certified English text was published at 52 Fed. Reg. 6262, 6264-6280 (Mar. 2, 1987), and is reprinted at 15 U.S.C.A. App. (West Supp. 2003).

[3] *See* Int'l Inst. for the Unification of Private L., *UNIDROIT Principles of International Commercial Contracts*, http://www.unidroit.org/english/principles/contracts/main.htm (last visited Dec. 13, 2013) (describing Principles and containing links to same).

1. U.N. Convention on Contracts for the International Sale of Goods

Following years of drafting under the auspices of UNCITRAL, the U.N. Commission on International Trade Law, on April 11, 1980, the U.N. Convention on Contracts for the International Sale of Goods was adopted at a diplomatic conference in Vienna, Austria.[4]

On December 11, 1986, the United States became one of the first countries to deposit an instrument ratifying the Convention. See U.N. Comm'n Int'l Trade L., *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Dec. 16, 2013).

At the time of ratification the United States limited the "sphere of application," the Convention's term referring to the situations in which the Convention applies. The United States' limitation was made pursuant to Article 95 of the Convention, which allows a state to declare "that it will not be bound by subparagraph (1)(b) of article 1." Article 95(1)(b) applies if just one party to a dispute is located in a "Contracting State," the Convention's term for member states. In keeping with these allowances, the U.S. instrument of ratification included a declaration that the United States is not bound when only one party is located in a contracting state.[5] *See Impuls I.D. Internacional, S.L. v. Psion-Teklogix, Inc.*, 234 F. Supp. 2d 1267, 1272 (S.D. Fla. 2002) (citing U.S. declaration); Joseph Lookofsky, *Understanding the CISG in the USA* 159 (2d ed. 2004) (naming "the United States and China" as "prominent among those States" attaching this declaration).

A sufficient number of other states having ratified, the Convention entered into force on January 1, 1988. Eighty states now are parties to the Convention, including Canada, Mexico, China, Egypt, Japan, Chile, Australia, New Zealand, and most of Europe. U.N. Comm'n Int'l Trade L., *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Dec. 16, 2013). A notable nonparty state is the United Kingdom.

No U.S. Supreme Court decision has analyzed the Convention, although a little over a hundred lower court decisions have referred to it. This section is based on decisions in the lower federal courts.[6] Given the statement in Article 7(1) of the Convention that "regard is to be had to its international character and to the need to promote uniformity in its application," select

[4] U.N. Comm'n Int'l Trade L., *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods*, in *U.N. Convention on Contracts for the International Sale of Goods* 33-34 (2010), *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf (last visited Dec. 16, 2013).

[5] The text of this declaration – the only condition the United States attached to its ratification – was: "Pursuant to article 95, the United States will not be bound by subparagraph 1(b) of article 1." *See* Pace L. Sch. Inst. of Int'l Commercial L., *United States*, http://www.cisg.law.pace.edu/cisg/countries/cntries-United.html (last visited Dec. 16, 2013).

[6] A few state judicial decisions have mentioned the Convention. *E.g., C9 Ventures v. SVC-West, L.P.*, 202 Cal. App. 4th 1483, 136 Cal. Rptr. 3d 550 (2012); *Orthotec, LLC v. Eurosurgical, S.A.*, 2007 WL 1830810 (L.A. Cnty. Super. June 27, 2007); *Vision Sys., Inc. v. EMC Corp.*, 2005 WL 705107 (Mass. Super. Feb. 28, 2005).

decisions from foreign jurisdictions, as well as prominent scholarly commentary, will supplement the discussion of domestic case law. This interpretive mandate is discussed more fully *infra* § III.C.1.d.

a. Status of the Convention As U.S. Federal Law

The Convention has the status of U.S. federal law, and is reprinted at 15 U.S.C.A. App. (West Supp. 2003). To be precise:

> [I]t fully preempts state contract law within its stated scope – including a state's adoption of the Uniform Commercial Code (UCC) Article 2, as well as state common law. The application of the CISG also fully supports federal question jurisdiction under U.S.C. § 1331.

Jack Graves, *The ABCs of the CISG* 1-2 (American Bar Association Section of International Law 2013). For additional discussion of the relationship between the Convention and the Uniform Commercial Code, see *infra* § III.C.1.d.i.2.

b. Organization of the Convention

The text of the Convention is divided into four parts. The first three parts provide rules for the covered sales transaction and the fourth part concerns a variety of other matters, as follows:

- *Part I (Articles 1-13):* Sphere of application, rules for interpretation of the Convention and the sales contract, and contractual form requirements
- *Part II (Articles 14-24):* Rules for contract formation
- *Part III (Articles 25-88):* Provisions related to the sale of goods, including general provisions, obligations of seller and buyer, remedies for breach, passing of risk, anticipatory breach and installment contracts, damages, interest and exemptions
- *Part IV (Articles 89-101):* Covered are:
    - State's ratification, acceptance, approval or accession to the Convention, as well as applicability (Articles 91, 100)
    - Convention's relationship with other international agreements (Article 90)
    - State declarations (Articles 92, 94-97)
    - Reservations (Article 98)
    - Applicability to territorial units (Article 93)

- Denunciation (Article 101)

- Relationship of this 1980 Convention to its predecessors, the 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods[7] and the 1964 Convention relating to a Uniform Law on the International Sale of Goods (Article 99)[8]

- The final paragraph provides that the texts of the Convention in the six official U.N. languages – Arabic, Chinese, English, French, Russian and Spanish – are equally authentic.[9]

c. Sphere of Application of the Convention

In the United States, the Convention governs contracts for the sale of goods when the parties' places of business are in different contracting states – as set forth in Article 1(1)(a) of the Convention[10] – unless the contract designates otherwise. It is this requirement that the parties' place of business be in different Convention member states that renders the contract "international."

If one of the parties has its place of business in a nonparty state, the Convention will not apply even if U.S. law applies under choice of law rules. Instead, if U.S. law applies, the law of the pertinent U.S. state will apply; everywhere except Louisiana, this is the relevant state's version of the Uniform Commercial Code. *See* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 11 (2d ed. 2001).

The requisites of the Convention's sphere of application are discussed below, in the following order:

- Place of business
- Contract for the sale of goods

[7] Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169, *available at* http://www.unidroit.org/english/conventions/c-ulf.htm (last visited Dec. 16, 2013). This treaty entered into force on Aug. 23, 1972, but it did not attract many ratifications, and some of those later were denounced; moreover, the United States, which signed on Dec. 31, 1965, never ratified. *See* U.N. Treaty Collection, *Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods*, http://treaties.un.org/Pages/showDetails.aspx?objid=08000002801153d9 (last visited Dec. 16, 2013).

[8] Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107, *available at* http://www.unidroit.org/english/conventions/c-ulis.htm (last visited Dec. 16, 2013). This treaty, which entered into force on Aug. 18, 1972, but it it did not attract many ratifications, and some of those later were denounced; moreover, the United States, which signed on Dec. 31, 1965, never ratified. *See* U.N. Treaty Collection, *Convention relating to a Uniform Law on the International Sale of Goods*, http://treaties.un.org/Pages/showDetails.aspx?objid=08000002801154bf (last visited Dec. 16, 2013).

[9] In addition to these official language versions, unofficial versions of the Convention are available in many languages, including Czech, Danish, Dutch, Finnish, German, Italian, Japanese, Norwegian, Persian, Polish, Portuguese, Serbian, and Swedish. *See* CISG Database, *Texts of the CISG*, *available at* http://www.cisg.law.pace.edu/cisg/text/text.html (last visited Dec. 16, 2013).

[10] As explained *supra* § III.C.1, Article 1(1)(b) of the Convention, which describes a broader sphere of application, does not apply on account of a declaration by which the United States conditioned its ratification.

- Designation of applicable law

i. Place of Business

As noted above, Article 1(1)(a) of the Convention, as ratified by the United States, applies only to contracts "between parties whose places of business" are in different contracting states. If a party has multiple places of business, Article 10(a) of the Convention provides that

> the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract …

The Convention does not define "place of business." Nevertheless, case law and commentary – including foreign sources, as specified in Article 7, the Convention's interpretation provision – point to a party's location, not the party's country of incorporation, as the controlling factor. *See* Stavros Brekoulakis, "Article 10," in *The United Nations Convention on Contracts for the International Sale of Goods* 176 (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011) (stating that most courts place importance on the location from which "a business activity is carried out," requiring "a certain duration and stability").

The Convention applies to sales contracts between two parties that are incorporated in the United States if their places of business are in different contracting states. Accordingly, in *Asante Technologies v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1147 (N.D. Cal. 2001), the court ruled that the Convention covered a contract between two Delaware corporations, because the place of business of the seller that had the closest connect to the contract was in Canada, a different state party. To the same effect is an Austrian decision concerning Austrian nationals, one with its place of business in Italy. *See* UNILEX, *Oberster Gerichtshof*, 2 Ob 191/98 X, 15.10.1988, *available at* http://unilex.info/case.cfm?id=386 (last visited Dec. 16, 2013). (On UNILEX, see *infra* § III.C.b.iv; on the use of interpretive sources, *see infra* § III.C.1.d.)

ii. Contracts for the Sale of Goods

The Convention applies only to contracts for the sale of goods, does not define the term "contract." Nor does it define the terms "sale" or "goods," except in the negative sense that some provisions state what the terms do not cover. The Convention's text, as well as relevant case law, help to define what transactions are covered.

ii.1. Convention Text

Article 2 states in full:

> This Convention does not apply to sales:
>
> (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
>
> (b) by auction;

(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investment securities, negotiable instruments or money;
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

This language establishes six transactions that do not amount to a "sale of goods" within the meaning of the Convention. The six exclusions fall into two categories:

- Exclusions based on the character of the transactions (Art. 2(a)-(c))
- Exclusions based on the character of the products (Art. 2(d)-(f))

For the most part, the list of exclusions is self-explanatory; a few, however, merit further consideration.

ii.1.a. Case Law Interpreting the Convention's Application to "Goods"

In case law interpreting the Convention, "goods" are items that are movable and tangible at the time of delivery. When considering the definition of "goods," courts should consult Convention-centered case law, including foreign sources, rather than domestic interpretations of ostensibly similar laws, such as the Uniform Commercial Code. This interpretive mandate, grounded in the explicit text of Article 7 of the Convention, is discussed *infra* § III.C.1.d.i.; resources for researching such Convention-centered case law and commentary may be found *infra* § III.C.2.

Distinctions made in Convention-centered case law include:

- Qualifying as a "sale of goods" covered by the Convention: sales of items as varied as art objects, pharmaceuticals, live animals, propane, computers, computer hardware, and secondhand or used goods.

- Not qualifying as a "sale of goods" covered by the Convention: the sale of intellectual property and the sale of a business, as well as distribution and franchise contracts. Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 17, 19 (2d ed. 2001) (discussing intellectual property and distribution contract, respectively); Joseph Lookofsky, *Understanding the CISG in the USA* 18 (2d ed. 2004) (treating distribution and franchise agreements).

ii.1.b. Consumer/"Personal Use"

Article 2(a) specifies that the Convention can apply to "goods bought for personal, family, or household use," if the seller neither knew nor "ought to have known" that the goods would be used for one of those purposes.

In determining whether a transaction should be excluded on the ground it is a consumer-based sale, courts should look to decisions interpreting the precise language of Article 2(a) – the

sale of goods "bought for personal, family or household use"– rather than to understandings of the term "consumer" found in Uniform Commercial Code or U.S. consumer-protection jurisprudence. This interpretive mandate, grounded in the explicit text of Article 7 of the Convention, is discussed *infra* § III.C.1.d.i. Resources for researching such Convention-centered case law and commentary may be found *infra* § III.C.2.

What matters is the use intended within the specific contract, and not the usual or traditional use of item at issue. Accordingly, the sale of goods traditionally deemed personal use may be covered by the Convention if they are purchased by a distributor for the purpose of resale. *See* Steven L. Harris, Kathleen Patchel & Frederick H. Miller, "Contracts Governed by CISG: Excluded Contracts," in 10A *Hawkland UCC Series (CISG)* § 10:14 (2013) (noting that a dealer's purchase of a car falls under the Convention). Likewise, the intended use – not the actual use – is what matters. *See* Ingeborg Schwenzer & Paschal Hachem, "Sphere of Application," in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 50 (Ingeborg Schwenzer, 3d ed. 2010).

Commentators are split on whether goods purchased for dual purposes – for personal use and for professional use – are covered. Nor is there developed case law on this matter.

Some commentators have stressed that the Convention was never intended to displace domestic consumer laws; accordingly, these commentators have recommended that courts consider the potential for overlap of international law and domestic consumer laws before choosing to displace one or the other regime. *See* Frank Spohnheimer, "Sphere of Application," in *The United Nations Convention on Contracts for the International Sale of Goods* 42 (Stefan Kröll, Loukas A. Misteli, & Maria del Pilar Perales Viscacillas eds., 2011).

ii.1.c. "Auction"

As quoted in full *supra* §III.C.1.c.ii.1, Article 2(b) excludes from the scope of the Convention sales by auction.

The exclusion clearly pertains to traditional, physical-presence auctions; however, whether it applies to online auctions is less clear. The primary purpose for excluding auctions local – and thus noninternational – nature of the transaction. This feature is absent in the case of an Internet auction. *See* Ingeborg Schwenzer & Paschal Hachem, "Sphere of Application," in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 56 (Ingeborg Schwenzer, 3d ed. 2010).

Commentators are divided on this question, and case law is sparse. At least one case refused to characterize e-Bay as an auction, and thus held the Convention applicable to the transaction at bar. *See* Frank Spohnheimer, "Sphere of Application," in *The United Nations Convention on Contracts for the International Sale of Goods* 42 (Stefan Kröll, Loukas A. Misteli, & Maria del Pilar Perales Viscacillas eds., 2011) (discussing the decision in *Bundesgerichtshof*, VIII ZR 275/03 (Ger. Nov. 3, 2004)).

iii.Contracts for Supply of Goods vs. Mixed Goods-Labor Contracts

The Convention specifies which types of mixed transactions qualify as contracts for the sale of goods. The pertinent provision, Article 3, states in full:

> (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
> (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

This provision thus distinguishes two types of contracts:

- Contracts for the supply of goods to be manufactured or produced (Article 3(1))
- Mixed contracts, involving obligations to supply labor or other services as well as goods (Article 3(2))

Each is considered in turn below.

iii.1. Contracts for Supply of Goods to be Manufactured or Produced

In general, as stated in Article 3(1), the Convention applies to a contract for the sale of "goods to be manufactured or produced," unless the buyer provides a substantial portion of the materials to be used in that manufacturing or production. A typical example of such a transactions occurs when a U.S. company supplies materials to be assembled in a country whose labor force works at lower wages. *See* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 19-20 (2d ed. 2001). *See also* UNILEX, *Oberster Gerichtshof*, CLOUT Case 105, 8 Ob 509/93 (Austria, Oct. 27, 1994) (holding that Convention did not apply, given that Austrian firm provided materials to be processed by Yugoslav firm), *available at* http://unilex.info/case.cfm?id=131 *and* http://www.uncitral.org/clout/showDocument.do?documentUid=1308&country=AUS (last visited Dec. 16, 2013). (On CLOUT and UNILEX, see *infra* §§ III.C.b.i, III.C.b.iv.; on the use of interpretive sources, *see infra* § III.C.1.d.)

Commentators are divided on the meaning of the term "substantial" in Article 3(1). The fact that Article 3(2) uses "preponderant," a term implying greater weight, indicates a lower threshold will meet the Article 3(1) standard of "substantial part."

iii.2. Mixed Contracts: Supply of Labor or Other Services As Well As Goods

As indicated by the plain language of Article 3(2), quoted in full *supra* § III.C.1.c.iii, the Convention does not cover contracts for the delivery of labor or services. Labor and services are not "goods"; that is, not movable and tangible goods.

Article 3(2) stipulates an exception to this general rule, however. In the case of a mixed contract – one that provides for goods and services – the Convention applies if the services do not constitute "the preponderant part of the obligations of the party who furnishes the goods…." (This test is analogous to the predominant purpose test that most U.S. jurisdictions apply to mixed transactions in order to determine whether a dispute is governed by common law or by the Uniform Commercial Code.)

Few reported U.S. cases address this issue directly. For instance, in *TeeVee Toons, Inc. v. Gerhard Schubert GmBH*, 2006 WL 2463537, at *5 (S.D.N.Y. Aug. 23, 2006), the court stated briefly that Article 3(2) of the Convention did not apply to the transaction at issue, reasoning that the "'preponderant part of the obligations' here pertains to the manufactured Schubert System, not labor or other services."

The following is an example of the larger body of foreign decisions that address this issues:

- Reviewing a contract for machines that make yoghurt containers, the *Corte di Cassazione*, Italy's highest court concluded that the obligation of the seller "exceeded the mere delivery of the contracted good and referred also to the installment and configuration of the device by its own experts," to an extent that the Convention did not apply, "since the obligation exceeded the mere delivery of the contracted good." *Jazbinsek GmbH v. Piberplast S.p.A.*, CLOUT abstract no. 728, No. 8224 , § 3(a), (b)(ii) (Corte di Cassazione, Italy, June 6, 2002) (citing Article 3(2) of the Convention), *English translation available at* http://cisgw3.law.pace.edu/cases/020606i3.html#cx *and additional case information available at* http://cisgw3.law.pace.edu/cases/020606i3.html#ctoc (last visited Dec. 16, 2013). (On CLOUT, see *infra* § III.C.b.i; on the use of interpretive sources, *see infra* § III.C.1.d.)

iii.3. Mixed Contracts and Computer Software

International contracts involving computer software have posed issues of interpretation of the mixed-contract standard in Article 3(2) of the Convention. For example:

- The Supreme Court of Austria held that the purchase of computer programs "on data storage mediums" constituted a purchase of movable and tangible property, so that the Convention applied to the software contract. *Oberster Gerichtshof*, CLOUT abstract no. 749, 5 Ob 45/05m (June 21, 2005) *(Software case), English translation available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050621a3.html#cx *and additional case information available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050621a3.html (last visited Dec. 16, 2013). (On CLOUT, see *infra* § III.C.b.i.)

- A German court determined that the sale of standard software for an agreed price was a "contract of sale of goods" within the meaning of Article 1 of the Convention. Although the software was ordered, delivered, and installed, the court held dispositive the fact that the installation was not tailor-made. *LG München*, CLOUT abstract no. 131, 8 HKO

24667/93 (Feb. 8, 1995) *(Standard software case), English translation available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html#cx *and additional case information available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html (last visited Dec. 16, 2013). (On CLOUT, see *infra* § III.C.b.i ; on the use of interpretive sources, *see infra* § III.C.1.d.)

In short, case law determines the nature of computer software by looking to whether it is, on the one hand, off-the-shelf, standard software, or, on the other hand, tailor-made software. Commentators and case law characterize standard software as "goods" covered by the Convention. But tailor-made software takes on the characteristics of a service.

iv. Designation of Applicable Law within the Agreement

Article 6 of the Convention allows parties to opt out:

> The parties may exclude the application of this Convention or … derogate from or vary the effect of any of its provisions.

Exclusion and derogation/modification are discussed separately below.

iv.1. Excluding Application of the Convention

Most courts have determined that for parties to opt out, the agreement must specifically and clearly exclude the Convention. *See* Loukas Mistelis, "Article 6," in *The United Nations Convention on Contracts for the International Sale of Goods* 104 (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011). Examples:

- A choice of law provision selecting British Columbia law was held not to "evince a clear intent to opt out of the CISG," because "it is undisputed that the CISG *is* the law of British Columbia." *Asante Technologies, Inc. v. PMC- Sierra, Inc*., 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) (emphasis in original).

- A federal appellate court held that the Convention applied notwithstanding the parties' contract that contained the phrase "Jurisdiction: Laws of the Republic of Ecuador," because the Convention governed under Ecuadorean law and because the contract did not expressly exclude the Convention. *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003).

- Referring to a contract stating "that the 'agreement shall be governed by the laws of the Province of Ontario, Canada,'" a court wrote: "Obviously, this clause does not exclude the CISG." *Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd.*, 2003 WL 223187, at *3 (N.D. Ill. Jan. 30, 2003).

- Explaining that the choice of law provision selected the law of a state party to the Convention "without expressly excluding application of the CISG," a court

approved the parties' stipulation that the Convention governed the transaction. *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002).

iv.2. Derogating or Modifying the Effect of the Convention

Pursuant to Article 6 of the Convention, "parties may … derogate from or vary the effect of any of its provisions." By way of example, parties sometimes prefer certain rules promulgated by the International Chamber of Commerce, a nearly hundred-year-old, global organization headquartered in Paris, France. *See* Int'l Chamber of Commerce, *The New Incoterms® 2010 Rules*, http://www.iccwbo.org/incoterms/ (last visited Dec. 16, 2013).

Parties frequently elect to displace some, but not all, provisions of the Convention. In this case, the Convention remains the law applicable to the balance of the contract.

Additionally, the parties later may modify their contracts in order to derogate from all or some terms of the Convention. To do so, they must satisfy the requirements of Article 29 concerning modifications.

d. Interpretive Issues

Challenges posed in interpreting the Convention are treated in Article 7 of the Convention. Meanwhile, Article 8 discusses the interpretation of the parties' conduct, and Article 9 the interpretation of the contract. Each is discussed in turn below.

i. Article 7: Interpretation of the Convention's Text and Gaps

To reduce the risk that different contracting states might interpret and apply the Convention differently, Article 7, the first provision in the Convention's "General Provisions" chapter, states as follows:

> Article 7
>
> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Proper interpretation of Convention terms thus requires consideration of the:

- International character of the Convention and need to promote uniformity in application;
- Observance of good faith in international trade; and

- Treatment of matters not expressly discussed in the Convention.

Each is discussed in turn below.

i.1. International Character of the Convention and Need to Promote Uniformity

The references in Article 7(1) to "international character" and to the "need to promote uniformity" indicate that the Convention is to be interpreted independently from domestic law. To be specific, interpretation should rely on the treaty's text and drafting history; on pertinent domestic and foreign case law; and on commentaries respecting the Convention. Sources endorsing this interpretive approach include:

- *Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L.*, 1999 WL 311945, at *2 (E.D. La. May 17, 1999), in which the court wrote: "Under CISG, the finder of fact has a duty to regard the 'international character' of the Convention and to promote uniformity in its application."

- *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2nd Cir. 1995), in which the court acknowledged that the Convention "directs that its interpretation be informed by its 'international character and ... the need to promote uniformity in its application and the observance of good faith in international trade'" (quoting Article 7(1) of the Convention).

- *Bundesgerichtshof*, CLOUT abstract no. 171, V III ZR 51/95, § II(2)(b) (Apr. 3, 1996) *(Cobalt sulphate case), English translation available at* http://cisgw3.law.pace.edu/cases/960403g1.html#cx *and additional case information available at* http://cisgw3.law.pace.edu/cases/960403g1.html#ctoc (last visited Dec. 16, 2013), in which the court declined the buyer's invocation of national law contrary to the Convention, explaining that the Convention "is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)." (On CLOUT, see *infra* § III.C.b.i.)

- *RA Laufen des Kantons Berne*, CLOUT abstract no. 201, § II(2)(b) (May 7, 1993) (*Automatic storage system case), English translation available at* http://cisgw3.law.pace.edu/cases/930507s1.html#cx *and additional case information available at* http://cisgw3.law.pace.edu/cases/930507s1.html#ctoc (last visited Dec. 16, 2013), in which the court refused to apply Finnish law on ground that the Convention "requires uniform interpretation on grounds of its multilaterality, whereby special regard is to be had to its international character (Art. 7(1) CISG)," and thus the Convention "is supposed to be interpreted autonomously and not out of the perspective of the respective national law of the forum." (On CLOUT, see *infra* § III.C.b.i.)

i.2. Relation of the Convention to the Uniform Commercial Code

Following an approach that contradicts the meaning of Article 7(1) as just stated, some U.S. courts have interpreted Convention provisions by reference to the Uniform Commercial Code, the half-century-old code governing sales contracts within the United States. *E.g.*, *Chicago*

Prime Packers, Inc. v. Norham Food Trading Co, 408 F.3d 894, 898 (7th Cir. 2005); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995); *Genpharm Inc. v. Pliva-Lachema A.S.*, 361 F. Supp. 2d 49, 55 (E.D.N.Y. 2005).

Statements from the American Law Institute and the National Conference of Commissioners on Uniform State Laws provide additional evidence that consulting the Uniform Commercial Code to interpret the Convention is ill-advised. When revising the Code, these two groups considered referring to Convention provisions like those in Article 2 of the Uniform Commercial Code. But they rejected the idea:

> [U]pon reflection, it was decided that this would not be done because the inclusion of such references might suggest a greater similarity between Article 2 and the CISG than in fact exists. The princip[al] concern was the possibility of an inappropriate use of cases decided under one law to interpret provisions of the other law.

U.C.C. art. 2 Prefatory Note (2003). Revisers concluded that "[t]his type of interpretation is contrary to the mandate of both the Uniform Commercial Code and the CISG," adding:

> [T]he CISG specifically directs courts to interpret its provisions in light of international practice with the goal of achieving international uniformity. This approach specifically eschews the use of domestic law … as a basis for interpretation.

Id. (citations to Article 7 of the Convention omitted). *See also* Henry Deeb Gabriel, *The Buyer's Performance under the CISG: Articles 53-60 Trends in the Decisions*, 25 J.L. & Commerce 273, 279 n.29 (2005) (quoting this passage in discussion of Convention interpretation).

Sources discussing the differences between the Convention and the Uniform Commercial Code include:

- John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3d ed. 1999)

- John P. McMahon; *Applying the CISG Guides for Business Managers and Counsel* (rev. May 2010), http://www.cisg.law.pace.edu/cisg/guides.html#a1.

i.3. Observance of Good Faith in International Trade

Article 7(1) states: "In the interpretation of this Convention, regard is to be had … to the need to promote … the observance of good faith in international trade." Autonomous interpretation is particularly advised with respect to this passage, given the myriad constructions of the term "good faith" in U.S. courts.

A close reading of Article 7(1) demonstrates that it does not require that the parties act with good faith. Rather, it requires courts to consider good faith when interpreting the Convention, but not the contract. *See* Ralph H. Folsom, Michael W. Gordon & John A.

Spanogle, *International Business Transactions* 25 (2d ed. 2001); *accord* Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Sales Law*, 12 Pace Int'l L. Rev. 79, 92 (2000). A district court wrote:

> [O]bservance of good faith in international trade … embodies a liberal approach to contract formation and interpretation, and a strong preference for enforcing obligations and representations customarily relied upon by others in the industry.

Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002), *rev'd on other grounds*, 386 F.3d 485 (2d Cir. 2004). That said, several commentators have read a reasonableness requirement into the Convention's "good faith" standard. *See* Joseph Lookofsky, *Understanding the CISG in the USA* 35 (2d ed. 2004).

The precise meaning and scope of "good faith" is to be found in the context of international trade and within the text of the Convention itself. Textual examples include Articles 36 and 40, which concern sellers' liability for certain nonconformities.[11] Likewise, UNCITRAL has noted other articles that manifest the principle of good faith in international trade.[12] Such good faith expectations within the Convention – expectations also recognized in the context of international trade – do not wholly correspond with constructions of "good faith" in U.S. or other countries' domestic jurisprudence.

i.4. Treatment of Matters Not Expressly Discussed in the Convention

As is the case with much written law, issues arise that the Convention text does not treat expressly. Article 7(2) of the Convention, which is quoted fully *supra* § III.C.1.d.i, states that such matters "are to be settled in conformity with general principles" or "with the law applicable by virtue of the rules of private international law."

Commentators point to two potential sources for resolution:

---

[11] Article 36 of the Convention states in full:

> (1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.
> (2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Referring to Article 36 and to Article 38, which deals with the buyer's examination of goods, Article 40 of the Convention provides:

> The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

[12] *See* U.N. Comm'n Int'l Trade L., "Article 7," in *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* 28-29 (2008) (listing Articles 16, 21, 29, 37, 40, 46, 64, 82, 85, and 88), *available at* http://www.uncitral.org/pdf/english/clout/digest2008/article007.pdf.

- General principles that may be discerned from analysis of the Convention's text; and

- Norms compiled in the Principles of International Commercial Contracts[13] that were promulgated in 2010 by UNIDROIT, the International Institute for the Unification of Private Law, headquartered in Rome, Italy.

Each is discussed in turn below.

i.4.a. General Principles in the Convention's Text

General principles may be derived from the text of the Convention. More than a dozen have been identified by UNCITRAL, the U.N. Commission on International Trade Law.[14] They include:

- Party autonomy
- Good faith
- Estoppel
- Place of payment of monetary obligation
- Currency of payment
- Burden of proof
- Full compensation
- Informality
- Dispatch of communications
- Mitigation of damages
- Binding usages
- Set-off
- Right to interest
- *Favor contractus* (favoring continuance, rather than avoidance, of a contract)

In light of U.S. jurisprudence, the general principle of informality merits specific examination.

i.4.b. Informality: General Principle That Agreement Need Not Be in Writing

In the present context, "informality" refers to the general principle that the Convention establishes no requirements regarding the form of an agreement; indeed, the contract need not be written. This corresponds with the express language of Article 11 of the Convention:

> A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

---

[13] *UNIDROIT Principles of International Commercial Contracts* (2010), http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.

[14] U.N. Comm'n Int'l Trade L., "Article 7," in *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* 28, 29-30 (2008), *available at* http://www.uncitral.org/pdf/english/clout/digest2008/article007.pdf. This source provides discussions of each of the general principles listed.

Because this principle is at odds with much U.S. domestic doctrine, it has caused some confusion in U.S. courts. Nevertheless, for a period of time, U.S. courts have recognized that the Convention allows a party to adduce evidence of the formation, modification, or termination of a contract even if it is not in writing. *See also* the discussion of parol evidence *infra* § III.C.1.d.iii.1.

i.4.c. Exception: Opting Out of the Informality Principle

Notwithstanding the general principle of informality just described, evidence of an agreement in writing may be required in some disputes; specifically, those involving a party from a contracting state that, pursuant to Article 12 of the Convention, has filed a reservation reserving the right to require such evidence.[15] The United States has not filed such a reservation, but several of its treaty partners have done so. A compilation of which countries have filed such conditions may be found at *CISG: Table of Contracting States*, Pace Law School Institute of International Commercial Law, http://www.cisg.law.pace.edu/cisg/countries/cntries.html (last visited Dec. 16, 2013).

An example of a U.S. case raising this issue:

- *Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d 395 (3d Cir. 2010) (holding, in a two-to-one panel decision, that in dispute involving one state that opted out of Article 11 of the Convention and one that did not, court should determine applicable law by consulting forum state's choice of law rules)

ii. UNIDROIT Principles

Another source consulted to determine the general principles that may support interpretation pursuant to Article 7(2) is a set of norms promulgated in 2010 by UNIDROIT. Formally titled the International Institute for the Unification of Private Law, the Rome-based UNIDROIT was founded as an independent intergovernmental organization in 1926. *See* Int'l Inst. Unification of Private L., *UNIDROIT: An Overview*, http://www.unidroit.org/dynasite.cfm?dsmid=103284 (last visited Dec. 16, 2013).

---

[15] Article 12 of the Convention states in relevant part:

> Any provision of article 11 … of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

In turn, Article 96 of the Convention provides with respect to Articles 11 and 12:

> A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11 … of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

The purpose of this 2010 compilation of norms – called the UNIDROIT Principles of International Commercial Contracts[16] – is stated in the first sentence of the preamble:

> These Principles set forth general rules for international commercial contracts.

The preamble then states, in pertinent part, that the Principles "may be used to interpret or supplement international uniform law instruments" and "to interpret or supplement domestic law." As these passages indicate, the drafters envisioned wide use of the Principles as guides to international commercial contract. Yet though the Principles cover the vast majority of issues arising in international commercial contracts, they were promulgated as guides to the interpretation of law, and not as law itself. *See* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 6 (2d ed. 2001).

The UNIDROIT Principles resulted from intensive comparative legal research and debate and have influenced legislators in various countries. What is more, they are frequently consulted in international commercial arbitration and foreign domestic courts. Given that the parties to a contract covered by the Convention intended international legal concepts to apply, when courts must fill gaps in Convention text, the Principles are an interpretive source preferable to jurisprudence based on domestic law. But courts should be aware that the Principles are not limited to contracts for the sale of goods; at times, the Principles set forth substantive rules different from those in the Convention. *See* Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* 6 (2d ed. 2001).

iii. Article 8: Interpretation of the Parties' Conduct

Article 8 concerns the interpretation of parties' conduct. It states in full:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 8(1) concerns interpretation of subjective intent, while Article 8(2) concerns interpretation of objective intent; Article 8(3) applies an "all relevant circumstances" approach to both.

[16] *UNIDROIT Principles of International Commercial Contracts* (2010), http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.

The ensuing section begins with an issue of interpretation not addressed; that is, the parol evidence rule. It then discusses, in turn, the subjective and objective methods of determining parties' intent. The section concludes by examining the Convention rule on usage as a component of interpretation, as spelled out in Article 9, quoted *infra* § III.C.1.d.iv.

iii.1. Absence of a Parol Evidence Rule

The Convention says nothing about the admissibility of oral evidence to clarify written terms of a contract. (As discussed *supra* § III.C.1.d.i.4.b, the Convention generally does not require the agreement to be in writing.) In other words, the Convention omits any parol evidence rule prohibiting such extrinsic evidence.

Courts generally have construed this omission as permission, as demonstrated in this statement:

> [C]ontracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement.

Claudia v. Olivieri Footwear Ltd., 1998 WL 164824, at *5 (S.D.N.Y. Apr. 7, 1998); *see also ECEM Eur. Chem. Mktg. B.V. v. Purolite Co.*, 2010 WL 419444, at *13 (E.D. Pa. Jan. 29, 2010); *Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH*, 2009 WL 818618, at *5 (S.D. Ohio Mar. 26, 2009); *Fercus, S.R.L. v. Palazzo*, 2000 WL 1118925, at *3 (S.D.N.Y. Aug. 8, 2000).

Also ruling that the parol evidence rule does not apply were *MCC-Marble Ceramic Ctr. v. Ceramica Nuova d'Agostino*, 144 F.3d 1384, 1389-90 (11th Cir.1998), and *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F.Supp. 2d 915, 919-21 (N.D. Ill. 1998). These courts rejected a contrary holding in *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr.*, 993 F.2d 1178, 1183 (5th Cir. 1993), deeming that holding unpersuasive for having failed to take the Convention into account.

iii.2. Subjective Determination of Parties' Intent

Article 8(1) of the Convention makes clear that one party's statements and other conduct are to be interpreted subjectively – according to that party's intent – whenever the "other party knew or could not have been unaware what that intent was." This intent is to be determined, according to Article 8(3), through examination of "all relevant circumstances," including the:

- Negotiations;
- Practices the parties have established between themselves;
- Usages; and
- Parties' subsequent conduct.

See MCC-Marble Ceramic Center v. Ceramica Nuova d'Agostino, 144 F.3d 1384 (11th Cir. 1998) (citing Article 8(1), (3), and engaging in substantial inquiry into the parties' subjective intent).

Although many circumstances may inform subjective intent, one U.S. district court resisted the parties' efforts to use self-serving declarations of subjective intent in order to create material factual disputes regarding the interpretation of a contract. *See Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 432 (S.D.N.Y. 2011).

iii.3. Objective Determination of Parties' Intent

When it is not possible to determine a subjective intent, Article 8(2) of the Convention provides that a party's statements or conduct are to be interpreted using an objective standard – that of a reasonable person. Examples:

- *Bezirksgericht St. Gallen*, CLOUT abstract no. 215, 3 PZ 97/18 (Switz. July 3, 1997) (*Fabrics case*), *English translation available at* http://cisgw3.law.pace.edu/cases/970703s1.html#cx *and additional case information at* http://cisgw3.law.pace.edu/cases/970703s1.html#ctoc (last visited Dec. 16, 2013) (applying Article 8(2), (3) in the absence of evidence of subjective intent, and thus determining intent objectively, by consideration of subsequent conduct). (On CLOUT, see *infra* § III.C.b.i; on the use of interpretive sources, *see supra* § III.C.1.d.)

- *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 432 (S.D.N.Y. 2011) (considering the objective intent standard to determine if the parties' prior history of transactions provided information about contract formation).

iv. Article 9: Usage As a Circumstances Relevant to Interpretation

"Usages" may constitute a "relevant circumstance" for interpretation, as stated in Article 8(3), quoted in full *supra* § III.C.1.d.iii. The Convention elaborates on usage in Article 9, which states:

> (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Each subparagraph is discussed in turn below.

iv.1. Usages Agreed to and Practices Established between Themselves

Article 9(1) provides that "parties are bound by any usage to which they have agreed." Given that informality is a hallmark of the Convention (*see supra* § III.C.1.d.iv.), the usage need not be explicit; rather, it may be inferred from conduct or from the parties' prior course of dealings.

Most commentators and courts have had little difficulty in determining prior practices between the parties. A question that does arise is how many times something must happen to constitute a prior practice. Certainly one time would not be enough, but at least some courts have found that two or three prior occasions sufficient. Ingeborg Schwenzer & Paschal Hachem, "General Provisions," in *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* 186 n.51 (Ingeborg Schwenzer, 3d ed. 2010) (referring to split of authority).

iv.2. International Trade Usages

Article 9(2) provides that parties shall be bound by trade usages even in the absence of agreement, provided that the parties knew or ought to have known of the usage and the trade usage is widespread within the particular trade.

The widespread existence of a particular practice within a trade is measured according to an international standard. As such, the trade usage must be widely known in international – not local or regional – trade. However, several courts have determined that in some industries, such as commodities or local markets, a trade usage exists by the sheer force of the high number of international participants in a well-known, widely regarded market. *See Oberlandesgericht*, CLOUT case No. 175, 6 R 194/95 (Austria, Nov. 9, 1995) *(Marble Slabs case)*, *available at* http://cisgw3.law.pace.edu/cases/951109a3.html (last visited Dec. 16, 2013). (On CLOUT, see *infra* § III.C.b.i; on the use of interpretive sources, *see supra* § III.C.1.d.)

When considering the Article 9(2) ought-to-have-known proviso, most courts have imposed this standard on parties with places of business in the geographical location of the usage, or on a foreign party that conducts relevant transactions regularly in the geographic area. *See* U.N. Comm'n Int'l Trade L., "Article 9," in *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* 40-41 (2008), *available at* http://www.uncitral.org/pdf/english/clout/digest2008/article007.pdf.

Most importantly, Article 9 should be interpreted to require that a trade usage supersede the Convention. As such, trade usages that require particular formalities or steps in the formation of a contract would supersede any other provisions of the Convention. *See id.*

Finally, as always, pursuant to Article 6, discussed *supra* § III.C.1.c.iv.2., parties remain free to derogate from any provisions within the Convention. Trade usages are no exception.

2. Researching International Sales Law

U.S. judicial decisions sometimes have reported that there is little case law available that interprets or applies the terms of the Convention. The reality is to the contrary. National and international decisions are bountiful; however, they are not easily found on the traditional U.S. research databases such as Westlaw or Lexis. Numerous resources, including comprehensive databases respecting the Convention, interpretive decisions, and scholarly commentary, are detailed below.

a. Print Resources

Books commenting on the Convention and other aspects of international sales law include:

- Ralph H. Folsom, Michael W. Gordon & John A. Spanogle, *International Business Transactions* (2d ed. 2001)
- Jack Graves, *The ABCs of the CISG* (American Bar Association Section of International Law 2013)
- John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry M. Flechtner ed., 4th ed. 2009)
- Joseph Lookofsky, *Understanding the CISG in the USA* 159 (2d ed. 2004)
- *International Contract Manual* (Albert Kritzer, Sieg Eiselen, Francesco Mazzotta & Allison Butler eds., 2007-2013) (five-volume looseleaf binder service, via Thompson/Reuters)
- *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Ingeborg Schwenzer, 3d ed. 2010)
- *The United Nations Convention on Contracts for the International Sale of Goods* (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011)

b. Online Resources

Databases that provide documents and ratification status, thesauri, bibliographies, commentaries, and other information related to international sales law are listed below. These websites were last visited on Dec. 16, 2013.

i. UNCITRAL

UNCITRAL is the acronym for the U.N. Commission on International Trade Law, a Vienna-based, nearly half-century-old U.N. entity. Its website is at http://www.uncitral.org/uncitral/en/index.html. Among the databases that it maintains is Case

Law on UNCITRAL Texts, known by its acronym, CLOUT. Available at http://www.uncitral.org/uncitral/en/case_law.html, this database includes abstracts of judicial decisions and arbitral awards, thesauri, a case index, and digests of case law related to conventions and model laws that have been prepared under the auspices of UNCITRAL.

The most recent *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* (2012) provides helpful guidance on each article of the Convention, and it refers to numerous foreign decisions. This digest is available at http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf.

ii. CISG-Advisory Council

The primary function of the Advisory Council of the U.N. Convention on Contracts for the International Sale of Goods, a private entity also known as CISG-AC, is the issuance of opinions on the interpretation and application of multiple aspects of the Convention. International organizations, professional associations, and adjudication bodies may ask the Council for opinions. The opinions may be found at http://www.cisgac.com/default.php?sid=128.

iii. Pace Law School Database

The Albert H. Kritzer CISG Database, available at http://www.cisg.law.pace.edu/, is maintained by the Institute of International Commercial Law at Pace Law School in White Plains, New York. This free, comprehensive database is updated monthly. Contents include:

- Text of the Convention in the official and unofficial languages
- Negotiating documents and other preparatory materials, or *travaux préparatoires*
- Commentaries
- Cases and arbitral awards from around the world, in English and English translation
- Lists of states parties, dates of entry into force, reservations, and declarations
- Guides and articles written by and for practitioners
- CISG-Advisory Council opinions
- Convention drafting tips

iv. Autonomous Network of CISG Websites

The Autonomous Network of CISG Websites, http://cisgw3.law.pace.edu/network.html#cp, offers public access to a current, comprehensive library of reference material on the Convention, in addition to decisions in eleven languages. Participants include more than two dozen providers, including countries and regions throughout the world. Of particular note is the Global Sales Law Project, available at http://www.globalsaleslaw.org, and maintained by the law faculty of the University of Basel, Switzerland.

v. UNILEX

Available at http://www.unilex.info/, the UNILEX database contains key documents, including the Convention and the 2010 UNIDROIT Principles of International Commercial Contracts (discussed *supra* § III.C.1.d.ii.), as well information about states parties, international case law, and a bibliography of additional resources. It is a venture of UNIDROIT and the University of Rome.

vi. Other Sources

In addition to the above-mentioned databases on international sales law, many websites provide additional information on international commercial law, including:

- *LexMercatoria*, www.lexmercatoria.org
- *TransLex*, http://www.trans-lex.org
- *Kluwer Arbitration Service*, www.kluwerarbitration.com

Recommended citation:[1]

Am. Soc'y Int'l L., "International Air Transportation," in
Benchbook on International Law § III.D (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/airtransport.pdf

D. International Air Transportation

International aviation treaties cover claims for damage to persons and property arising from international air carriage. The most challenging issues related to judicial application of the treaties involve two choice-of-law questions:

- Is the particular claim governed by a treaty?
- If so, which treaty?

Some cases that have been removed from state court further raise difficult questions about federal subject-matter jurisdiction.

This chapter first provides a brief historical overview of international aviation law. It next identifies the main treaties and other agreements applicable in U.S. courts. It then addresses choice of law and subject-matter jurisdiction. The final sections summarize the key substantive rules contained in the treaties.

1. History of International Aviation Law

The 1929 Warsaw Convention – formally titled the Convention for the Unification of Certain Rules Relating to International Carriage by Air[2] – is the first international treaty addressing claims for damage to persons and property arising from international air carriage. The main goal of the treaty was to foster the development of a nascent commercial airline industry by establishing strict limits for liability of air carriers. *See Eastern Airlines v. Floyd*, 499 U.S. 530, 546 (1991). Since 1929, states have concluded a series of subsequent treaties that have gradually increased the liability limitations. The airlines themselves have also entered into a series of private, voluntary agreements (inter-carrier agreements) that displace the treaty rules in certain cases.

---

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

[2] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000 (1934), 137 L.N.T.S. 11, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html [hereinafter Warsaw Convention]. This Convention, which entered into force on Feb. 13, 1933, has 152 states parties; among them is the United States, for which the Convention entered into force on Oct. 29, 1934. Int'l Civil Aviation Org., *Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at The Hague on 28 September 1955*, http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf (last visited Dec. 9, 2013).

Next came the 1944 Chicago Convention.[3] Formally titled the Convention on International Civil Aviation, this treaty established a multilateral organization in order to pursue goals outlined in the Convention's preamble, such as:

- Promoting the safe and orderly development of international civil aviation; and
- Providing for the establishment of air transportation services in a manner that advances equal opportunity as well as sound and economical operations.

That multilateral body – the International Civil Aviation Organization, or ICAO – has the status of a specialized agency of the United Nations. ICAO promulgates international standards for aviation and serves as a forum through which its nearly 200 member states may cooperate on global aviation issues.[4]

At an ICAO meeting in 1999, the Convention for the Unification of Certain Rules for International Carriage by Air, typically called the Montreal Convention, was formed and signed.[5] This 1999 Montreal Convention replaces the 1929 Warsaw Convention with a modernized liability regime that recognizes the advances in aviation safety. Accordingly, it increased the liability limits for air carriers under the Warsaw Convention.

2. Treaties Applicable in U.S. Courts

Numerous international aviation treaties may arise in U.S. courts, even if the United States is not a party:

- The 1929 Warsaw Convention, described *supra* § III.D.1. Article 22 of this treaty sets limits of: 125,000 French francs per passenger for claims involving death or personal injury; 250 French francs per kilogram for claims involving lost or damaged registered luggage or goods; and 5,000 French francs for lost or damaged objects that the passenger carries himself or herself.

---

[3] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, *available at* http://www.icao.int/publications/pages/doc7300.aspx [hereinafter Chicago Convention]. This Convention, which entered into force on Apr. 4, 1947, has 190 states parties; among them is the United States, which deposited its instrument of ratification on Aug. 9, 1946. *See* Int'l Civil Aviation Org., *Convention on International Civil Aviation*, http://www.icao.int/publications/Documents/chicago.pdf (last visited Dec. 9, 2013).

[4] *See* Int'l Civil Air Org., *ICAO in Brief*, http://www.icao.int/about-icao/pages/default.aspx (last visited Dec. 9, 2013).

[5] Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, *available at* http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/toc.html [hereinafter Montreal Convention]. This treaty, which entered into force on Nov. 4, 2003, has 104 states parties; among them is the United States, for which the treaty entered into force on Nov. 4, 2003. Int'l Civil Aviation Org., *Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999*, http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (last visited Dec. 9, 2013). This 1999 treaty governing carriage by air should not be confused with another Montreal Convention, concluded in 1971 – an antihijacking treaty formally titled the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and described *supra* § II.A.3.e.

- The 1955 Hague Protocol,[6] or supplementary treaty, to the 1929 Warsaw Convention. Article XI of the Hague Protocol amended the Warsaw Convention by raising the limit for personal injury claims to 250,000 French francs, or about $16,600 per passenger.

- The 1961 Guadalajara Convention[7] amended the Warsaw Convention by creating special rules for the indirect carriage of cargo, in which the shipper purchases transportation from one carrier, such as a freight-forwarder, but the transportation is provided by a different carrier.

- The 1975 Montreal Protocol Nos. 1[8] and 2[9] express the liability limits in the Warsaw Convention and Hague Protocol in Special Drawing Rights to facilitate conversion to local currency.

---

[6] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.hague.protocol.1955/doc.html [hereinafter Hague Protocol]. This Protocol, which entered into force on Aug. 1, 1963, has 137 states parties; among them is the United States, for which the Hague Protocol entered into force on Dec. 14, 2003. Int'l Civil Aviation Org., *Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at The Hague on 28 September 1955*, http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf (last visited Dec. 9, 2013).

[7] Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.guadalajara.supplementary.convention.1961/ [hereinafter Guadalajara Convention]. This treaty, which entered into force May 1, 1964, has 86 states parties. Int'l Civil Aviation Org., *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed By a Person Other than the Contracting Carrier Signed at Guadalajara on 18 September 1961*, http://www.icao.int/secretariat/legal/List%20of%20Parties/Guadalajara_EN.pdf (last visited Dec. 9, 2013). The United States is not a party; nevertheless, the Guadalajara Convention may still provide the applicable law for an international flight if the place of departure and place of destination are both outside the United States.

[8] Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, 2097 U.N.T.S. 23, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.montreal.protocol.1.1975/portrait.pdf [hereinafter Montreal Protocol 1]. This Montreal Protocol entered into force on Feb. 15, 1996, and has 49 state parties. ICAO, Parties to Montreal Protocol No. 1, *available at* http://www.icao.int/secretariat/legal/List%20of%20Parties/AP1_EN.pdf (last visited Dec. 9, 2013). Although the United States is not a party to this protocol, the protocol may still provide the applicable law for an international flight if the place of departure and place of destination are both outside the United States.

[9] Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, 2097 U.N.T.S. 63, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.montreal.protocol.2.1975/portrait.pdf [hereinafter Montreal Protocol 2]. This Montreal Protocol entered into force on Feb. 15, 1996, and has 50 state parties. ICAO, Parties to Montreal Protocol No. 2, *available at* http://www.icao.int/secretariat/legal/List%20of%20Parties/AP2_EN.pdf (last visited Dec. 9, 2013). Although the United States is not a party to this protocol, the protocol may still provide the applicable law for an international flight if the place of departure and place of destination are both outside the United States.

- The 1975 Montreal Protocol No. 4[10] amended the Warsaw Convention by modernizing the air cargo rules.

- The 1999 Montreal Convention – formally titled the Convention for the Unification of Certain Rules for International Carriage by Air[11] – supersedes the Warsaw Convention and subsequent treaties for some (but not all) claims arising after November 4, 2003.

3. Key Treaties and U.S. Principle of Self-Execution

The 1929 Warsaw Convention is a self-executing treaty, meaning that "no domestic legislation is required to give the Convention the force of law in the United States." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

To date, no federal appellate court has ruled explicitly that the 1999 Montreal Convention – which, as stated above, supersedes the 1929 Warsaw Convention in some circumstances – is self-executing. The Senate report accompanying treaty ratification, however, indicates that the 1999 treaty also is self-executing. It states:

> The Montreal Convention, like the Warsaw Convention, will provide the basis for a private right of action in U.S. courts in matters covered by the Convention. No separate implementing legislation is necessary for this purpose.

S. Exec. Rep. No. 108-8, at 3 (2003). All judicial decisions that have applied the Montreal Convention are consistent with the proposition that the treaty is self-executing.

Judicial decisions applying the 1929 Warsaw Convention constitute an important body of precedent for resolving analogous claims under the 1999 Montreal Convention, as the Senate report recommending ratification recognized, S. Exec. Rep. No. 108-8, at 3 (2003):

> In the nearly seventy years that the Warsaw Convention has been in effect, a large body of judicial precedent has been established in the United States. The negotiators of the Montreal Convention intended to preserve these precedents.

4. Inter-Carrier Agreements

As noted *supra* § III.D.1, many commercial airlines have entered into a series of inter-carrier agreements that displace the treaty rules in certain cases. The key aspects of these agreements are as follows:

---

[10] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, S. Exec. Rep. No. 105-20, 2145 U.N.T.S. 36, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.montreal.protocol.3.1975/doc.html [hereinafter Montreal Protocol]. This Montreal Protocol has 58 state parties and entered into force for the United States on Mar. 4, 1999. Int'l Civil Aviation Org., *Montreal Protocol No. 4*, http://www.icao.int/secretariat/legal/List%20of%20Parties/MP4_EN.pdf (last visited Dec. 9, 2013).

- Article 17 of the 1966 Montreal Inter-carrier Agreement raised the 1929 Warsaw Convention limit for personal injury claims to $75,000 per passenger.

- The 1997 International Air Transport Association (IATA) Inter-carrier Agreements[12] require carriers to waive the defense of non-negligence under Article 20(1) of the Warsaw Convention for the portion of a claim that does not exceed 100,000 SDRs, or a route-specific amount identified by the carrier, unless the carrier can prove that the damage was not due to negligence, wrongful act, or omission of the carrier itself, its servants, or agents. They also eliminate the Convention's liability limit for bodily injury or death. *See* Matthew Pickelman, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time?*, 65 J. Air. L. & Com. 273, 284, 287 (1998-99).

5. Scope of Application of Treaties

The 1999 Montreal Convention and the 1929 Warsaw Conventions apply to "all international carriage of persons, baggage or cargo performed by aircraft for reward." Montreal Convention, art. 1.1; *accord* Warsaw Convention, art. 1.1.

International air carriage means any carriage with regard to which the origin and destination, as identified in the agreement between the parties, are:

- In different countries (regardless of any breaks in carriage), both of which are parties to the convention.

- In the same country (which is a party to the convention), if there is an agreed stop in another country (which does not have to be a party to the applicable convention). Thus, international round-trip air carriage from a country which is a party to a convention is international air carriage, even if the intermediate destination is not a convention party.

Montreal Convention, art. 1.2; Warsaw Convention, art. 1.2.

If carriage is performed by several successive carriers, it is deemed to be "one undivided carriage if it has been regarded by the parties as a single operation," regardless of whether the governing contracts take the form of a single contract or a series of contracts. Montreal Convention, art. 1.3; Warsaw Convention, art. 1.3. Moreover, air carriage "does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State." Montreal Convention, art. 1.3; *accord* Warsaw Convention, art. 1.3.

[12] Inter-carrier Agreement on Passenger Liability, opened for signature Oct. 31, 1995; Agreement on Measures to Implement the IATA Inter-carrier Agreement, opened for signature May 16, 1996. *See also* Montreal Convention, art 21.

6. Determining the Applicable Law

To be considered when determining applicable law are preliminary issues, the nature of the flights under review, and the nature of the applicable agreement. Each is discussed below.

For information about which states are parties to which treaties, and the dates on which states became parties to particular treaties, see Int'l Civil Aviation Org., *Current lists of parties to multilateral air treaties*, http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx (lasted visited Dec. 9, 2013).

a. Preliminary Issues

To determine whether a particular claim is governed by the 1999 Montreal Convention, the 1929 Warsaw Convention, or some other agreement, the court must first determine whether "the place of departure and the place of destination . . . are situated . . . within the territories of two States Parties." Montreal Convention, art. 1.2; *accord* Warsaw Convention, art. 1.2.

The places of departure and destination are determined according to the terms of the agreement between the air carrier and the passenger (for passenger travel), or the air carrier and the consignor (for cargo shipments). *See* Montreal Convention, art. 1.2; Warsaw Convention, art. 1.2.

The applicable law varies according to whether the flight is a round-trip or one-way flight; these options are discussed in turn below.

b. International Round-Trip Flights

The applicable law for an international round-trip flight depends on whether the flight begins and ends in the United States.

i. International Round Trips Beginning and Ending in the United States

Round-trip air transportation that begins and ends in the United States and has a stopping point outside the United States is covered by the conventions, regardless of whether the country in which the stopping point is located is a party to any international aviation treaty. Montreal Convention, art. 1.2; Warsaw Convention, art. 1.2.

The 1999 Montreal Convention applies to a round-trip flight beginning and ending in the United States if travel occurred on or after November 4, 2003.[13]

[13] Montreal Convention, art. 55. The Warsaw Convention, as amended by Montreal Protocol No. 4, applies to a round-trip flight beginning and ending in the United States if travel occurred between Mar. 4, 1999, and Nov. 4, 2003. The Warsaw Convention, without amendment, applies to a round-trip flight beginning and ending in the United States if travel occurred before Mar. 4, 1999. For travel occurring before Nov. 4, 2003, inter-carrier agreements may increase liability above the treaty-based limits.

ii. International Round Trips Beginning and Ending Outside the United States

The treaties apply to flights if the place of departure and the place of destination are both "within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party." Montreal Convention, art.1.2; *accord* Warsaw Convention, art. 1.2.

For a round trip beginning and ending in State X, the court should first determine the international aviation treaties to which State X was a party on the date of air carriage.

If State X was not a party to the 1999 Montreal Convention on the date of the air carriage, but was a party to the 1929 Warsaw Convention, inter-carrier agreements may increase liability above the treaty-based limits.

If no treaty applies – that is, if the origin state was not party to any international aviation treaty on the relevant date – then ordinary tort and contract principles apply.

c. One-Way International Air Carriage

The applicable law for one-way international carriage depends on whether the flight began or ended in the United States.

i. Either the Place of Departure or the Place of Destination is in the United States

For one-way international air carriage in which the place of departure or the place of destination was in the United States, the court must determine whether the United States and the other country were both parties to the same treaty on the date on which air carriage occurred. The United States was party to the following treaties as of the dates specified:

- 1955 Hague Protocol, as of December 14, 2003;
- 1999 Montreal Convention, as of November 4, 2003;
- 1975 Montreal Protocol No. 4, as of March 4, 1999; and
- 1929 Warsaw Convention, as of October 29, 1934.[14]

If the United States and the other state were both parties to the 1999 Montreal Convention on the relevant date, that Convention will govern over the rules of the Warsaw Convention, Montreal Protocol No.4, and Hague Protocol. Montreal Convention, art. 55.

[14] For air carriage between Mar. 4, 1999, and Dec. 14, 2003, the United States was in a treaty relationship with others state parties to the 1975 Montreal Protocol No. 4. However, federal appellate courts are divided on whether, during this period, the United States was in a treaty relationship (other than the 1929 Warsaw Convention) with states that were parties to the 1955 Hague Protocol, but not to the 1975 Montreal Protocol No. 4. *Compare Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 957-58 (9th Cir. 2006) (concluding that the United States effectively became a party to the Hague Convention when it ratified the Montreal Protocol) *with Avero Belgium Ins. v. American Airlines Inc.*, 423 F.3d 73, 82-89 (2d Cir. 2005) (concluding that the United States did not become a party to the Hague Convention when it ratified the Montreal Protocol).

If the United States and the other state were not both parties to the same treaty on the relevant date, then no treaty applies. *See Chubb & Son v. Asiana Airlines*, 214 F.3d 301, 314 (2d Cir. 2000) (holding that separate adherence by two countries to different versions of a treaty is insufficient to establish a treaty relationship), *cert. denied*, 533 U.S. 928 (2001). In this situation, courts should apply ordinary tort and contract law principles.

If the court determines that a particular case is governed by a treaty that predates the Montreal Convention, inter-carrier agreements may increase liability above the treaty-based limits.

As a general rule, a later treaty between two states governs over the incompatible terms of a prior treaty between the same two states.[15]

ii. Neither the Place of Departure nor the Place of Destination is in the United States

For one-way international air carriage in which both the place of departure and the place of destination were outside the United States, the court must determine whether the departure country and the destination country were both parties to the same treaty on the date on which air carriage occurred.

If the place of departure and place of destination were both outside the United States, the court must consider the potential applicability of the following treaties: the 1929 Warsaw Convention, the 1955 Hague Protocol, the 1961 Guadalajara Convention, the 1975 Montreal Protocols, and the 1999 Montreal Convention.

Having ascertained whether the departure country and destination country were both parties to the same treaty on the relevant date, the court should apply the principles set forth *supra* § III.D.5.

d. Inter-Carrier Agreements

In the mid-1990s, the major international air carriers – acting under the auspices of the International Air Transport Association – entered into private, voluntary agreements. These are known as the 1997 Inter-Carrier Agreements. In January 1997, the U.S. Department of Transportation issued an order approving these agreements. D.O.T. Order 97-1-2 (Jan. 8, 1997). *See* George N. Tompkins, Jr., *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999* 12-15 (2010). Some air carriers that have not signed these agreements are subject to the 1966 Montreal Inter-Carrier Agreement. Indeed, under 14 C.F.R. Part 203, 1 (2013), certain air carriers

[15] *See* Vienna Convention on the Law of Treaties, art. 30, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf [hereinafter Vienna Convention on Treaties]. This treaty, which entered into force on Jan. 27, 1980, has 113 states parties; however, the United States is not among them. U.N. Treaty Collection, *Vienna Convention on the Law of Treaties*, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Dec. 9, 2013). Nevertheless, as discussed *infra* § IV.A, U.S. officials have recognized this provision of the treaty to represent customary international law, a source of law discussed *infra* § I.B.

operating to or from the United States must assent to the Montreal Agreement and waive the liability limits and defenses in the Warsaw Convention.

i. Claims Governed by the Montreal Convention

If the analysis set out *supra* § III.D.6.a. or § III.D.6.c. shows that the Montreal Convention applies, that Convention supersedes all inter-carrier agreements.

ii. Claims Governed by the Warsaw Convention and Subsequent Amendments

If the analysis set out *supra* § III.D.6.a. or § III.D.6.c. shows that the claim is governed by the Warsaw Convention and/or subsequent amendments to that treaty (including the 1955 Hague Protocol, the 1961 Guadalajara Convention, or the Montreal Protocol), then:

- If the carrier is party to the 1997 Inter-Carrier Agreements, those agreements take precedence over earlier treaty rules.

- If the carrier is not party to the 1997 Inter-Carrier Agreements, but is party to the 1966 Montreal Inter-Carrier Agreement, the 1966 agreement supersedes earlier treaty rules and is superseded by later treaty rules.

- If the carrier is not party to any of the inter-carrier agreements, then the treaty rules apply. *See* Tompkins, *supra*, at 1-15. For carriage to or from the United States, the carrier may be required to waive certain aspects of the treaty rules. *See* 14 C.F.R. Part 203 (2010).

iii. Claims Not Covered by Any Treaty

As detailed below, if the analysis set out *supra* § III.D.6.a. or § III.D.6.d. shows that the claim is not governed by any treaty, then courts should apply ordinary tort and contract law principles.

7. Federal Jurisdiction

Federal courts have jurisdiction over claims arising under the 1999 Montreal Convention and the 1929 Warsaw Convention (and subsequent amendments thereto), as detailed below.

a. Federal Question Jurisdiction

Article 17 of the Warsaw Convention creates a federal cause of action for claims involving death or personal injury; it provides a basis for jurisdiction under the general federal question statute, 28 U.S.C. § 1331 (2006). *See, e.g.*, *Benjamins v. British European Airways*, 572 F.2d 913, 916-19 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

The same holds true for Article 17 of the Montreal Convention. *See* S. Exec. Rep. No. 108-8, at 3 (2003) ("The Montreal Convention, like the Warsaw Convention, will provide the basis for a private right of action in U.S. courts in matters covered by the Convention.").

Article 18 of both Conventions creates a federal cause of action for damage to cargo; this also provides a basis for federal jurisdiction. One lower court wrote that although "[t]he Warsaw Convention provides the cause of action," the statute that "provides the sole basis of federal court jurisdiction" is the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1601 *et seq.* (2006), discussed in detail *supra* § II.B. *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1026-27 (2d Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997).

Article 19 of both Conventions addresses damage caused by "delay in the carriage by air of passengers," baggage or cargo. No case holds explicitly that Article 19 provides a basis for federal question jurisdiction, but the rationale that courts have employed with respect to Articles 17 and 18 applies equally to Article 19.

b. Removal Jurisdiction

If a plaintiff brings suit in state court and pleads a claim under Article 17, 18, or 19 of the Montreal or Warsaw Convention, removal to federal court is permissible under ordinary rules governing removal procedure and jurisdiction for federal question cases. *See* 28 U.S.C. §§ 1441, 1446-47 (2006).

c. Removal Jurisdiction and Complete Preemption

The Montreal and Warsaw Conventions preempt at least some state tort law claims. The Supreme Court has held "that recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking' . . . if not allowed under the Convention, is not available at all." *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 161 (1999) (quoting, in part, Article 17 of Warsaw Convention).

Under the doctrine of complete preemption, "Congress may so completely pre-empt a particular area [of law] that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *see also Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003). Thus, if a plaintiff files a state tort law action in state court, without alleging a federal cause of action, that tort claim is effectively converted into a federal claim if plaintiff's claim falls within the scope of a federal statute or treaty that has completely preemptive effect. In such cases, the claim is removable to federal court on the theory that plaintiff's claim is really a federal claim disguised as a state law claim.

Lower federal courts are divided about whether state law claims related to the Montreal and Warsaw Conventions are removable to federal court under the doctrine of complete preemption:

- Some lower federal courts have held that the Montreal and Warsaw Conventions completely preempt state tort law claims within the scope of the treaties. *See, e.g.*, *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151, 1153 (8th Cir. 1999); *In re Air Crash at Lexington, Kentucky*, 501 F. Supp. 2d 902, 913 (E.D. Ky. 2007). If those courts

are correct, cases filed in state court in which plaintiffs plead only state law claims are removable to federal court under the doctrine of complete preemption.

- However, other federal courts have concluded that the Conventions do not completely preempt state law. *See Narkiewicz-Laine v. Scandinavian Airlines Sys.*, 587 F. Supp. 2d 888, 890 (N.D. Ill. 2008) (emphasizing that "[b]ecause the conditions and limits of the Montreal Convention are defenses to the state-law claims raised by the plaintiff, they do not provide a basis for federal-question subject matter jurisdiction.").

The Supreme Court has not yet ruled on this issue. Moreover, the Supreme Court's decisions applying the doctrine of complete preemption do not provide clear guidance on the contours of the doctrine. *See, e.g.*, Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. Pa. L. Rev. 537 (2007); Trevor W. Morrison, *Complete Preemption and the Separation of Powers*, 155 U. Pa. L. Rev. Pennumbra 186 (2007); Paul E. McGreal, *In Defense of Complete Preemption*, 156 U. Pa. L. Rev. Pennumbra 147 (2007).

8. Venue

Claims based on the Montreal Convention or the Warsaw Convention must be filed in a domestic court "in the territory of one of the" state parties. *See* Montreal Convention, art. 33; Warsaw Convention, art. 28.1. The plaintiff is free to choose the court of the place where:

- The carrier has its domicile;
- The carrier has its principal place of business;
- The international air carriage contract was made, if the carrier has a place of business there; or
- The intended destination of the international air carriage that gave rise to the claim is located.

Montreal Convention, art. 33.1; Warsaw Convention, art. 28.1.

The Montreal Convention adds a fifth option: "In respect of damage resulting from the death or injury of a passenger, an action may be brought . . . in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence" if certain other conditions are satisfied. Montreal Convention, arts. 33.2, 33.3.

No other basis will support venue in a suit of this nature filed in a state or federal court in the United States.

9. Types of Claims Covered by Treaties

Claims that may be covered by these treaties include: death or bodily injury of a passenger; destruction or loss of or damage to baggage or cargo; and damage caused by delay. Each is discussed below.

a. Death or Bodily Injury of a Passenger

Article 17.1 of the Warsaw and Montreal Conventions states:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The Supreme Court has applied Article 17 in several cases. The Court has held that an injury "caused by the normal operation of the aircraft's pressurization system" is not an "accident" within the meaning of Article 17. *Air France v. Saks*, 470 U.S. 392, 396, 405 (1985). Article 17 does not allow "recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury." *Eastern Airlines v. Floyd*, 499 U.S. 530, 533, 551 (1991).

The Court held in 2004 that the term "accident" in Article 17 includes a case in which "the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin." *Olympic Airways v. Husain*, 540 U.S. 644, 646, 652-56 (2004).

b. Destruction or Loss of or Damage to Checked or Unchecked Baggage

Both the Montreal and Warsaw Conventions provide: "The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier." Montreal Convention, art. 17.2; *accord* Warsaw Convention, art. 18.1.

Furthermore, "[i]n the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents." Montreal Convention, art. 17.2.

c. Destruction or Loss of or Damage to Cargo

"The carrier is liable for damage sustained in the event of the destruction or loss of or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air." Montreal Convention, art. 18.1; *accord* Warsaw Convention, art. 18.1

"The carriage by air . . . comprises the period during which the cargo is in the charge of the carrier." Montreal Convention, art. 18.3; *accord* Warsaw Convention, art. 18.2.

The treaties contain very specific rules. See treaty text for details.

d. Damage Caused by Delay in the Carriage of Passengers, Baggage or Cargo

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." Montreal Convention, art. 19; *accord* Warsaw Convention, art. 19.

10. Limitation of Liability

States established liability limitations for air carriers in the 1929 Warsaw Convention. States and airlines gradually increased those liability limitations in a series of treaties and other agreements concluded over the next seven decades. *See* Montreal Convention. The liability limitations that apply to a particular claim depend on which treaty or other agreement applies to that claim. This section summarizes the liability limitations in the 1999 Montreal Convention.

a. "Special Drawing Rights"

The Montreal Convention expresses liability limitations in terms of "Special Drawing Rights." Montreal Convention, arts. 21-23. The Special Drawing Right is an international reserve asset that the International Monetary Fund created in 1969. To determine the dollar equivalent, a court must calculate the conversion rate between dollars and Special Drawing Rights on the date of the judgment. Montreal Convention, art. 23.1.

Current information about conversion rates is available at International Monetary Fund, *SDR Valuation*, http://www.imf.org/external/np/fin/data/rms_sdrv.aspx (last visited Dec. 9, 2013). As of late 2013, one Special Drawing Right was worth about US $1.54. *Id*.

b. Periodic Adjustment for Inflation

The liability limitations in the Montreal Convention "shall be reviewed by the Depositary at five-year intervals . . . by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision." Montreal Convention, art. 24.1.

Information about inflation adjustments is published in the *Federal Register*. *See* Inflation Adjustments to Liability Limits Governed by the Montreal Convention Effective December 30, 2009, 74 Fed. Reg. 59017 (Nov. 16, 2009).

c. Limitation of Liability for Death or Injury of Passengers

According to the treaty text, carriers are subject to strict liability, without any need for plaintiffs to prove fault, for claims involving death or bodily injury not exceeding 100,000 Special Drawing Rights per passenger. Montreal Convention, art. 21.1. This figure has since been adjusted for inflation. The current figure is 113,100 Special Drawing Rights. *See* 74 Fed. Reg. 59017.

"The carrier shall not be liable for damages [for death or bodily injury] to the extent that they exceed for each passenger [113,100] Special Drawing Rights if the carrier proves that: (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party." Montreal Convention, art. 21.2; 74 Fed. Reg. 59017.

An air carrier does not lose the benefit of the liability limitation for passenger injury or death under the Warsaw Convention if the carrier fails "to provide notice of that limitation in the 10-point type size required by a private accord among carriers." *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 124, 128-30 (1989).

d. Limitation of Liability for Claims Involving Baggage, Cargo, or Delay

"In the case of damage caused by delay . . . in the carriage of persons, the liability of the carrier for each passenger is limited to" 4,694 Special Drawing Rights. Montreal Convention, art. 22.1; 74 Fed. Reg. 59017. (The original figure in the treaty, before inflation adjustments, was 4,150.)

"In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to [1131] Special Drawing Rights for each passenger unless the passenger has made . . . a special declaration of interest . . . and has paid a supplementary sum if the case so requires." Montreal Convention, art. 22.2; 74 Fed. Reg. 59017. (The original figure in the treaty, before inflation adjustments, was 1,000.)

"In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of [19] Special Drawing Rights per kilogram, unless the consignor has made . . . a special declaration of interest . . . and has paid a supplementary sum if the case so requires." Montreal Convention, art. 22.3; 74 Fed. Reg. 59017. (The original figure in the treaty, before inflation adjustments, was 17.)

The treaties contain very specific rules. See treaty text for details.

e. No Punitive Damages

"In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention . . . .

In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable." Montreal Convention, art. 29.

f. Prior Changes in Liability Limitations

The liability limitations summarized above are based on the 1999 Montreal Convention. Depending on the facts of a particular case, other limitations may apply.

11. Other Defenses

Apart from establishing liability limitations, the Montreal Convention and related agreements create several other defenses. This section briefly summarizes the most important defenses: contributory negligence; estoppel; statute of limitations; federal preemption; and sovereign immunity. Courts should consult the treaty text for additional details.

a. Contributory Negligence

"If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation . . . the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage." Montreal Convention, art. 20. This provision applies to claims for property damage as well as personal injury claims.

b. Estoppel

"Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage." Montreal Convention, art. 31.1. "If no complaint is made within the times" specified in Article 31, "no action shall lie against the carrier, save in the case of fraud on its part." Montreal Convention, art. 31.4.

c. Statute of Limitations

"The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped." Montreal Convention, art. 35.1.

d. Federal Preemption

The Montreal and Warsaw Conventions preempt at least some state tort law claims within the scope of the Conventions. The Supreme Court has held "that recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking' . . . if not allowed under the Convention, is not available at all." *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161 (1999) (quoting, in part, Article 17 of the 1929 Warsaw Convention).

e. Sovereign Immunity

The United States ratified the Montreal Convention subject to this sovereign immunity declaration:

> [T]he Convention shall not apply to international carriage by air performed and operated directly by the United States of America for non-commercial purposes in respect to the functions and duties of the United States of America as a sovereign State.

Montreal Convention, 2242 U.N.T.S. 309, 461. Article 57 of the Montreal Convention expressly authorizes this type of reservation.

12. Treaty Interpretation

In cases involving the Warsaw Convention, the Supreme Court has indicated that U.S. courts should take account of judicial decisions in other countries that are parties to the Convention. *E.g.*, *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 173-76 (1999); *Eastern Airlines v. Floyd*, 499 U.S. 530, 550-51 (1991); *Air France v. Saks*, 470 U.S. 392, 404 (1985). *See also Olympic Airways v. Husain*, 540 U.S. 644, 658-63 (2004).

Numerous published judicial decisions from domestic courts in other countries have interpreted specific provisions of the Warsaw Convention and, more recently, of the Montreal Convention. For suggestions about how to find relevant judicial decisions from other jurisdictions, *see infra* § IV.B. The court likely will order the parties to provide briefing about foreign legal decisions in any case in which this would be useful.

Recommended citation:[1]

Am. Soc'y Int'l L., "Human Rights," in
Benchbook on International Law § III.E (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/humanrights.pdf

E. Human Rights

Alleged violations of individual rights recognized at international law are increasingly part of the federal docket, as a result of statutes that confer jurisdiction over such violations and/or implement U.S. treaty obligations into domestic law. With regard to some violations, such as the transnational trafficking of humans, suits for civil remedies form one component of a comprehensive legislative and regulatory framework. Certain human rights claims arise not as allegations in lawsuits, moreover, but rather as defenses to governmental actions against individuals. Examples may be found in the:

- Alien Tort Statute
- Torture Victim Protection Act
- Trafficking Victims Protection Act
- Doctrine of *Non-refoulement*, or Nonreturn

This chapter discusses each of these in turn below.[2]

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

[2] The Alien Tort Statute, codified at 28 U.S.C. § 1350 (2006), is described in detail in the sections immediately following. The second-named statute, the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, codified at note following 28 U.S.C. § 1350 (2006), is discussed *infra* § III.E.2, and the third-named statute, the Trafficking Victims Protection Act of 2000, codified as amended at 22 U.S.C. §§ 7101 *et seq*. (2006), is described *infra* § III.E.3. Among practitioners, both of the latter two statutes frequently are referred to as the TVPA. With the exception of direct quotations, in order to avoid confusion this *Benchbook* uses the full name of each statute rather than that acronym.

Yet another statute that allows the assertion of international law claims in U.S. courts is the Anti-Terrorism Act of 1990, Pub. L. No. 101-519, 18 U.S.C. § 2333 (2006); its terms are not detailed in this edition of the *Benchbook*.

1. Alien Tort Statute

The Alien Tort Statute, codified at 28 U.S.C. § 1350 (2006) and also sometimes called the "Alien Tort Claims Act," reads in full:

> 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.

This U.S. law dates to the first statute establishing the federal judicial system. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789). Yet to date only six judgments of the Supreme Court mention the Alien Tort Statute, and only two of those offer any extended analysis of that statute.[3] The two are:

- *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)
- *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (2013)

This section thus is based on the guidance set forth in *Sosa* and *Kiobel*, supplemented by selected decisions from lower federal courts. *Caveat:* Many decisions in the latter group were issued before the Supreme Court's rulings. Such lower court decisions are cited on precise points of law not yet addressed by Supreme Court; it should be recognized, however, that some of them might not have gone forward for some other reason later explored by the Supreme Court, such as extraterritoriality.

a. Overview of Alien Tort Statute Litigation

The following elements constitute a proper claim for civil damages under the Alien Tort Statute, 28 U.S.C. § 1350 (2006):

1. Proper plaintiff – an "alien."

[3] The other four decisions are *Mohamad v. Palestinian Auth.*, __ U.S. __, __, 132 S. Ct. 1702, 1705 (2012) (affirming dismissal on Torture Victim Protection Act ground without reaching Alien Tort Statute claims); *Samantar v. Yousuf*, 560 U.S. 305, 308, 324-26 (2010) (remanding on question of immunity without reaching merits); *Rasul v. Bush*, 542 U.S. 466, 472, 484 (2004) (ruling on jurisdictional ground without reaching substance of complaint); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 432-39 (1989) (ruling on immunities issue). *See also Kiobel*, __ U.S. at __, 133 S. Ct. at 1663 (observing that "the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years").

2. Plaintiff has pleaded "a tort" in violation of either:
   a. a treaty of the United States; or
   b. the law of nations.
3. Proper defendant.
4. Defendant's alleged acts constitute an actionable mode of liability.

In moving to dismiss an Alien Tort Statute case, defendants typically have argued that one or more of the above elements have not been satisfied. Additional commonly raised defenses include the following:

- Presumption against extraterritoriality
- Immunities
- Act of state doctrine
- Political question
- *Forum non conveniens*
- Time bar
- Exhaustion of local remedies
- International comity

These aspects of Alien Tort Statute litigation are detailed below. Treated first are the elements of an Alien Tort Statute claim, as informed by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Then follows a discussion of defenses, leading with extraterritoriality, the question at bar in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (2013). The section concludes with a discussion of damages and other available redress.

b. Elements of an Alien Tort Statute Claim

This section discusses the requisite elements of an Alien Tort Statute claim. Central to the discussion is the decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *see infra* § III.E.1.b.ii.2.

i. Alien Plaintiff

The Alien Tort Statute by its terms confers jurisdiction over claims by aliens only. As the Supreme Court made clear in *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004), the statute does not distinguish between resident and nonresident aliens. Legal permanent residents may sue under the statute. U.S. citizens may not; rather, they must seek relief pursuant to the Torture Victim Protection Act, discussed *infra* § III.E.2, or bring other types of claims.

i.1. Maintenance of Alien Tort Statute and Torture Victim Protection Act Claims

While the Alien Tort Statute has been applied to many different international law torts, the Torture Victim Protection Act, discussed *infra* § III.E.2, permits suits only for allegations of torture or extrajudicial killing. Lower courts have split on whether alien plaintiffs alleging torture

or extrajudicial killing may rely on both the Alien Tort Statute and the Torture Victim Protection Act in the same suit:

- The U.S. Court of Appeals for the Eleventh Circuit is among the lower courts that have held that both statutes may be invoked. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005), *cert. denied*, 549 U.S. 1032 (2006). Such courts look to a statement in the legislative history, to the effect that Congress intended the Torture Victim Protection Act to

  > enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.

  S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). *See*, *e.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005).

- In contrast, the Seventh Circuit held that for aliens and citizens alike, the Torture Victim Protection Act is the sole avenue for relief based on claims of torture or extrajudicial killing. *Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

ii. Tort

By its terms, the Alien Tort Statute provides federal jurisdiction over cases involving torts – as opposed to breaches of contract – committed in violation either of a treaty or of the law of nations. Virtually all case law deals with the latter option; accordingly, this section begins with a brief treatment of the treaty option and then proceeds to lay out in detail the treatment of cases alleging violations of the law of nations.

Allegations brought under the Alien Tort Statute are subjected to a "searching review of the merits." *Kadić v. Karadžić*, 70 F.3d 232, 238 (2d Cir. 1995). Citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), discussed *infra* § III.E.1.b.ii.2, the U.S. Court of Appeals for the Second Circuit recently explained that if a court

> 'cannot find that Plaintiffs have grounded their claims arising under international law in a norm that was universally accepted at the time of the events giving rise to the injuries alleged, the courts are without jurisdiction under the ATS to consider them.'

Velez v. Sanchez, 693 F.3d 308, 318 (2d Cir. 2012) (quoting *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008)), *cert. denied*, 555 U.S. 1218 (2009)).[4]

[4] With regard to the general federal pleading standard, see *Ashcroft v. Iqbal*, 556 U.S. 662 (2008); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2006).

ii.1. Violation of a Treaty of the United States

The Alien Tort Statute confers federal jurisdiction over a tort committed in violation of a treaty of the United States. Few cases have involved this basis for jurisdiction, however. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court rejected plaintiff's invocation of a treaty to which the United States had become a party in 1992. The Court reasoned that although the treaty at issue, the 1966 International Covenant on Civil and Political Rights,[5]

> does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.

Sosa, 542 U.S. at 734-35. For discussion of the doctrine of non-self-executing treaties, see *supra* § I.C.

ii.2. Violation of the Law of Nations

Most Alien Tort Statute cases proceed under the law of nations prong of the statute. The reference to the law of nations is often associated with customary international law, a source of law discussed in § I.B.2. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003); *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 37 n.23 (2011) (writing that customary international law is but "one of the sources for the law of nations"), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).

ii.3. Supreme Court's *Sosa* Framework for Determination

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court outlined the methodology for determining whether the tort pleaded violates international law, a prerequisite to federal jurisdiction under the Alien Tort Statute. Having considered the claim at bar in light of the 1789 statute, the opinion of the Court, written by Justice David H. Souter, stated:

> [C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.

Id. at 725. The Court advised "judicial caution," *id.* It pointed especially to "the practical consequences" of recognizing a cause of action. *Id.* at 732-33. The *Sosa* framework thus entails *inter alia* multiple considerations. The following are discussed in sections below:

- Acceptance of the norm by the civilized world
- Definition of the norm with specificity in international law

[5] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. This treaty, which entered into force on Mar. 23, 1967, has 167 states parties. U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 11, 2013). The United States ratified on June 8, 1992, subject to declarations and reservations set out *id*.

- Consideration of the practical consequences of enforcing the norm

It should be noted that prior to the decision in *Sosa*, lower courts typically had held that the tort in question had to be sufficiently defined, universal, and obligatory. *E.g.*, In re *Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring). In *Sosa*, Justices of the Supreme Court acknowledged that the requirements it posited were "generally consistent" with those formulations. *Sosa*, 542 U.S. at 732; *id.* at 747-48 (Scalia, J., dissenting). Thus, pre-*Sosa* opinions may remain useful in determining the cognizability of torts under the Alien Tort Statute.

ii.3.a. Accepted by Civilized World

As for the acceptance of the tort alleged, the Court in *Sosa*, 542 U.S. at 733, proceeded by reference to the "current state of international law." It did not require that the tort be contained within a federal statute. *Id.* at 714, 719, 723.

With respect to some causes of action, it may be necessary to consider whether international law extends liability to private or nonstate – as opposed to public or state – actors. This consideration is discussed *infra* § III.E.1.b.iii.3.

ii.3.b. Defined with Specificity

The Court in *Sosa* drew upon its own jurisprudence respecting one of the earliest-recognized international crimes – piracy – in stating that torts alleged in Alien Tort cases should parallel "the specificity with which the law of nations defined piracy." *Sosa*, 542 U.S. at 732 (citing *United States v. Smith*, 18 U.S. 153, 163-80 (1820)).

ii.3.c. Practical Consequences

In *Sosa*, 542 U.S. at 725-26, the Supreme Court instructed the lower courts to proceed with "caution" in exercising their "discretionary judgment" to recognize actionable torts. Lower courts should consider the "practical consequences" of making the cause of action available to litigants; to be precise, the Court wrote *id.* at 732-33:

> And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.

The Court appended a footnote, *id.* at 733 n.21,which cited a:

- Statement by the European Commission "that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals"; and

- "[P]olicy of case-specific deference to the political branches," as indicated by "the Executive Branch's view of the case's impact on foreign policy."

ii.4. Supreme Court's Application of Framework in *Sosa*

The plaintiff in *Sosa* sought to recover for the international law tort of arbitrary detention, claiming that the elements of that tort had been satisfied when he was kidnapped in Mexico and held for a short time. The Court rejected the claim.

To be specific, the Court in *Sosa* indicated that to the extent that arbitrary detention is cognizable under the Alien Tort Statute, the impugned conduct must amount to more than a "relatively brief detention in excess of positive authority," more than "the reckless policeman who botches his warrant," and more than "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment." 542 U.S. at 737-38. The Court held that the plaintiff had failed to establish an actionable tort under international law, and pointed by way of comparison to the prohibition of "prolonged" arbitrary detention as set forth in the *Restatement (Third) of Foreign Relations Law of the United States* (1987).[6]

ii.5. Post-*Sosa* Rulings in Lower Courts on Actionable Claims

As described above, the Supreme Court held in *Sosa* that the standard it had just articulated was not satisfied by the conduct at issue, a short period of detention. Lower courts subsequently applied the *Sosa* methodology with regard to other torts. Some conduct has been found actionable, some not. A sampling of those rulings follow, with the caveat that most predate the Court's 2013 extraterritoriality ruling in *Kiobel*, detailed *supra* § III.E.1.c.i. Courts thus must analyze the case before them according to both the extraterritoriality standard of *Kiobel* and to the actionability standard of *Sosa*.

ii.5.a. Ruled Actionable

International law torts that lower courts, post-*Sosa*, have recognized as actionable under the Alien Tort Statute include:

- Arbitrary denationalization or denaturalization, by a state actor[7]
- Child labor[8]
- Crimes against humanity[9]

---

[6] Designated subsequently as *Restatement*, this 1987 American Law Institute treatise compiles many of the doctrines discussed in this chapter. Its provisions must be consulted with due caution, however, particularly given that it was published decades before the Supreme Court's most recent interpretations of the Alien Tort Statute. On use of this *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, *see infra* § IV.B.1.

[7] In re *S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 252 (S.D.N.Y. 2009).

[8] *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810, 814-16 (S.D. Ind. 2010); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1075-76 (C.D. Cal. 2010).

[9] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, __ U.S. __, 133 S. Ct. 1995 (2013); *Sexual Minorities Uganda v. Lively*, __ F. Supp. 2d __, 2013 WL 4130756, at *7-*11 (D. Mass. Aug. 14, 2013); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112,

- Enslavement, involuntary servitude, forced labor, and sexual slavery[10]
- Genocide[11]
- Hijacking[12]
- Nonconsensual human medical experimentation[13]
- Purposeful use of poisoned weapons[14]
- Summary execution/extrajudicial killing[15]
- Torture, physical or mental, by a state actor[16]
- Trafficking[17]
- War crimes, [18] including deliberate targeting of civilians[19]

ii.5.b. Division of Authority on Actionability

Lower court rulings post-*Sosa* have split with respect to the cognizability of international law torts such as:

- Cruel, inhumane, and degrading treatment[20]
- Detention without legal authority/brief arbitrary detention[21]
- Terrorism[22] and the financing of terrorism[23]

1154-57 (E.D. Cal. 2004). *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in judgment).

[10] *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1074-76 (C.D. Cal. 2010); *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 521 (S.D.N.Y. 2009); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1014 (S.D. Ind. 2007); *Jane Doe I v. Reddy*, 492 F. Supp. 2d 988 (N.D. Cal. 2007).

[11] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, __ U.S. __, 133 S. Ct. 1995 (2013).

[12] In re *Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 480-81 (S.D.N.Y. 2010).

[13] *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010).

[14] *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 119-20 (2d Cir. 2008) (*dicta*).

[15] *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 383 n.4 (S.D.N.Y. 2009); In re *Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 593 (E.D. Va. 2009).

[16] *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005); *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417, 419 (2d Cir. 2004); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 738 n.29 (2004).

[17] *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009).

[18] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, __ U.S. __, 133 S. Ct. 1995 (2013); *Estate of Manook v. Research Triangle Inst., Int'l*, 693 F. Supp. 2d 4, 18 (D.D.C. 2010); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 744-47 (D. Md. 2010).

[19] In re *Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 582-3 (E.D. Va. 2009).

[20] *Compare Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (rejecting tort) *with Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal 2004); In re *S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 253-54 (S.D.N.Y. 2009); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010).

[21] *Compare Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (holding eight-hour detention not actionable) *with Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (alleging periods of detention longer than a day, an allegation not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

[22] *Compare Lev v. Arab Bank, PLC*, 2010 U.S. Dist. LEXIS 16887, at *22 (E.D.N.Y. Jan. 29, 2010); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 281 (E.D.N.Y. 2007) (finding jurisdiction over terrorism) *with Saperstein v.*

ii.5.c. Ruled Not Actionable

Since the Supreme Court decided *Sosa*, lower courts have declined to recognize a federal cause of action under the Alien Tort Statute for international law torts such as:

- Apartheid as practiced by nonstate actors[24]
- Unlawful killings by nonstate actors[25]
- Conversion[26]
- Detention without notice of consular rights[27]
- Displacement of remains[28]
- Failure to follow health and safety standards[29]
- Forced exile[30]
- Fraud[31]
- Freedom of thought, conscience, religion, and association[32]
- Harassment[33]
- Imposing production quotas that lead to child labor[34]
- Manufacture and supply of an herbicide used as a defoliant with collateral damage[35]
- Property destruction or confiscation, absent other violations[36]
- Property destruction by U.S. government[37]
- Racial discrimination[38]
- Deprivation of rights to life, liberty, security and association[39]
- Torture by a nonstate actor[40]

Palestinian Auth., 2006 U.S. Dist. LEXIS 92778, at *26 (S.D. Fla. 2006). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J. concurring).

[23] *Krishanthi v. Rajaratnam,* 2010 U.S. Dist. LEXIS 88788, at *37-*43 (D.N.J. Aug. 26, 2010).

[24] In re *S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 250-51 (S.D.N.Y. 2009).

[25] *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1358-59 (11th Cir. 2010).

[26] *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).

[27] *Mora v. New York*, 524 F.3d 183, 208-09 (2d Cir. 2008); *see Jogi v. Voges*, 480 F.3d 822, 824 (7th Cir. 2007).

[28] *Weiss v. Am. Jewish Comm.*, 335 F. Supp. 2d 469, 476 (S.D.N.Y. 2004).

[29] *Viera v. Eli Lilly & Co.*, 2010 U.S. Dist. LEXIS 103761, at *9-*10 (S.D. Ind. Sept. 30, 2010).

[30] *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (alleging this tort, not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

[31] *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004). *See also Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995); *Abiodun v Martin Oil Service, Inc.*, 475 F.2d 142, 145 (7th Cir. 1973).

[32] *Gang Chen v. China Cent. TV*, 2007 U.S. Dist. LEXIS 58503, at *7-*8 (S.D.N.Y., Aug. 9, 2007) (dicta).

[33] *Zapolski v. F.R.G.*, 2010 U.S. Dist. LEXIS 43863, at *6-*7 (E.D.N.Y., May 4, 2010).

[34] *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1024 (7th Cir. 2011).

[35] *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 119-20 (2d Cir. 2008).

[36] *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417, 419 (2d Cir. 2004).

[37] *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854-55 (D.C. Cir. 2010).

[38] *Sarei v. Rio Tinto, PLC*, 631 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, __ U.S. __, 133 S. Ct. 1995 (2013).

[39] *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006) (alleging this tort, not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

[40] Ali *Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 24, 30 (D.D.C. 2010).

iii. Proper Defendant

Comparison of the text of the Alien Tort Statute, quoted in full *supra* § III.E.1, with the corollary provision of the Torture Victim Protection Act, quoted *infra* § III.E.2, reveals a significant difference: although the latter describes the potential defendant, the Alien Tort Statute contains no such express reference. That lacuna has generated considerable litigation, with respect to the persons whom plaintiffs have endeavored to sue. Defendants so named have included:

- Natural persons; that is, human beings
- Nonnatural persons – also called juridical persons or artificial persons – such as:
  - Organizations
  - States
  - Corporations

In suits naming private or nonstate actors as defendants, a court also must ask:

- Does liability for violation of the international law tort at bar extend to private or nonstate actors as well as to public or state actors?

Each of these factors is discussed in turn below.

iii.1. Natural Persons

Widely held to have spurred enactment of the Alien Tort Statute in 1789 was an incident that had occurred five years earlier, when "a French adventurer" physically attacked a French diplomat in Philadelphia, and France decried the absence of a clear U.S. remedy for what was termed an act contrary to the law of nations. *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, __, 133 S. Ct. 1659, 1666 (2013) (citing *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (O.T. Phila.1784)); *see also* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int'l L. 687, 692-95 (2002) (describing this so-called Marbois incident).

That paradigm has persisted for centuries: natural persons – human beings – have been treated as proper defendants from the very first reported Alien Tort Statute decision through to the 1980 appellate decision that gave rise to increased litigation and the 2004 Supreme Court opinion interpreting the statute. *See Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1,607) (D.C.S.C. 1795) (ordering human defendant to pay restitution to alien plaintiff following mortgaging of slaves while docked at a U.S. port); *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (permitting alien plaintiffs to pursue lawsuit against police official alleged to have committed torture); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (in a suit against a man who had helped U.S. agents detain the plaintiff, establishing the framework for determining which international law torts are cognizable under the statute).

The availability of this statute as a means to seek redress from natural persons represented an exception to the traditional role of the "law of nations," the regulation of behavior between nation-states. When the Alien Tort Statute was passed in 1789, some "rules binding

individuals for the benefit of other individuals overlapped with the norms of state relationships," as the Supreme Court put it in *Sosa*, 542 U.S. at 715. The Court listed "three specific offenses against the law of nations" understood in 1789 to implicate natural persons:

- Violation of safe conducts
- Infringement of the rights of ambassadors
- Piracy

Id. (citing 4 William Blackstone, *Commentaries on the Laws of England* ch. V, 68 (1765-69)).

Moreover, the potential for natural persons to participate in international law increased markedly in the post-World War II era. The International Military Tribunals at Nuremberg and Tokyo established that humans could be held criminally liable for violating international law. Subsequently, the proliferation of widely ratified multilateral human rights treaties entrenched the principle that each human being is protected by certain international law norms. *See generally*, *e.g.*, Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 Ind. L.J. 809 (2000).

In short, a natural person may be a defendant in Alien Tort Statute litigation, assuming that other components of such a suit are met. Among such components may be whether the defendant is a private or state actor, as discussed *infra* § III.E.1.b.iii.3.

iii.2. Nonnatural / Artificial / Juridical Persons

The amenability to Alien Tort Statute suit of nonnatural persons – also known as artificial persons or juridical persons – has been more contested than that of natural persons. Examples of nonnatural persons that have been named as defendants include:

- Organizations
- Sovereign States
- Corporations

Each is discussed in turn below.

iii.2.a. Organizations

Given that the Alien Tort Statute makes no mention of potential defendants, as noted *supra* § III.E.1.b.iii, it contains no explicit limitation on suits against an entity like an organization. In determining that an organization was not "individual" within the express terms of the Torture Victim Protection Act, and thus was not amenable to suit under that Act, the Supreme Court distinguished the two statutes. *Mohamad v. Palestinian Auth.*, __ U.S. __, __, 132 S. Ct. 1702, 1709 (2012).[41]

[41] Justice Sonia Sotomayor wrote in her opinion for the Court that "the Alien Tort Statute … offers no comparative value here regardless of whether corporate entities can be held liable in a federal common-law action brought under that statute." *Mohamad*, 132 S. Ct. at 1709. On Alien Tort Statute suits against corporations, see *infra* § III.E.1.b.iii.2.c.

Only a small handful of earlier lower court decisions had addressed whether an organization could be held liable under the Alien Tort Statute. For example, one case proceeded to a default judgment against a political party. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), *rev'd on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205, 224 (2d Cir. 2004).

iii.2.b. Sovereign States

A primary purpose of international law is to regulate the behavior of nation-states. The Alien Tort Statute names as potential avenues for relief two sources of international law, treaties and the law of nations. *See supra* § III.E.1.b.ii. Any prospect that a state might be held liable under the statute is quite limited, however, given doctrines of immunity that preclude such suits.

A civil action against a foreign sovereign state or its agents or instrumentalities may not go forward unless the action satisfies the narrow exceptions set forth in the Foreign Sovereign Immunities Act of 1976 (FSIA), codified at 28 U.S.C. § 1602 *et seq*. (2006), detailed *supra* § II.B.1 and *infra* § III.E.1.c.ii.a. On common law immunities, see *supra* § II.B.1.b and *infra* § III.E.1.c.ii.b.

iii.2.c. Corporations

The Supreme Court has not ruled on whether corporations may be held liable under the Alien Tort Statute. As the Court explained in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, __, 133 S. Ct. 1659, 1663 (2013), it heard argument on the question in *Kiobel*, but subsequently ordered reargument. Eventually, the Court decided the case on the ground of extraterritoriality, detailed *infra* III.E.1.c.i, it did not pass judgment on the corporate liability question.

The Supreme Court had granted *certiorari* after the U.S. Court of Appeals for the Second Circuit held, by a two-to-one panel vote, that that the law of nations does not recognize corporate defendants. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). That ruling conflicted with those in other circuits, which had allowed cases to go forward against corporations. *E.g.*, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, __ U.S. __, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality); *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1017-21 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

iii.3. Status of Defendant as State Actor or Private Actor

In keeping with a primary purpose of international law, the regulation of behavior between nation-states, some international law rules apply only to states and to state actors, also called public or governmental actors. Others apply as well to private or nonstate actors. Thus the Supreme Court in *Sosa v. Alvarez-Machain* instructed courts to consider

> whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor….

542 U.S. at 733 n.20.

Relying on lower court jurisprudence, this section discusses: first, international law torts that have been held to extend both to private and state actors; second, those torts that have been held to extend only to state actors; and third, those on which there is a division of authority respecting this question. The section concludes by discussing means by which, even with regard to state-action torts, a private actor may be held liable if the private actor's actions were sufficiently linked to state action.

iii.3.a. International Law Torts Applicable to State and Nonstate Actors Alike

Courts have indicated that the following international law torts apply to private actors as well as to state actors:

- Genocide[42]
- War crimes[43]
- Forced labor[44]
- Hijacking of aircraft[45]

iii.3.b. International Law Torts Requiring State Action

The following international law torts have been deemed not to extend to private actors, absent sufficient linkage to state action:

- Torture[46]
- Extrajudicial killing/summary execution[47]

iii.3.c. Division of Authority on Applicability to Private Actors

Lower courts have divided on whether – absent sufficient linkage to state action – private actors may be held liable for violation of the following international law torts:

- Crimes against humanity[48]

---

[42] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004) (citing *Kadić v. Karadžić*, 70 F.3d 232, 239-41 (2d Cir. 1995)).

[43] *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, __ U.S. __, 132 S. Ct. 1702 (2012); *Abdullahi v. Pfizer, Inc.,* 562 F.3d 163, 173 (2d Cir. 2009); *Kadić v. Karadžić*, 70 F.3d 232, 243 (2d Cir. 1995); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945-46 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005).

[44] *Adhikari v. Daoud & Partners*, 2010 WL 744237, at *7 (S.D. Tex. Mar. 1, 2010); *Jane Doe I v. Reddy*, 2003 WL 23893010, at *8 (N.D. Cal. Aug. 4, 2003); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

[45] *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 (D.D.C. 2003).

[46] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–795 (D.C. Cir. 1984) (Edwards, J., concurring), *discussed in Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004).

[47] *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, at *39 (S.D.N.Y. Feb. 22, 2002), *citing Kadić v. Karadžić*, 70 F.3d 232, 241 (2d. Cir. 1995).

- Acts of terrorism[49]

iii.3.d. Potential Liability of Private Actors for Torts Requiring State Action

Even if the international law tort has been deemed to extend only to state action, a private-actor defendant may be judged liable under the Alien Tort Statute if the defendant's conduct is sufficiently linked to state action. To decide whether this is the case, some lower courts have employed an analysis akin to the "color of law" inquiry applied pursuant to:

- The general federal civil rights statute, 42 U.S.C. § 1983 (2006);[50]
- Agency law; and
- The Torture Victim Protection Act, described *infra* § III.E.2.

A court thus may deem a private actor amenable to suit under the Alien Tort Statute if a "'close nexus'" exists between a nation-state and the actions of the private defendant, such that the "'seemingly private behavior may be fairly treated as that of the State itself.'" *Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 188 (2d Cir. 2009) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotation omitted)), *cert. denied*, 130 S. Ct. 3541 (2010). *See also Aldana v. Del Monte Fresh Produce, N.A.,* 416 F.3d 1242, 1247-48 (11th Cir. 2005); *Kadić v. Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995) (holding that self-avowed yet unrecognized state may qualify as state for this purpose).

iv. Defendant's Acts Constitute an Actionable Mode of Liability

A defendant may be held liable under the Alien Tort Statute based not only on the defendant's acts as a principal perpetrator, but also on other modes of liability. Indeed, in a recent decision, one court observed:

> Aiding and abetting liability under the ATS has been accepted by every circuit that has considered the issue.

---

[48] *Compare Kadić v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995) *with Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008).

[49] *Compare Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007), *with Saperstein v. Palestinian Auth.*, 2006 WL 3804718, at *5-*8 (S.D. Fla. Dec. 22, 2006).

[50] The analysis derives from the precise text of that statute:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

Sexual Minorities Uganda v. Lively, __ F. Supp. 2d __, __, 2013 WL 4130756, at *11 (D. Mass. Aug. 14, 2013). Modes of liability that may be alleged include:

- Aiding and abetting[51]
- Conspiracy[52]
- Responsibility as a superior or commander of the primary actor[53]

The issue of accomplice liability generally arises at the summary judgment phase. *Presbyterian Church*, 582 F.3d at 260.

iv.1. Dispute over Consultation of International or Domestic Law

Courts have split on whether to determine accomplice liability questions by resort to international or to domestic law:

- The U.S. Courts of Appeals for the Second and the District of Columbia Circuits are among those courts that have looked to international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 32-37 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).

- A minority view has held that domestic law should govern subsidiary issues like accomplice liability; by this view, international law should be consulted only on the substantive issue of whether a tort is actionable under the Alien Tort Statute. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring).

c. Defenses

In addition to challenges on the grounds just discussed, commonly raised defenses to Alien Tort Statute lawsuits include:

- Presumption against extraterritoriality
- Immunities
- Act of state
- Political question
- *Forum non conveniens*

---

[51] *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748-49 (9th Cir. 2011), *vacated and remanded in light of* Kiobel, __ U.S. __, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 29-30 (2011), *vacated on other grounds*, 527 Fed. Appx. 7 (2d Cir. 2013); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315-16 (11th Cir. 2008); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005).

[52] *See Cabello v. Fernández-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005).

[53] *See Arce v. Garcia*, 434 F.3d 1254 (11th Cir. Fla. 2006); *see also Ford v. Garcia,* 289 F.3d 1283, 1288 (11th Cir. 2002) (analyzing command responsibility under the Torture Victim Protection Act, a statute discussed *infra* § III.E.2).

- Time bar
- Exhaustion of remedies
- Comity

Each will be discussed in turn below.

i. Presumption against Extraterritoriality

A court confronted with an Alien Tort Statute lawsuit must determine whether the relationship between the claims and the United States is sufficient; if it is not, the case must be dismissed. This was the unanimous conclusion of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (2013).

i.1. Reasoning in *Kiobel*

Although the full Supreme Court agreed that the case before it in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (2013), must be dismissed, the reasoning by which the Justices arrived at this principle differed:

- A five-member majority held that the judicial creation of a cause of action under the Alien Tort Statute – the text of which contains no "'clear indication of extraterritoriality'" – must be evaluated pursuant to "a canon of statutory interpretation known as the presumption against extraterritorial application." *Id.* at __, 133 S. Ct. at 1664-65 (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. __, __, 130 U.S. 2869, 2883 (2010)). Underpinning this opinion for the Court by Chief Justice John G. Roberts, Jr. was a concern that Alien Tort Statute judgments could have foreign policy consequences adverse to the interests of the political branches of the United States. *See id.* at __, __, __, 133 S. Ct. at 1664-65, 1667-69.

- In contrast, Justices Stephen G. Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan concurred in the judgment, by means of an opinion that rejected application of the presumption against extraterritoriality and instead listed three situations in which the relationship between the United States and the claims should suffice to support an Alien Tort Statute suit. *Id.* at __, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).[54]

[54] This minority opinion advocated the finding of Alien Tort Statute jurisdiction if:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Id. at __, 133 S. Ct. at 1671 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring in the judgment).

All nine Justices agreed that the suit could not go forward on the facts at bar. To be precise, as described in *Kiobel*:

- Plaintiffs were "nationals" of a foreign state, although they were "legal residents" of the United States, where they had "been granted political asylum."
- Defendants were corporations chartered in countries other than the United States, although each had an office in New York and the shares of each were traded on the New York Stock Exchange.
- Defendants were alleged not to have committed international law torts directly, but rather to have aided and abetted a foreign state's commission of such violations.
- The challenged acts occurred outside of U.S. territory.

__ U.S. at __, 133 S. Ct. at 1662-63 (Roberts, J., opinion for the Court); *see id.* at __, 133 S. Ct. at 1677-78 (Breyer, J., concurring in the judgment).

Summarizing the approach that led to rejection of the suit, the opinion for the Court stated:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.

Id. at __, 133 S. Ct. at 1669. Notwithstanding this passage, two of the five Justices who joined the opinion advocated a formulation that would have compelled dismissal of a broader swath of potential Alien Tort Statute claims. *See id.* at __, 133 S. Ct. 1669-70 (Alito, J., joined by Thomas, J., concurring).[55] Conversely, another Justice in the five-member majority stressed that the Court's opinion "is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute"; he anticipated future litigation of the issue. *Id.* at __, 133 S. Ct. at 1669 (Kennedy, J., concurring).[56]

---

[55] They wrote:

> [A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality – and will therefore be barred – unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations.

Id. at __, 133 S. Ct. at 1670 (Alito, J., joined by Thomas, J., concurring). On the Alien Tort Statute framework set out in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *see infra* § III.E.1.b.ii.

[56] He wrote:

> Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of

i.2. Lower Court Rulings Post-*Kiobel*

Courts confronted with factors different from those in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1659 (2013), described *supra* § III.E.1.c.i.1, will need to evaluate whether and to what extent extraterritoriality affects the reach of the Alien Tort Statute. In the months immediately following issuance of the decision of *Kiobel*, a handful of lower courts undertook this analysis, and arrived at a range of results. In two such cases, the Alien Tort Statute litigation was permitted to go forward:

- Allegations of an international law tort of persecution based on sexual orientation survived a motion to dismiss notwithstanding the extraterritoriality ruling in *Kiobel*. *Sexual Minorities Uganda v. Lively*, __ F. Supp. 2d __, __, 2013 WL 4130756, at *13-*15 (D. Mass. Aug. 14, 2013). Although many impugned actions occurred in Uganda and the plaintiff was a Uganda-based organization, the court ruled that extraterritoriality did not bar the suit, because the defendant was "an American citizen who has allegedly violated the law of nations in large part through actions committed within this country," *id*. at __, 2013 WL 4130756, at *14.

- Allegations of international law torts arising out of the 1998 terrorist bombing of the U.S. embassy in Kenya "'touched and concerned' the United States with 'sufficient force to displace the presumption against extraterritorial application of the ATS," another district court ruled. *Mwani v. bin Laden*, 947 F. Supp. 2d 1, 3 (D.D.C. 2013) (relying on the passage in *Kiobel*, __ U.S. at __, 133 S. Ct. at 1669, quoted *supra* § III.E.1.b.i). Characterizing the case as one of first impression, the court recommended an immediate appeal. *Id*. at 6.

The *Kiobel* standard presented an obstacle to Alien Tort Statute litigation in two other cases:

- A suit in which "non-American plaintiffs have asserted ATS claims against foreign defendants for actions that took place in Israel and Lebanon" was dismissed pursuant to *Kiobel*. *Kaplan v. Central Bank of Iran*, __ F. Supp. 2d __, __, 2013 WL 4427943, at *16 (D.D.C. Aug. 20, 2013). The court distinguished *Mwani*, described above, on the ground that in that case "the attack was planned in the United States and targeted at one of its embassies," while in the case before it funding and deployment of the attacks all had occurred in countries other than the United States. *Id.*

- Defendants' petition for mandamus relief in a suit concerning South Africa's apartheid era was denied. *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013). The appellate court grounded its denial of extraordinary relief in part on the reasoning that defendants would prevail if they were to move in the district court for dismissal by application of the *Kiobel* extraterritoriality standard. *See id.* at 187-94.

> today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

Id. at __, 133 S. Ct. at 1669 (Kennedy, J., concurring).

ii. Immunities

Both statutory and common law immunities may bar suit against a particular defendant. Each type of immunity will be discussed in turn.

ii.1. Foreign States and the Foreign Sovereign Immunities Act

Civil actions against foreign sovereign states may not go forward unless they satisfy the narrow exceptions set forth in the Foreign Sovereign Immunities Act of 1976 (FSIA), codified at 28 U.S.C. § 1602 *et seq*. (2006). As the Supreme Court wrote in a case brought against a foreign country pursuant to the Alien Tort Statute:

> [T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country….

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989); *see Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (reaffirming this statement). The scope of the Foreign Sovereign Immunities Act, which governs foreign states and entities defined as their agents or instrumentalities, is detailed *supra* § II.B.1. On common law immunities, see *supra* § II.B.1.b and *infra* § III.E.1.c.ii.b.

ii.2. Foreign Officials and Common Law Immunities

A current or former foreign official is not immune from Alien Tort Statute suits by virtue of the Foreign Sovereign Immunities Act, for the reason that such an official is a natural person and not an "agency or instrumentality of a foreign state" as required by that Act, 28 U.S.C. § 1603 (2006). After so ruling in *Samantar v. Yousuf*, 560 U.S. 305, 314-16 (2010), the Supreme Court remanded for determination of whether any common law immunities applied to the defendant at bar, who plaintiffs alleged was responsible for torture and extrajudicial killings in Somalia while he held official posts including Prime Minister. The Court mentioned in particular common law immunity doctrines respecting foreign officials' official acts, heads of state, and diplomats. *See id.* at 312 n.6, 320-22. The consideration on remand of the first two types of immunity is described below.

ii.2.a. Foreign Official's Common Law Immunities

Following remand of the Supreme Court decision just discussed, common law immunities were held not to bar suit against a former Somali official named as defendant in a suit brought under the Alien Tort Statute and the Torture Victim Protection Act. *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), *cert. denied*, 2014 WL 102984 (Jan. 13, 2014); *see Samantar v. Yousuf*, __ U.S. __, 133 S. Ct. 2879 (2013) (inviting the Solicitor General to file a brief expressing the United States' views on the case). In a unanimous panel opinion written by Chief Judge William Byrd Traxler, Jr., the U.S. Court of Appeals for the Fourth Circuit held:

- *Status-based head of state immunity:* The defendant's status as Prime Minister of Somalia during some of the relevant period did not render him immune from suit, for the reason that status-based immunity only applies to defendants who are incumbent officials at the time of suit. *See Samantar*, 699 F. 3d at 768-773.

- *Conduct-based foreign official immunity:* The defendant's conduct as a foreign official did not render him immune from suit, either. *See id*. at 773-78. The Fourth Circuit held that any such immunity did not apply to the acts alleged – "torture, extrajudicial killings and prolonged arbitrary imprisonment of political and ethnically disfavored groups" – because such acts violated *jus cogens*, or peremptory, norms. *See supra* § I.B (discussing this source of international law). The Executive's argument against the claimed conduct-based type of immunity, for reasons different from those on which the court focused, was treated as supplementing but not controlling the judicial decision. *See Samantar*, 699 F. 3d at 77-78.

ii.2.b. Waiver

A state may waive certain immunities that otherwise would be available to a defendant. *See Mamani v. Berzaín*, 654 F.3d 1148, 1151 n.4 (11th Cir. 2011); *infra* § II.B.1.a.iii.1.

iii. Act of State

The act of state doctrine holds that courts of one country may not invalidate sovereign acts done by another country within the latter country's own borders. *See W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 409 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). As detailed *supra* § II.B.2, defendants may invoke this doctrine when allegations necessarily require the court to rule on the validity of the actions of a foreign government. The U.S. Court of Appeals for the Second Circuit has stated, however, that only in "a rare case" would application of the act of state doctrine preclude an Alien Tort suit. *Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

To decide a motion to dismiss under this jurisprudential doctrine, the Supreme Court in *Sabbatino*, 376 U.S. at 428, advised consideration of three factors, none of which is dispositive:

- The degree of international consensus concerning the illegality of the alleged activity under international law.

- Whether, and to what extent, adjudicating the case would have foreign relations implications.

- Whether the foreign government at issue is still in existence.

Each is discussed in turn below.

iii.1. Degree of Consensus

The greater the degree of international consensus that the alleged activity violates international law, the less appropriate it is to dismiss a complaint on the act of state ground. In the context of Alien Tort Statute litigation, the U.S. Court of Appeals for the Ninth Circuit wrote that the doctrine did not apply to allegations based on *jus cogens*, or peremptory norms. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992)), *vacated and remanded in light of Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality). *See supra* § I.B (discussing peremptory norms as a source of international law).

The list of rights that enjoy a high degree of international consensus, as listed in Section 702 of the *Restatement*, include:

- Genocide
- Slavery
- Torture and cruel, inhuman or degrading treatment
- Systematic racial discrimination
- Prolonged arbitrary detention

In contrast, actions not prohibited by international consensus – for example, the expropriation of property – are not exempt from dismissal by virtue of the act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 428, 436-37 (1964).

iii.2. Foreign Relations Implications

In determining whether its decision might have adverse foreign relations implications, a court should consult the views of the U.S. government and/or the foreign government. *Doe I v. Unocal Corp.*, 395 F.3d 932, 959 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005); *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289, 346 (S.D.N.Y. 2003). In particular, a court should give "'respectful consideration'" to the opinion of the U.S. Department of State. *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1296 (N.D. Cal. 2004) (quoting *Kadić v. Karadžić*, 70. F.3d 232, 250 (2d Cir. 1995)); *see Restatement* § 443 n.8.

iii.3. Existence of Foreign Government

Evidence that the government at issue is no longer in existence weighs against dismissal on the ground of act of state. *Abiola v. Abubakar*, 2005 U.S. Dist. LEXIS 27831, at *5-*6 (N.D. Ill. Nov. 8, 2005); *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1303 (N.D. Cal. 2004). Even if the government remains in existence, however, this factor does not require dismissal. *Doe I v. Unocal Corp.*, 395 F.3d 932, 958-59 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005).

iv. Political Question

When a defendant seeks dismissal action under the political question doctrine, detailed *supra* § II.B.3, courts consider six factors set out in the seminal Supreme Court decision in *Baker v. Carr*, 369 U.S. 186, 217 (1962). These are:

- A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- A lack of judicially discoverable and manageable standards for resolving it; or
- The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- An unusual need for unquestioning adherence to a political decision already made; or
- The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

See Corrie v. Caterpillar, 503 F.3d 974, 981 (9th Cir. 2007). The six factors can be grouped into three main categories, as follows:

- Existence of a textual commitment the political branches of government
- Ability of the court to identify standards by which to rule
- Respect for the political branches

Each of these three categories is discussed in turn below. *Caveat:* Given the requirement of case-by-case analysis, courts frequently have professed to limit their rulings to the facts before them.

iv.1. Textual Commitment to Political Branches

Issues arising under the Alien Tort Statute, such as human rights violations and appropriate tort remedies, are matters that the text of the Constitution has committed to the judiciary. U.S. Const., art. III. This weighs against dismissal on the ground of political question. *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289, 347-48 (S.D.N.Y. 2003); *Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995).

In a challenge to the acts of U.S. officials, however, the U.S. Court of Appeals for the District of Columbia Circuit applied this factor in favor of dismissal, reasoning that actions like that at bar implicate foreign policy decisionmaking, an activity that is "textually committed to the political branches of the government." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006); *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006), *cert. denied,* 549 U.S. 1166 (2007). *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007).

iv.2. Ability of Court to Identify Standards by Which to Rule

Judicially discoverable standards are available to aid resolution of questions related to the Alien Tort Statute. In *Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995), the court wrote that the existence of these standards "obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." This reasoning counsels against dismissal on the political question ground.

iv.3. Respect for the Political Branches

If the defendant argues that resolution of the case may signal disrespect for another branch of government, courts frequently look to the views of the U.S. government. *E.g.*, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 (2d Cir. 2005). Consistent with this practice, the Supreme Court wrote in *Sosa* that in determining whether to apply the political question doctrine, courts "should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

To determine the Executive's views, courts have consulted:

- Treaties. *See Hwang Geum Joo v. Japan*, 413 F.3d 45, 49-52 (D.C. Cir. 2005).
- Executive agreements. *See Whiteman v, Dorotheum GmbH & Co. KG*, 431 F.3d 57, 73 (2d Cir. 2005).
- Statements of Interest submitted by the Executive Branch in the course of the litigation. This is the most common source used in the making of such determinations. Courts have ruled that although views set forth in a Statement of Interest must be given deference, they do not control the decision regarding the political question doctrine. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 (11th Cir. 2004); *Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

When the Executive has not conveyed its view, the court may interpret this silence as an indication of neutrality. *See Alperin v. Vatican Bank*, 410 F.3d 532, 558 (9th Cir. 2005).

v. *Forum Non Conveniens*

The *forum non conveniens* doctrine permits dismissal when, as detailed *supra* § II.B.4, there exists a more appropriate forum for adjudication of the matter. Defendants frequently make this assertion in Alien Tort Statute cases. *See* In re *Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992). In assessing this contention, courts conduct the full *forum non conveniens* analysis to determine whether:

- An alternative forum is adequate and available; and

- The defendant has met the burden of proving that private and public interest factors substantially weigh in favor of litigating the case in the other forum.

It is difficult to derive any particular guidance from other rulings, because *forum non conveniens* analyses turn on unique facts. It nonetheless appear that, in weighing the public interest factor of the second prong, the court may deem the United States' strong interest in the vindication of violations of international human rights to weigh against dismissal. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

If the plaintiff is a U.S. citizen, the plaintiff's choice of forum is entitled to "substantial deference and should only be disturbed if the factors favoring the alternative forum are compelling." *Id.* at 101.

Also noted is the difficulty of suing a defendant in a foreign state implicated in human rights abuses. *Id.* at 106. A forum that puts plaintiff's life at risk is not an adequate alternative forum. *Aldana v. Fresh Del Monte Produce, Inc.*, 2003 U.S. Dist. LEXIS 26777, at *6 (S.D. Fla. June 4, 2003).

vi. Time Bar

As is apparent from the full text quoted *supra* § III.E.1, the Alien Tort Statute contains no statute of limitations. On the theory that the Torture Victim Protection Act, discussed *infra* § III.E.2, is the most analogous federal statute, some courts have applied the latter statute's explicit ten-year limitations period to Alien Tort Statute cases. *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir.), *cert. denied*, 543 U.S. 874 (2004); *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir.), *cert. denied*, 540 U.S. 820, 540 U.S. 821 (2003); *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002).

Claims under the Alien Tort Statute are subject to federal principles of equitable tolling. *Deutsch*, 324 F.3d at 717-18. Equitable tolling may apply if extraordinary circumstances, or the defendant's wrongful conduct, are such that the plaintiff's inability to file earlier was "beyond his control and unavoidable even with diligence." *Jean v. Dorelien*, 431 F.3d 776, 779-81 (11th Cir. 2005) (internal quotation omitted). Such tolling may be appropriate for periods during which the:

- Defendant is absent from the United States;
- Violence persists in the state where the tort is alleged to have occurred; or
- Plaintiff's family members risk reprisals.

See Jean v. Dorelien, 431 F.3d at 779-81; *Hilao v Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005).

vii. Exhaustion of Remedies

The terse language of the Alien Tort Statute contains no explicit requirement of exhaustion of remedies in the state where the tort is alleged to have occurred. (This stands in

contrast with an explicit provision in the Torture Victim Protection Act. *See infra* § III.E.2.) Accordingly, lower courts have held that a plaintiff's failure to exhaust remedies – a doctrine discussed *supra* § II.B.6 – posed no bar to an Alien Tort Statute suit. *See*, *e.g.*, *Jean v. Dorelien,* 431 F. 3d 776, 781 (11th Cir. 2005).

Yet as detailed *supra* § III.E.1.b.ii.3.c, the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), indicated that in some circumstances exhaustion might be considered. U.S. Courts of Appeals subsequently divided on application of this statement:

- Considering whether a prudential doctrine of exhaustion of remedies should apply to claims under the Alien Tort Statute, a divided *en banc* panel of the Ninth Circuit held that any remedy must be "available, effective, and not futile." *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 827, 832 (9th Cir. 2008) (en banc). Later in the same litigation, the same circuit approved of the district court's additional considerations regarding the degree of acceptance of the norm and the extent of a nexus between the claim and the United States. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, __ U.S. __, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality).

- The Seventh Circuit rejected this approach, stating in *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011), that the implications of the argument that plaintiffs must exhaust local remedies in the state in which the violations occurred "border on the ridiculous."

viii. Comity

Comity – which is neither "a matter of absolute obligation" nor "of mere courtesy and goodwill" – has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); *see also Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544 n.27 (1987). Defendants in Alien Tort Statute cases occasionally argue that this concept of international comity – detailed *supra* § II.B.6 – counsels against the exercise of jurisdiction. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 63-64 (2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).

The U.S. Court of Appeals for the Seventh Circuit has suggested that the principle may justify a stay of proceedings in the United States, if the courts of the state in which the violation occurred seem willing and able to provide a remedy. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011).

d. Damages and Other Remedies

Most cases pursued under the Alien Tort Claims Act seek money damages. Plaintiffs may also join claims seeking injunctive or other equitable relief. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d. Cir. 2002); *Doe v. Israel*, 400 F. Supp. 2d 86, 97 (D.D.C. 2005).

2. Torture Victim Protection Act

Enacted in 1992, the Torture Victim Protection Act of 1991,[57] Pub. L. No. 102-256, 106 Stat. 73, is codified at note following 28 U.S.C. § 1350 (2006); that is, in a note immediately following the codification of the Alien Tort Statute. In contrast with that latter statute – which, as discussed *supra* § III.E.1, refers broadly to "a tort … committed in violation of the law of nations or a treaty of the United States" – the Torture Victim Protection Act provides a civil remedy for just two international law torts. Those two torts, which are defined below, are:

- Torture
- Extrajudicial killing

A congressional report described the Torture Victim Protection Act as a means to "enhance the remedy already available under" the Alien Tort Statute, in that the Act extends a civil remedy to U.S. citizens who have suffered either torture or extrajudicial killing under the color of law of a foreign state. S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). In its judgment in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004), the Supreme Court characterized the Torture Victim Protection Act as "supplementing," but not replacing, the Alien Tort Statute.

In establishing the civil action, the Torture Victim Protection Act states as follows:

> Liability. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350.

[57] Among practitioners in the field, the Torture Victim Protection Act of 1991 typically is referred to as the TVPA. With the exception of direct quotations, this *Benchbook* uses the full name rather than the acronym, however, in order to avoid confusing this statute with a subsequently enacted statute to which practitioners in another field often give the self-same acronym; that is, the Trafficking Victims Protection Act of 2000, codified as amended at 22 U.S.C. §§ 7101 *et seq*. (2006), and *described infra* § III.E.3.

To date, only four judgments of the Supreme Court mention the Torture Victim Protection Act, and only one offers any extended analysis.[58] That judgment is:

- *Mohamad v. Palestinian Auth.* __ U.S. __, 132 S. Ct. 1702 (2012)

This section discusses that decision, which interpreted the statutory term "individual," and further treats other aspects of Torture Victim Protection Act litigation by reference to select lower court opinions. *Caveat:* Many decisions in the latter group were issued before the Supreme Court's rulings. Such lower court decisions are cited on precise points of law not yet addressed by Supreme Court; it should be recognized, however, that some of them might not have gone forward for some other reason later explored by the Supreme Court, such as the meaning of "individual."

a. Overview of Torture Victim Protection Act Litigation

The following elements constitute a proper claim for civil damages under the Torture Victim Protection Act:

1. Proper plaintiff; that is, in the case of:
   a. torture, an individual victim
   b. extrajudicial killing, a legal representative or person entitled to sue for the wrongful death of a victim.
2. The victim suffered "torture" or "extrajudicial killing" within the meaning of the Act.
3. Proper defendant; that is, defendant is "[a]n individual" who acted "under actual or apparent authority, or under color of law," of a "foreign nation."
4. Defendant subjected the victim to torture or extrajudicial killing.

i. Overview of Defenses

In seeking to dismiss a Torture Victim Protection Act suit, defendants regularly argue that the court lacks subject-matter jurisdiction on the ground that the plaintiff has failed sufficiently to allege that one or more of the above elements is present. Decisions analyzing such claims are discussed below.

Additional defenses commonly raised in Torture Victim Protection Act cases include many of those detailed *supra* § III.E.1.c. with regard to the Alien Tort Statute. Discussions of overlapping defenses – immunities, political question, *forum non conveniens*, and comity – will not be repeated here. Rather, this section examines only those defenses that have merited distinct treatment in litigation brought pursuant to this Act. The section also adds consideration of a

[58] The other three decisions are *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, __, 133 S. Ct. 1659, 1665 (2013) (referring to the Act as point of comparison in discussion of scope of Alien Tort Statute); *Samantar v. Yousuf*, 560 U.S. 305, 308, 324-26 (2010) (remanding on question of immunity without reaching merits); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-38 (2004) (ruling against plaintiff based on interpretation of the Alien Tort Statute).

defense unique to this two-decades-old Act, that of nonretroactivity. Thus treated below, within the specific context of the Torture Victim Protection Act, are:

- Nonretroactivity
- Act of state
- Exhaustion of local remedies
- Time bar

i.1. Extraterritoriality Not a Defense

As detailed *supra* § III.E.1.c.i, in 2013 a majority of the Supreme Court held that "a canon of statutory interpretation known as the presumption against extraterritorial application" pertained to the Alien Tort Statute, the text of which contains no "'clear indication of extraterritoriality.'" *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, __, __, 133 S. Ct. 1659, 1664, 1665 (2013) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, __, 130 U.S. 2869, 2883 (2010)).

The presumption does not hold with regard to the Torture Victim Protection Act. By its terms the Act authorizes civil suits for torture or extrajudicial killings in an extraterritorial context; that is, only when the defendant is someone who acted "under actual or apparent authority, or color of any *foreign nation* …." Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (emphasis added). Justice Anthony M. Kennedy recognized this when he wrote in his separate opinion in *Kiobel*:

> Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act ….

__ U.S. at __, 133 S. Ct. at 1669 (Kennedy, J., concurring).

b. Elements of a Torture Victim Protection Act Claim

Discussed below are challenges respecting the requisite elements of a Torture Victim Protection Act claim – elements listed *supra* § III.E.2.a.

i. Proper Plaintiff

Plaintiffs in a lawsuit pursuant to this Act must be the human victim or the legal representative of that victim, as detailed below.

i.1. Human Victim

The Torture Victim Protection Act, § 2, note following 28 U.S.C. § 1350, authorizes a civil suit when an "individual" is subjected to torture or extrajudicial killing. In *Mohamad v. Palestinian Auth.*, __ U.S. __, __, 132 S. Ct. 1702, 1707-08 (2012), the Court held that an "individual" is a natural person – a human being. Although the precise holding pertained to the

status of the defendant "individual," Justice Sonia Sotomayor wrote in her opinion for a unanimous Court:[59]

> Only a natural person can be a victim of torture or extrajudicial killing.

Id. Clearly, a natural person is a proper plaintiff under the Act.

i.2. Victim's Legal Representative / Wrongful-Death Claimant

If the individual victim is deceased, the Act further authorizes a suit by "the individual's legal representative, or" by "any person who may be a claimant in an action for wrongful death." Torture Victim Protection Act, § 2(a)(2), note following 28 U.S.C. § 1350.

In *Mohamad*, the Court wrote that the term "person" has "a broader meaning in the law than 'individual,' and frequently includes nonnatural persons." __ U.S. at__, 132 S. Ct. at 1708 (citations omitted). It concluded that "Congress' use of the broader term evidences an intent to accommodate that possibility"; that is, the possibility that "estates, or other nonnatural persons, in fact may be claimants in a wrongful-death action." *Id.* at __ n.3, 132 S. Ct. at 1708 n.3.

A year before the Supreme Court issued its decision in *Mohamad*, the U.S. Court of Appeals for the Eleventh Circuit looked to the law of the forum state to determine whether plaintiffs at bar – children who alleged their fathers had been subjected to extrajudicial killings – were proper wrongful-death claimants. *Baloco* ex rel. *Tapia v. Drummond Co.*, 640 F.3d 1338, 1347-50 (11th Cir. 2011). It did so based on a finding of Congress's intent that it made after consulting legislative history. *Id.* at 1348-49 (quoting H.R. Rep. No. 102-367 (I), at 4, 1992 U.S.C.C.A.N at 87 (1991); S. Rep. No. 249, 102d Cong., 1st Sess., at 7 (1991).

i.3. Any Nationality

The Torture Victim Protection Act contains no limitation on the nationality of the plaintiff. Therefore – in contrast with the Alien Tort Statute, 28 U.S.C. § 1350 (2006), which is confined by its terms to noncitizens – the Torture Victim Protection Act permits suits by all natural persons, U.S. citizens and noncitizens alike.

i.4. Maintenance of Alien Tort Statute and Torture Victim Protection Act Claims

If other requirements are met, torture or extrajudicial killing – the two actionable Torture Victim Protection Act torts – may be alleged in an Alien Tort Statute suit. Lower courts have split on whether alien plaintiffs alleging torture or extrajudicial killing may rely on both the Alien Tort Statute and the Torture Victim Protection Act in the same suit:

[59] Justice Antonin Scalia joined all of Sotomayor's opinion for the Court, save for a different section, which discussed legislative history. *See id.* at 1702. Justice Stephen G. Breyer concurred, writing, after his own discussion of legislative history: "I join the Court's judgment and opinion." *Id.* at 1711 (Breyer, J., concurring).

- The U.S. Court of Appeals for the Eleventh Circuit is among the lower courts that have held that both statutes may be invoked. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005). Such courts look to a statement in the legislative history, to the effect that Congress intended the *Torture Victim Protection Act* to

> enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.

S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). *See*, *e.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005).

- In contrast, the Seventh Circuit held that for aliens and citizens alike, the Torture Victim Protection Act is the sole avenue for relief based on claims of torture or extrajudicial killing. *Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

ii. Conduct Alleged

In contrast with the Alien Tort Statute, which provides the basis for an array of international law torts, so long as they satisfy the standards detailed *supra* § III.E.1, the Torture Victim Protection Act authorizes recovery for two torts only:

- Torture
- Extrajudicial killing

The elements of each are set forth below.

ii.1. Torture

After establishing "torture" as one of two actionable torts, as set forth in the statutory text quoted *supra* § III.E.2, the Torture Victim Protection Act, § 3(b)(1), note following 28 U.S.C. § 1350, states:

> [T]he term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind ….

This definition "borrows extensively from" that in Article 1 of the 1984 Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, a treaty to which the United States is a party.[60] *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002); *see also* S. Rep. No. 249, 102d Cong., 1st Sess., at 3 (1991). Indeed, the Torture Victim Protection Act operates as U.S. implementing legislation with respect to certain aspects of the Convention. *See United States v. Belfast*, 611 F.3d 783, 807-09 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1511 (2011).

ii.2. Extrajudicial Killing

After establishing "extrajudicial killing" as the other of the two actionable torts, as set forth in the statutory text quoted *supra* § III.E.2, the Torture Victim Protection Act, § 3(a), note following 28 U.S.C. § 1350, defines extrajudicial killing as a:

> [D]eliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

The same section proceeds to exclude from the definition "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." *Id.*

According to the legislative history, Congress adopted this definition in accordance with the ban on extrajudicial killing contained in the 1949 Geneva Conventions on the laws of customs of war, treaties to which the United States and all member states of the United Nations belong. *See* S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(A) & n.7 (1991).[61]

---

[60] Article 1 of that treaty defines torture as follows:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S. 85, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx. This treaty, which entered into force on June 26, 1987, has 154 states parties. U.N. Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Dec. 17, 2013). The United States ratified on Oct. 21, 1994, subject to declarations and reservations set out *id.*

[61] This section of the Senate Report cites the Geneva Convention (No. 1) for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.N.T.S. 3114, 75 U.N.T.S. 31, *available at* http://www.icrc.org/ihl.nsf/INTRO/365?OpenDocument (last visited Dec. 17, 2013). In pertinent part, subsection (d) of Article 3 of that treaty forbids

> the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

iii. Proper Defendant

As quoted in full *supra* § III.E.2, the Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350, requires that the defendant be "[a]n individual" who acted "under actual or apparent authority, or color of law, of any foreign nation." Each aspect of this definition is discussed in turn below.

iii.1. "Individual": Natural Person Only

The defendant must be a natural person; that is, a human being. This was made clear in *Mohamad v. Palestinian Auth.*, __ U.S. __, __, 132 S. Ct. 1702, 1705 (2012), in which the Supreme Court unanimously held "that the term 'individual' as used in the Act encompasses only natural persons."

The Court in *Mohamad* thus rejected the Torture Victim Protection Act suit at bar, which had been brought against an organization. It extended its reasoning to all "nonnatural" persons – sometimes also referred to as "artificial" or "juridical" persons – naming as examples corporations, partnerships, associations, firms, societies, and related entities. *See id*. at 1707.

iii.1.a. Foreign States

As an artificial person, a foreign state cannot be a defendant: it falls outside the statutory term "individual" as construed by the Supreme Court in *Mohamad v. Palestinian Auth.*, __ U.S. __, 132 S. Ct. 1702 (2012). Even if this were not the case, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (2006), discussed *supra* §§ II.B, III.E.1.c.ii.a., typically would preclude such a suit. *See Mohamad*, __ U.S. at __, 132 S. Ct. at 1706; S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(D) (1991).

iii.2. Actual or Apparent Authority or Color of Law

The Supreme Court recently wrote:

> [T]he Act does not impose liability on perpetrators who act without authority or color of law of a foreign state.

Mohamad v. Palestinian Auth., __ U.S. __, 132 S. Ct. 1702, 1710 (2012) (citing H.R. Rep. No. 102-367 (I), at 5, and S. Rep. No. 249, 102d Cong., 1st Sess., at 8 (1991), each of which specified that the legislation was not intended to cover "purely private" acts). This statement

---

This provision is known as Common Article 3 because it is repeated verbatim in the other three 1949 Geneva Conventions on the laws and customs of war, which concern: in No. 2, the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; in No. 3, the Treatment of Prisoners of War; and No. 4, the Protection of Civilian Persons in Time of War. Each of these four treaties is universally accepted; that is, all 195 U.N. member states have joined the treaty regime. *See generally* Int'l Comm. Red Cross, *The Geneva Conventions of 1949 and their Additional Protocols*, http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (last visited Dec. 17, 2013) (presenting links to each treaty that report 195 states parties).

tracks the explicit statutory requirement that the defendant acted "under actual or apparent authority, or color of law," of a "foreign nation." Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (2006).

To interpret this provision, courts employ analysis similar to that in Alien Tort Statute suits involving torts that require state action. By this analysis, described *supra* § III.E.1.b.iii.3.b, courts draw from general principles of agency law and from the jurisprudence interpreting a federal civil rights statute, 42 U.S.C. § 1983 (2006). *See*, *e.g.*, *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

If the defendant is not an agent of a foreign nation-state, courts may require a showing that the defendant was in a symbiotic relationship with a state actor. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 (11th Cir. 2009). Proof of state action does not require proof of widespread government misconduct; the actions of a single official are sufficient. *Romero*, 552 F.3d at 1317.

iv. Defendant Subjected Victim to Torture or Extrajudicial Killing

The Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350, requires that the defendant "subjec[t]" the victim to torture or extrajudicial killing.

The legislative history provides that the Torture Victim Protection Act allows suits "against persons who ordered, abetted, or assisted in the torture." S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(E) (1991). The Senate Report states in the same section that "anyone with higher authority who authorized, tolerated or knowingly ignored" the commission of actionable torts "is liable for them."

Referring to such provisions, courts have concluded that Congress intended the Torture Victim Protection Act to extend to forms of responsibility such as ordering, aiding and abetting, command responsibility, and conspiracy. *See Chavez v. Carranza*, 559 F.3d 486, 498-99 (6th Cir.), *cert. denied*, 558 U.S. 822 (2009); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005); *Ford* ex rel. *Estate of Ford v. Garcia*, 289 F.2d 1283, 1286 (11th Cir. 2002); With explicit reference to the Sixth Circuit's decision in *Chavez*, the Supreme Court wrote in *Mohamad v. Palestinian Auth.*, __ U.S. at __, 132 S. Ct. 1702, 1709 (2012):

> [T]he TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing.

c. Defenses

In general, many of the same defenses commonly raised in Alien Tort Statute litigation, and detailed *supra* § III.E.1.b.iii.3., are applicable to cases brought under the Torture Victim Protection Act. This section examines only those defenses that have merited distinct treatment within the specific context of the Torture Victim Protection Act:

- Nonretroactivity

- Act of state
- Exhaustion of local remedies
- Time bar

Each of these defenses is discussed in turn below.

i. Nonretroactivity

The Torture Victim Protection Act took effect on March 12, 1992. Occasionally, plaintiffs have filed suit under the Act for conduct occurring before that date. Courts have ruled that the Act does not have impermissible retroactive effect, for the reason that it neither creates new liabilities nor impairs rights. *E.g.*, *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1153-54 (11th Cir. 2005) (applying general nonretroactivity analysis established in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

ii. Act of State

On the act of state doctrine in general, see *supra* § II.B.2; on the application of the doctrine to Alien Tort Statute litigation, see *supra* § III.E.1.c.iii.

With particular respect to the Torture Victim Protection Act, the legislative history suggests that the act of state doctrine cannot prevent liability with respect to allegations of torture committed by former government officials. The legislative report generated in connection with this statute provides:

> [T]he committee does not intend the 'act of state' doctrine to provide a shield from lawsuit for former officials. … Since the doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.

S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(D) (1991).

iii. Exhaustion of Local Remedies

Unlike the Alien Tort Statute, the Torture Victim Protection Act explicitly requires that plaintiffs exhaust local remedies before pursuing suit in U.S. courts. The Act thus provides:

> A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

Torture Victim Protection Act, § 2(b), note following 28 U.S.C. § 1350 (2006). *See Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

A challenge under this portion of the statute constitutes an affirmative defense. Therefore, the defendant bears the "substantial" burden of proof that plaintiff has not exhausted available local remedies. Doubts are to be resolved in the favor of the plaintiff; moreover, the plaintiff

need not pursue a local remedy if such pursuit would be futile or would subject the plaintiff to a risk of reprisal. *See Jean v. Dorelien*, 431 F.3d 776, 781-83 (11th Cir. 2005).

iv. Explicit Time Bar

Unlike the Alien Tort Statute, the Torture Victim Protection Act explicitly sets forth a limitations period:

> No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Torture Victim Protection Act, § 2(c), note following 28 U.S.C. § 1350 (2006).

This limitations period is subject to equitable tolling. *See Hilao v Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (citing S. Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991)); *see also Jean v. Dorelien*, 431 F.3d 776, 780 (11th Cir. 2005).

d. Damages and Other Remedies

The Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (2006), makes clear that an individual found to have committed torture or extrajudicial killing "shall, in a civil action, be liable for damages." This has been held to include both compensatory and punitive damages. *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1151 (11th Cir. 2005).

Many judgments have been entered under this statute, but damages have been collected in few cases. In its 2012 judgment in *Mohamad v. Palestinian Authority*, the Supreme Court wrote:

> [W]e are told that only two TVPA plaintiffs have been able to recover successfully against a natural person – one only after the defendant won the state lottery.

__ U.S. __, __, 132 S. Ct. 1702, 1710 (citing *Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005)).

3. Human Trafficking

Recent, unprecedented efforts to combat human trafficking include U.S. legislative developments, anti-trafficking policy implementation, and innovations in international law. U.S. domestic law slightly predates the key international treaty on human trafficking. Nevertheless, domestic and international law are largely consistent. With regard to enforcement, the numbers of criminal and civil cases against human traffickers have surged in the United States. On a parallel track, the European Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia have issued several important human trafficking rulings. This section focuses on the U.S. government's efforts to comply with the principal statute at issue, the 2000 Trafficking Victims Protection Act, and its subsequent reauthorizations.

a. Overview of Statutory Law

Congress passed the Victims of Trafficking and Violence Prevention Act in 2000. Pub. L. No. 106–386, 114 Stat. 1466 (2000) (codified as amended in Title 22, Chapter 78, and Title 18, Chapter 77, of the U.S. Code). Typically referred to as the TVPA,[62] this statute:

- Enumerated new federal criminal prohibitions;
- Afforded victims access to refugee resettlement benefits and new immigration protections; and
- Established a governmental office to conduct international monitoring and reporting on human trafficking. Information about and reports by this unit, the State Department's Office to Monitor and Combat Trafficking in Persons, may be found at http://www.state.gov/j/tip/index.htm (last visited Dec. 9, 2013).

Subsequent reauthorizations of the Trafficking Victims Protection Act, in 2003, 2005, 2008, and 2013:

- Extended the extraterritorial reach of the law;

[62] Among practitioners in this field, the statute typically referred to as the TVPA. This *Benchbook* uses the full name rather than the acronym, however, in order to avoid confusion of this 2000 statute with an earlier statute to which practitioners in another field often give the self-same acronym; that is, the Torture Victim Protection Act of 1991, Pub.L. 102-256, H.R. 2092, 106 Stat. 73. Enacted on Mar. 12, 1992, and codified in the note following 28 U.S.C. § 1350 (2006), the Torture Victim Protection Act is described *supra* § III.E.2.

- Enumerated additional criminal prohibitions; and
- Added a civil remedy that permits victims to sue traffickers in federal court.

The reauthorized law is sometimes referred to as the TVPRA.

i. Developments Leading to Adoption of the Trafficking Victims Protection Act

Section 1 of the Thirteenth Amendment to the U.S. Constitution states:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 of the amendment authorizes Congress "to enforce this article by appropriate legislation."

Initially, the Thirteenth Amendment's prohibition on chattel slavery could only be implemented through criminal statutory provisions.[63] Those statutes did not adequately address the modern manifestations of human trafficking in the United States, as a Congressional finding set forth in the Trafficking Victims Protection Act pointed out. *See* 22 U.S.C. § 7101(b)(13) (2006). For example, in *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court narrowly interpreted 18 U.S.C. § 1584 to criminalize only servitude brought about through use or threatened use of physical or legal coercion. With passage of the Trafficking Victims Protection Act, Congress sought to broaden the definition to encompass other, more subtle forms of coercion and conduct "that can have the same purpose and effect." 22 U.S.C. § 7101(b)(13).

ii. Relation between the Trafficking Victims Protection Act and International Legal Instruments

The Trafficking Victims Protection Act is largely consistent with multilateral treaties that proscribe human trafficking. Among these is an issue-specific treaty adopted in 2000 to supplement an omnibus treaty on transnational organized crime. This issue-specific 2000 Trafficking Protocol – formally titled the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[64] – is discussed more fully *infra* § III.E.3.b.

---

[63] Courts are divided over whether the Thirteenth Amendment to the U.S. Constitution carries with it a private right of action. *Compare Manliguez v. Joseph*, 226 F. Supp. 2d 377, 383-85 (E.D.N.Y. 2002), *with Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1357 (6th Cir. 1996).

[64] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, Annex II, *available at* http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. This treaty, which entered into force on Dec. 25, 2003, has 159 states parties, among them the United States, which ratified the treaty on November 3, 2005. U.N. Treaty Collection, Status, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en, (last visited Dec. 16, 2013).

It would not be correct to characterize the Trafficking Victims Protection Act as a federal statute that "implements" the 2000 Trafficking Protocol, for two reasons:

- *Timing:* The Trafficking Victims Protection Act became law weeks before the Trafficking Protocol was finalized and opened for signature in 2000, and well before that protocol entered into force in 2003 or was ratified by the United States in 2005; and

- *Omission:* Although the Trafficking Victims Protection Act itself lists an extensive catalogue of treaties and conventions that condemn slavery and servitude, the 2000 Trafficking Protocol is not included.[65]

Nonetheless, there is considerable consistency between the Trafficking Victims Protection Act and the 2000 Trafficking Protocol. The U.S. government has coined the term the "Three P's" – prevention, protection, prosecution – to describe the scope both of the legislation and of the Trafficking Protocol.

Considerations related to adjudication of trafficking cases include:

- Treaty framework
- The United States' ratification of the Trafficking Protocol
- Elements of the U.S. statutory scheme addressing human trafficking
- Common defenses

Each is discussed in turn below.

For an excellent overview of relevant international law, see Anne T. Gallagher, *The International Law of Human Trafficking* (2010).

---

[65] Among the findings set forth in the Trafficking Victims Protection Act is the following:

> The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports, including the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labor Convention; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/167, 51/66, and 52/98; the Final Report of the World Congress against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); and the 1991 Moscow Document of the Organization for Security and Cooperation in Europe.

22 U.S.C. § 7101(b)(23). Three additional international conventions specifically address trafficking in persons: the Convention on the Elimination of All Forms of Discrimination against Women, art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13, entered into force Sept. 3, 1981; the Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3, entered into force Jul. 1, 2002; and the Convention on the Rights of the Child, art. 35, Nov. 20, 1989, 1577 U.N.T.S. 3, entered into force Sept. 2, 1990. Because the United States has not ratified any of these treaties, they are not addressed in this chapter.

b. The 2000 Trafficking Protocol

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[66] is typically called the Trafficking Protocol. At times it is also designated "the Palermo Protocol," in recognition of the fact that it is one of three protocols, or side treaties, supplementing the 2000 U.N. Convention against Transnational Organized Crime.[67] That comprehensive treaty is known as the Palermo Convention, for the reason that, along with the Trafficking Protocol and one other side treaty, it was opened for signature in December 2000 at a diplomatic conference in Palermo, Italy.[68] States must ratify the Convention against Transnational Organized Crime in order to ratify the Trafficking Protocol.

The U.N. Office of Drugs and Crime, which is based in Vienna, Austria, serves as the secretariat for the Conference of Parties to the Palermo Convention; the website for that agency is http://www.unodc.org (last visited Dec. 9, 2013).

---

[66] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, Annex II, *available at* http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. This treaty, which entered into force on Dec. 25, 2003, has 158 states parties, among them the United States, which ratified on Nov. 3, 2005. U.N. Treaty Collection, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime*, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en (last visited Dec. 9, 2013).

[67] U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Vol. 1, U.N. Doc. A/55/49 (2001), *available at* http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. This treaty, which entered into force on Sept. 29, 2003, has 179 states parties, among them the United States, which ratified on Nov. 3, 2005. U.N. Treaty Collection, *United Nations Convention Against Transnational Organized Crime*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Dec. 9, 2013).

[68] *See* U.N. Office on Drugs and Organized Crime, *United Nations Conference and the Protocols Thereto*, http://www.unodc.org/unodc/treaties/CTOC/index.html#Fulltext (visited Dec. 9, 2013). As stated *id*., the other protocol opened for signature at this time was the Protocol against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, 2241 U.N.T.S. 480. This treaty, which entered into force on Jan. 28, 2004, has 138 states parties, including the United States, which ratified on Nov. 5, 2005. U.N. Treaty Collection, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the U.N. Convention against Transnational Organized Crime*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en (last visited Dec. 9, 2013). The third side treaty is the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Nov. 15, 2000, 2326 U.N.T.S. 208. This treaty, which entered into force on July 3, 2005, has 105 states parties; the United States is not among them. U.N. Treaty Collection, *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en (last visited Dec. 9, 2013). Both protocols are available at http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

c. Trafficking Defined

Article 3(a) of the 2000 Trafficking Protocol defines trafficking as follows:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

One phrase in the passage above, "exploitation of the prostitution of others," is purposefully left undefined in the Protocol. The official record of the negotiations, known as the *travaux préparatoires*, or prepareatory works states:

> The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws.[69]

As the official notes clarify, states may criminalize prostitution, but this is not required. States parties to the Trafficking Protocol exercise complete discretion on this aspect of their domestic criminal law.

In contrast, pursuant to Article 5 of the Trafficking Protocol, states must criminalize all forms of human trafficking, including forced labor and forced prostitution, "when committed intentionally."[70] Similarly, states must criminalize the trafficking of children, defined in Article 3(d) of the Trafficking Protocol as any persons under 18 years of age. Article 3(c) confirms that the "recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation" is trafficking, even if no force, fraud, or coercion is present.

d. Reservations Accompanying U.S. Ratification of the Trafficking Protocol

When it ratified the 2000 Trafficking Protocol on November 3, 2005, the United States attached a number of reservations and one understanding; these may be found at U.N. Treaty Collection, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women*

[69] The *travaux préparatoires* for the 2000 U.N. Convention Against Transnational Organized Crime and its Protocols are available at http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf (last visited Dec. 9, 2013), at page 347.

[70] Notably, the Trafficking Victims Protection Act does not criminalize organ trafficking. The National Organ Transplant Act of 1984 prohibits the buying and selling of organs in the United States. Pub. L. 98-507, 98 Stat. 2339 (codified as amended in scattered sections of 42 U.S.C.).

and Children, supplementing the United Nations Convention against Transnational Organized Crime, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en (last visited Dec. 9, 2013). Issues addressed included:

- Jurisdiction
- Federalism

Each is discussed in turn below.

i. Jurisdiction

With regard to jurisdiction, the first U.S. reservation to its ratification of the 2000 Trafficking Protocol provided in part:

> The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law.

This reservation thus proceeded to state that the United States would "implement paragraph 1(b) of the" U.N. Convention against Transnational Organized Crime, described *supra* § III.E.3.b, "to the extent provided for under its federal law."

ii. Federalism

A second reservation concerned the relationship of federal law and constituent states in the United States. It stated that

> U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, such as the Thirteen Amendment's prohibition of "slavery" and "involuntary servitude," serves as the principal legal regime within the United States for combating the conduct addressed in this Protocol ….

This reservation then stated that federal criminal law "does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or otherwise implicate another federal interest, such as the Thirteenth Amendment." It concluded, however, that federalism concerns would not preclude the mutual legal assistance and international cooperation required by the Convention against Transnational Organized Crime and the Trafficking Protocol.

e. Elements of the Treaty Implemented by U.S. Law and Policy

The 2000 Trafficking Protocol is best analyzed under the "Three P's" paradigm of prevention, protection, and prosecution. Protection of victims typically arises out of provisions of the Trafficking Victims Protection Act, and prosecution of traffickers most frequently occurs in

federal courtrooms. This is changing, however, given that all fifty states in the United States have adopted human trafficking statutes.

i. General Protection of Victims

Article 6 of the 2000 Trafficking Protocol addresses "assistance to and protection of victims of trafficking in persons." The Protocol requires that states consider implementing measures to:

- Protect the privacy and identity of victims of trafficking;
- Provide victims with information about court and administrative proceedings, permitting victims to present their views in criminal proceedings;
- Provide measures "for the physical, psychological, and social recovery" of victims. This includes appropriate housing, counseling, and information on legal rights, medical and material assistance, and employment opportunities;
- Consider the special needs of children;
- "[P]rovide for the physical safety of victims of trafficking"; and
- Ensure that the domestic legal system permits trafficking victims to obtain compensation for damage suffered.

With regard to privacy measures, victims of trafficking are routinely referred to only by their initials or first names in written opinions in criminal cases. *See*, *e.g.*, *United States v. Marcus*, 628 F.3d 36, 45 n.12 (2d Cir. 2010).[71]

With regard to victim presentations, U.S. law permits witnesses to make victim-impact statements in criminal cases. *See* 18 U.S.C. § 3771.

With regard to victims' recovery, the Trafficking Victims Protection Act established funding for nongovernmental agencies, which provide many recovery-related services.

Finally, with regard to compensation, 18 U.S.C. § 1593 (2006) requires courts to award restitution to victims of trafficking. This statute specifically addresses the difficulty of calculating restitution for victims of trafficking, requiring that victims receive compensation for the full value of their losses.

[71] A federal grand jury had indicted the defendant in *Marcus* for unlawful forced labor and sex trafficking between January 1999 and October 2001. His conviction was reversed on appeal, for the reason that the Trafficking Victims Protection Act took effect on Oct. 28, 2000. *United States v. Marcus*, 538 F.3d 97 (2d Cir. 2008). The Supreme Court reversed and remanded. 560 U.S. 258 (2010). The U.S. Court of Appeals for the Second Circuit upheld the forced labor conviction and remanded to the trial court for retrial on the sex trafficking conviction. 628 F.3d 36, 44 (2d Cir. 2010). At this juncture, prosecutors dropped the sex trafficking charge, and the defendant was sentenced to eight years in prison on the remaining charges. 517 Fed. Appx. 8 (2d Cir.), *cert. denied*, 134 S. Ct. 135 (2013).

Section 1593(b)(3) defines "full amount of the victim's losses" as "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. § 201 et seq. (2012))." This formulation permits a victim of sex trafficking to recover the amount earned by the trafficker for commercial sexual services. Restitution orders issued under other statutes, such as 18 U.S.C. § 3663 (2006), limit restitution in sex trafficking cases to back wages, which may be a less appropriate measure of loss. In 2012, the Treasury Department issued a notice on Restitution Payment under the Trafficking Victims Protection Act. I.R.S. Notice 2012-12, 2012-6 I.R.B. 365, *available at* http://www.irs.gov/pub/irs-drop/n-12-12.pdf (last visited Dec. 9, 2013).

Mandatory restitution payments awarded under 18 U.S.C. § 1593 are excluded from gross income for federal income tax purposes. Because of this tax treatment and the more accurate damages calculation in sex trafficking cases, restitution orders made to trafficking victims should be made under 18 U.S.C. § 1593 only.

ii. Immigration Measures

Article 7 of the 2000 Trafficking Protocol requires states to consider measures to "permit victims of trafficking in persons to remain" in the state's territory, either temporarily or permanently. As in other instances, provisions of the federal statute, the Trafficking Victims Protection Act, correspond to this international obligation.

This Act initially established two forms of immigration relief for trafficking victims, by:

- Creating a new nonimmigrant category – T – for aliens who qualified as victims of a "severe form of trafficking in persons" set out in § 101(a)(15)(T) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1101(a)(15)(T). The Department of Homeland Security may award up to 5,000 of these T-visas annually. Recipients may eventually adjust their immigration status to legal permanent residency.

- Establishing "continued presence," a temporary immigration status that permits potential witnesses to stay in the United States through the investigation and criminal prosecution stages. 22 U.S.C. § 7105(C)(3), 7105(E).

The 2008 reauthorization of the Trafficking Victims Protection Act, known as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, established another avenue for relief for victims of labor exploitation and trafficking in the United States. Pub. L. No. 110-457, 122 Stat. 5072 (codified in scattered sections of 6, 8, 18, 22, and 42 U.S.C. (Supp. II 2009)). Holders of special visas reserved for domestic workers and servants of diplomats and international organization employees – that is, holders of A-3 and G-5 visas –may remain in the United States to pursue civil claims against their employers. Section 203(c) of this 2008 reauthorization statute, codified at 8 U.S.C. § 1375c (2006), permits A-3/G-5 visa holders to request deferred action as they pursue their civil claims.

Section 205(a)(3)(A)(iii), codified at 22 U.S.C. § 7105, also requires that a victim's previously granted continued presence remain in effect for the duration of a civil action filed under 18 U.S.C. § 1595, even if continued presence otherwise would have been terminated.

iii. Prosecution of Traffickers: Criminal Prohibitions and Definitions

The Trafficking Victims Protection Act of 2000 and subsequent reauthorizations created a number of additional crimes and remedies, and it further recodified several preexisting crimes.[72] These criminal statutes are generally referred to as the chapter 77 crimes, as they appear in chapter 77 of Title 18 of the U.S. Code. These include:

- 18 U.S.C. § 1581, Peonage.
- 18 U.S.C. § 1584, Sale into involuntary servitude.
- 18 U.S.C. § 1589, Forced labor.
- 18 U.S.C. § 1590, Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor.
- 18 U.S.C. § 1591, Sex trafficking of children or by force, fraud, or coercion.
- 18 U.S.C. § 1592, Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.
- 18 U.S.C. § 1593, Mandatory restitution.
- 18 U.S.C. § 1593A, Benefitting financially from peonage, slavery, and trafficking in Persons.
- 18 U.S.C. § 1594, General provisions, including those on attempt and forfeiture.
- 18 U.S.C. § 1595, Civil remedy, providing a private right of action.
- 18 U.S.C. § 1596, Additional jurisdiction in certain trafficking offenses, extraterritorial jurisdiction.

Other crimes, codified in chapters other than chapter 77, are often charged along with trafficking offenses. These include:

- 18 U.S.C. § 2423, Transportation of minors into prostitution.
- 18 U.S.C. § 1546, Fraud and misuse of visas, permits, and other documents.

[72] Several of the chapter 77 crimes predated the Trafficking Victims Protection Act and remained essentially untouched or only slightly modified. These include sections 1981 and 1984, which were untouched, and section 1583, which only added an additional obstruction prohibition.

- 18 U.S.C. § 1351, Fraud in foreign labor contracting

The 2008 amendments to the Trafficking Victims Protection Act added a number of provisions to the existing criminal statutes prohibiting obstruction of justice.

The definition of "severe forms of trafficking" underpins these criminal statutes. The Trafficking Victims Protection Act defines the term "severe forms of trafficking in persons" as follows:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
>
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

22 U.S.C. § 7102(9). It further defines "sex trafficking" as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." *Id*. § 7102(10).

iv. Monetary Remedies

Trafficking victims in the United States may obtain financial damages in criminal cases through mandatory restitution, as discussed *supra* § III.E.3.e.1. In addition, trafficking victims may bring federal or state civil cases seeking money damages. Most commonly, these civil cases include state law claims for tort damages, contract breach, labor law violations under state law or the federal Fair Labor Standards Act, and negligence. Cases brought during a federal criminal action are subject to a mandatory stay. 18 U.S.C. § 1595.

v. Civil Remedies and Restitution

In the civil context, in cases brought under 18 U.S.C. § 1595, courts have awarded a full range of damages. The U.S. Court of Appeals for the Ninth Circuit has held that punitive damages are available to plaintiffs filing federal civil actions for trafficking. *Ditullio v. Boehm*, 662 F.3d 1091, 1102 (9th Cir. 2011). Trial courts routinely award back wages, tort damages, and contract damages, as well as punitive damages. *See*, *e.g.*, *Mazengo v. Mzengi*, 542 F. Supp. 2d 96 (D.D.C. 2008).

In the criminal context, 18 U.S.C. § 1593, described *supra* § III.E.3.e.iii, defines the scope of mandatory criminal restitution.

vi. Federal Civil Actions under Chapter 77

Section 1595 of Title 18 of the U.S. Code creates a federal right of action for victims of trafficking. Any crime that a federal prosecutor may charge under 77 of Title 18 of the U.S. Code, discussed *supra* § III.E.3.e.iii, may be included in a federal civil complaint brought under 18 U.S.C. § 1595 for conduct that occurred after the enactment date of December 19, 2003. The original civil remedy, created by the 2003 reauthorization, permitted suits only under 18 U.S.C. §§ 1589, 1590, or 1591. Section 221 of the William Wilberforce Trafficking Victims Reauthorization Act of 2008, codified at 18 U.S.C. §§ 1593(b), 1595, extended the civil remedy to all offenses listed in chapter 77. Pub. L. No. 110-457, 122 Stat. 5072 (2008).

vii. Extraterritorial Jurisdiction

Federal law, codified at 18 U.S.C. §§ 1596, 3271, provides extraterritorial jurisdiction for criminal and civil prosecutions of trafficking crimes listed in chapter 77 of Title 18 of the U.S. Code, discussed *supra* § III.E.3.e.iii.

f. Common Affirmative Defenses

A host of defenses has been advanced in trafficking cases. The most frequent, in both criminal and civil cases, pertain to: limitations periods; constitutional provisions; timing of conduct; the diplomatic status of the defendant; the asserted absence of force, fraud, or coercion; the asserted family status of the alleged victim; asserted cultural differences; the immigration status of the alleged victim; the defense of consent; an asserted belief that the alleged victim was an adult; the relationship of trafficking to slavery; and the status of the defendant in relation to subcontractors. Each of these defenses is treated below.

i. Limitations Period Defense

Defendants routinely challenge the statute of limitations for each count of the complaint or indictment. The statute of limitations for a civil trafficking case under 18 U.S.C. § 1595(c) is ten years. *Doe v. Siddig*, 810 F. Supp. 2d 127 (D.D.C. 2011).

ii. Constitutional Overbreadth Defense

Defendants have attacked the forced labor statute as overbroad, in violation of constitutional guarantees. By this claim, defendants argue that they did not threaten the alleged victim, but merely warned, honestly and innocently, that the authorities would deport that person. At least one U.S. court of appeal has rejected this defense. *United States v. Calimlim,* 538 F.3d 706, 710-13 (7th Cir. 2008), *cert. denied*, 555 U.S. 1102 (2009).

In sex trafficking cases, defendants have unsuccessfully challenged the term "sex act" as unconstitutionally vague. *E.g.*, *United States v. Martinez*, 621 F.3d 101 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1622 (2011).

iii. Timing of Conduct: Pre-Enactment Activity Defense

Under the pre-enactment activity claim, the defense challenges whether the conduct charged in the indictment predated the enactment of the relevant portion of the statute. *See United States v. Marcus*, 560 U.S. 258, 260 (2010) (criminal context); *Ditullio v. Boehm*, 662 F.3d 1091, 1102 (9th Cir. 2011) (civil context). Prosecutors generally counter that conduct that straddles the pre-enactment and post-enactment dates qualifies as a continuing violation. *Ditullio*, 662 F.3d at 1096.

iv. Status of the Accused: Diplomatic Immunity Defense

A defendant may raise diplomatic immunity, arguing that service must be quashed and the complaint dismissed. *See Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996). Only diplomats credentialed under the 1961 Vienna Convention on Diplomatic Relations[73] enjoy this total immunity. Consular officers and individuals working for international organizations have only functional immunity. *See Park v. Shin*, 313 F.3d 1138, 1143 (9th Cir. 2002).

Furthermore, even diplomats with full immunity may not enjoy residual immunity once they depart the United States or abandon their post. *Swarna v. Al-Awadi*, 622 F.3d 123, 137-38 (2d Cir. 2010) (analyzing residual immunity provided for under Article 39(2) of the 1961 Vienna Convention on Diplomatic Relations).

v. "No Force, Fraud, or Coercion" Defense

The "no force, fraud or coercion" defense arises when a defendant contends that the alleged victim was a happy and fulfilled worker, a claim advanced *inter alia* by submission of photographs of the alleged victim enjoying life at, for example, parties or Disneyland. *See*, *e.g.*, *Doe v. Siddig*, 810 F. Supp. 2d 127 (D.D.C. 2011), a case in which defendants filed an answer with dozens of photographs not considered by the court. Defendants also have introduced as evidence letters sent to family members in the country of origin, describing satisfaction with life in the United States. *E.g.*, *United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

vi. Status of Alleged Victim: Family Member Defense

Under the "family member" defense, a defendant submits that the alleged trafficking victim was a member of the family performing chores, rather than an employee forced to work. *See, e.g.*, *Velez v. Sanchez*, 693 F.3d 308, 328 (2d Cir. 2012).

---

[73] Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *available at* http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf. This treaty, which entered into force on Apr. 24, 1964, has 189 states parties; among them is the United States, which ratified on Nov. 13, 1972. *See* U.N. Treaty Collection, *Vienna Convention on Diplomatic Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en (last visited Dec. 9, 2013). The Convention has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006). This treaty, which has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006), is discussed *supra* § II.B.

vii. Cultural Defense

The cultural defense is premised on the claim that the defendants' treatment of the alleged victim is appropriate and customary in the defendants' country of origin. *See*, *e.g.*, *United States v. Afolabi*, Crim. No. 2:07-cr-00785-002 (D.N.J. 2007). The cultural defense in this case was discussed in Assoc. Press, *Lawyer Says N.J. Trafficking Case Involves Culture Norms Not Understood in America*, Dec. 8, 2010, *available at* http://www.nj.com/news/index.ssf/2010/12/nj_immigrants_lawyer_says_smug.html. The conviction and sentence were affirmed on appeal in an unpublished opinion. *United States v. Afolabi*, Case No. 10-3287 (3d Cir. 2011).

Defendants frequently engage expert witnesses to support this defense, which can be related to the family member defense just described. In an Eritrean context, for example, experts dubbed a domestic worker's position in the family as "fictive kinship." *Mesfun v. Hagos*, No. CV 03-02182 MMM (RNBx), 2005 WL 5956612 (C.D. Cal. Feb. 16, 2005).

viii. Immigration Status of Alleged Victim: Lack of Standing

In what is known as the "illegal alien" or *Hoffman Plastics* defense, defendants argue that the alleged victim has no standing to bring a civil action because the victim is in the United States illegally. *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 151 (2002). Most courts that have considered this decision have construed it narrowly, to apply only to certain claims for back wages brought under the National Labor Relations Act. *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 247 (2d Cir. 2006).

ix. Immigration Status of Alleged Victim: Immigration "Fraud"

Under the "immigration fraud" defense, defendants contend that the alleged victim made false accusations in order to obtain a T-visa or other immigration status to remain in the United States.

x. Defense of Consent

In raising a consent defense, a defendant may argue that although the plaintiffs or complaining witnesses had contracts promising them minimum wage and benefits, these workers voluntarily (and orally) agreed to accept a far lower wage. In the sex trafficking context, defendants often argue that the alleged victims voluntarily engaged in prostitution and did not suffer force, fraud, or coercion with any nexus to prostitution. *See, e.g., United States v. Paris*, No. 3:06-cr-64, 2007 U.S. Dist. LEXIS 78418, at 29-30 (D. Conn. Oct. 23, 2007). On appeal, on appeal, no arguments raised on this point were considered. *See United States v. Martinez*, 621 F.3d 101 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1622 (2011).

xi. Defense Based on Perceived Age of Alleged Victim

In a case concerning a severe form of trafficking involving a child under 18 years of age, the defense may argue that the defendant believed that the child was an adult; that is, a person

older than 18. *United States v. Daniels*, 653 F.3d 399, 409-10 (6th Cir. 2011) (upholding jury instructions stating that the government was "not required to prove knowledge of the minor's age to sustain a conviction"), *cert. denied*, 132 S. Ct. 1069 (2012).

xii. "Not Slavery" Defense

In the Alien Tort Statute context, defendants argue that trafficking does not rise to the level of slavery, and therefore does not violate customary international law. *See*, *e.g.*, *Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010).

Similarly, defendants in TVPRA cases, described *supra* § III.E.3.a, frequently point to the lack of physical violence, the absence of chains and other restraints, in an effort to compare the victims' treatment favorably with that of slaves held in the United States during the early nineteenth century. In such a case, a federal appellate court declined "to construct a minimum level of threats or coercion required to support a conviction" for involuntary servitude, thus leaving the question for the finder of fact. *United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002), *cert. denied*, 538 U.S. 981 (2003).

xiii. Independent Contractor/Lack of Agency Defense

In several civil lawsuits against larger employers, in which subcontractors or recruiters were most directly responsible for the forced labor, the larger employers typically have claimed that the subcontractors or recruiters were independent contractors, and that they acted outside the scope of their agency to the larger employer.

xiv. Payment of Legal Wages Defense

Several civil cases have been brought on behalf of trafficking victims who were paid wages that were the equivalent of, or surpassed, the required minimum wage. In these cases, employers have attempted to conflate compliance with wage and hour laws with their defense against human trafficking allegations.

It is possible for a victim of human trafficking to be paid wages, but still to qualify as being trafficked. This is particularly true when traffickers illegally deduct enormous sums for food, housing, purported debts, and transportation. *See United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

xv. Conclusion

All of these defense are frequently rejected by the court of first instance, and so do not appear in appellate decisions.

4. *Non-refoulement*, or Nonreturn

A person in the United States may invoke the legal principle of *non-refoulement*, or nonreturn, in an effort to block transfer or return to another country. This most commonly occurs in asylum and extradition cases. On occasion it arises in other detention contexts. Following a general discussion of the history and scope of the principle, each context will be addressed in turn.

a. History and Scope of *Non-refoulement* Principle

According to the legal principle of *non-refoulement* (from the French *refouler*, "to force back"), a state may not return a person to a place where the person is sufficiently likely to suffer violations of certain rights. The principle developed as a reaction to World War II incidents in which refugees from Nazism were returned to face death and other persecution. The principle first appeared in the 1951 Convention relating to the Status of Refugees,[74] as follows:

> Article 33 – Prohibition of expulsion or return (refoulement)
>
> 1. No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[74] Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176 (entered into force Apr. 22, 1954), *available at* http://www.unhcr.org/3b66c2aa10.html [hereinafter Refugee Convention]. As of Apr. 1, 2011, 145 states were parties to the Convention; the United States is not among them. *See* U.N. Treaty Collection, *Convention relating to the Status of Refugees*, http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSONLINE&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en (last visited Dec. 9, 2013). The United States is, however, it is a party to the 1967 Refugee Protocol, a treaty that incorporates operative provisions of the 1951 Refugee Convention.

b. Pertinent Treaty Provisions Binding the United States

Though not a party to the 1951 Refugee Convention, quoted in the section immediately above, the United States is party to three subsequent treaties pertinent to *non-refoulement* or nonreturn:

- 1967 Protocol Relating to the Status of Refugees[75]
- 1984 Convention Against Torture[76]
- 1966 International Covenant on Civil and Political Rights[77]

Relevant aspects of each treaty are discussed below.

i. Protocol Relating to the Status of Refugees

In 1967, states adopted a protocol, or supplementary treaty, to the 1951 Refugee Convention; the United States acceded to this 1967 Protocol Relating to the Status of Refugees on November 1, 1968.[78]

In Articles 1(1) and 7(1) of the 1967 Refugee Protocol, states "undertake to apply articles 2 to 34 inclusive of the Convention to refugees," without reservation. The Supreme Court noted in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999), that the Refugee Protocol thus "incorporates by reference" Articles 2 through 34 of the Refugee Convention. Included within these enumerated articles is the nonreturn provision of Article 33, which is quoted in full *supra* § III.E.4.a.

---

[75] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *available at* http://www.unhcr.org/3b66c2aa10.html [hereinafter Refugee Protocol]. This treaty, which entered into force on Oct. 4, 1967, has 146 states parties; among them is the United States, which acceded to the treaty entered into force on Nov. 1, 1968. U.N. Treaty Collection, *Protocol relating to the Status of Refugees*, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (last visited Dec. 9, 2013).

[76] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S. 85, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx. This treaty, which entered into force on June 26, 1987, has 154 states parties. U.N. Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Dec. 9, 2013). The United States ratified on Oct. 21, 1994, subject to declarations and reservations set out *id.* None of these statements concerns the principle of *non-refoulement*.

[77] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. This treaty, which entered into force on Mar. 23, 1967, has 167 states parties. U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 9, 2013). The United States ratified on June 8, 1992, subject to declarations and reservations set out *id.*

[78] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *available at* http://www.unhcr.org/3b66c2aa10.html [hereinafter Refugee Protocol]. This treaty, which entered into force on Oct. 4, 1967, has 145 states parties besides the United States. U.N. Treaty Collection, *Protocol relating to the Status of Refugees*, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (last visited Dec. 9, 2013).

Congress implemented the tenets of the 1967 Refugee Protocol when it enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107 (codified as amended in scattered sections of Title 8 of the U.S. Code). "If one thing is clear from the . . . the entire 1980 Act," the Supreme Court has written, "it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

The Refugee Act of 1980 contains a nonreturn provision:

> [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1231(b)(3)(A).

ii. Convention Against Torture

Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[79] provides:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The Convention Against Torture was implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, Subdiv. B, Title XXII, Ch. 3, Subch. B, § 2242, 112 Stat. 2681, 822-823 (codified as 8 U.S.C. § 1231 note (2012)). This legislation, known as FARRA or, on occasion, the FARR Act, makes explicit the prohibition against *refoulement*:

> It shall be the policy of the United States not to expel, extradite, or otherwise

[79] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S. 85, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx. This treaty, which entered into force on June 26, 1987, has 154 states parties. U.N. Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Dec. 9, 2013). The United States ratified on Oct. 21, 1994, subject to declarations and reservations set out *id.* None of these statements concerns the principle of *non-refoulement*.

> effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

FARRA required other government agencies – such as the Department of Justice and the Department of State – to issue regulations implementing Article 3 of the Convention Against Torture. The primary implementing regulations may be found at 8 C.F.R. § 208.18 (2012).

iii. International Covenant on Civil and Political Rights

The 1966 International Covenant on Civil and Political Rights[80] addresses expulsion in language somewhat different from that of the refugee and anti-torture treaties because it arises in the context of regular immigration proceedings. Article 13 states:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The United States signed this treaty in 1977 and ratified it in 1992. Attached to the instrument of ratification, however, was this proviso: "That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). To date there has been no legislation passed to implement Article 13.

c. Customary International Law and *Non-refoulement*

Although rare, a litigant may seek application of *non-refoulement* as customary international law. *See Yuen Jin v. Mukasey*, 538 F.3d 143, 159 (2d Cir. 2008). As a general matter, such a claim requires consideration of the discussion *supra* § I.B with regard to the use of customary international law in U.S. courts. As a specific matter, it is to be noted that the question of whether the *non-refoulement* norm has attained the status of customary international law is itself contested.[81] A judge who wishes to entertain such a claim may need to require full briefing

---

[80] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. This treaty, which entered into force on Mar. 23, 1967, has 167 states parties. U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 9, 2013). The United States ratified on June 8, 1992, subject to declarations and reservations set out *id.*

[80] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *available at* http://www.unhcr.org/3b66c2aa10.html [hereinafter Refugee Protocol]. This treaty, which entered into force on Oct. 4, 1967, has 145 states parties besides the United States. U.N. Treaty Collection, *Protocol relating to the Status of Refugees*, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (last visited Dec. 9, 2013).

[81] *Compare*, *e.g.*, Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of Non-

of both the general and specific issues.

d. *Non-refoulement* in U.S. Litigation

Non-refoulement typically arises in asylum and extradition cases, although invocation in other detention contexts is possible.

i. *Non-Refoulement* in Processes of Deportation and Removal

Individuals who are found present in the United States unlawfully, for example when they enter illegally or overstay a visa, are subject to removal pursuant to 8 U.S.C. § 1227 (2006). People fleeing persecution who have been ordered removed from the United States may raise *non-refoulement* claims under two statutes: the Refugee Act of 1980 and FARRA.

i.1. Withholding of Removal Under The Refugee Act of 1980

Judicial review of a final order of removal is authorized by 8 U.S.C. § 1252(a)(1) (2006). Individuals denied withholding of removal by the Board of Immigration Appeals must file a petition for review with a federal appeals court no later than 30 days after the date of the final order of removal. 8 U.S.C. § 1252 (b)(1)-(2). Absent an order from the court, a petition for review does not stay the alien's removal pending the court's decision; therefore, an applicant may concurrently file for a stay. 8 U.S.C. § 1252(b)(3)(B).

A court reviewing a final order of removal is limited to reviewing the administrative record on which the order is based. 8 U.S.C. § 1252(b)(4)(A). The Supreme Court held in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987), that the Refugee Act of 1980 "removed the Attorney General's discretion" in withholding of removal proceedings, so that decisions regarding withholding of removal are reviewable. This ruling rendered 8 U.S.C. § 1252(b)(4)(D) – which states that "the Attorney General's discretionary judgment whether to grant relief under Section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion" – inapplicable in review of withholding of removal cases. "[T]he administrative findings of fact are conclusive," however, "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B).

The process of *non-refoulement* begins at the administrative level, at the moment that an individual subject to removal invokes the nonreturn right provided for in the Refugee Act of 1980 by seeking withholding of removal. This claim for nonreturn is typically, though not necessarily, advanced in tandem with a request for a grant of asylum at a deportation or exclusion hearing. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 159 (1993). While both the Refugee Act and FARRA are only available to aliens who reside in or have arrived at the border of the United States, as detailed in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999),

---

Refoulement: Opinion," *in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 141, ¶¶ 196-253 (Erika Feller, Volker Türk & Frances Nicholson eds. 2003) (discussing principle as customary international law), *with* James C. Hathaway, *Leveraging Asylum*, 45 Texas Int'l L.J. 503 (2010) (challenging contentions that *non-refoulement* is even a norm of customary international law, let alone a nonderogable *jus cogens* norm).

withholding of removal and asylum are distinct forms of relief:

- Withholding bars the deportation of an alien only to a particular country or countries. If the requirements are met, a grant of withholding is mandatory unless one of the exceptions discussed *infra* § III.E.4.d.i.1. applies.

- Asylum permits an alien to remain in the United States and to apply for permanent residency after one year and citizenship after five years. Asylum also enables successful applicants to provide derivative asylum status to their spouse and minor children. The decision to grant asylum is not mandatory; rather, it falls within the discretion of the Attorney General.

An applicant for withholding of removal, the mandatory *non-refoulement* remedy, must establish that:

- The applicant's life or freedom would be threatened because of race, religion, nationality, membership in a particular social group, or political opinion, pursuant to 8 U.S.C. § 1231(b)(3) (2006); and

The burden of showing that life or freedom is "more likely than not" to be threatened if the applicant is removed to a third country rests with the applicant. 8 U.S.C § 1231(b)(3)(C) (2006), *explained in INS v. Stevic*, 467 U.S. 407, 422, 429-30 (1984). This standard may be met by the applicant's own, uncorroborated, credible testimony. 8 U.S.C. § 1158(b)(1)(B)(ii). Credibility is to be judged based on the totality of the circumstances, taking into account the "demeanor, candor, or responsiveness of the applicant," the plausibility of the applicant's account, and the consistency of all written and oral statements. *Id.* § 1158(b)(1)(B)(iii). Although there is no presumption of credibility, a finding of past persecution (for instance, in an earlier asylum determination) gives rise to a rebuttable presumption of a future threat. 8 C.F.R. § 208.16(b)(1).

Even if an applicant otherwise meets this burden, withholding of removal is unavailable if the applicant falls within one of the "mandatory denial" categories, for the reason that the applicant:

- "Participated in Nazi persecution, genocide, or any act of torture or extrajudicial killing." 8 U.S.C. § 1231(b)(3)(B) (referring to 8 U.S.C. § 1227(a)(4)(D)).

- "[O]rdered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(B)(i).

- Constitutes a danger to the community of the United States, given that the person was "convicted by a final judgment of a particularly serious crime." *Id.* § 1231(b)(3)(B)(ii).

- Committed, it is believed, a "serious nonpolitical crime outside the United States" before arriving in the United States. *Id.* § 1231(b)(3)(B)(iii).

- Poses, it is reasonably believed, a "danger to the security of the United States." *Id.* § 1231(b)(3)(B)(iv).

- Endorsed or espoused terrorist activity or persuaded others to support terrorist activity. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001), codified at 8 U.S.C. § 1182 (2006).

Individuals who are barred from relief via withholding of removal may also pursue a claim for deferral of removal under the Convention Against Torture, discussed *infra* § III.E.4.d.i.3.

i.2. Withholding of Removal Under FARRA, the Foreign Affairs Reform and Restructuring Act of 1998 (CAT Withholding)

As discussed *supra* § III.E.4.b.ii, FARRA implemented the Convention Against Torture. Federal courts thus encounter the Convention Against Torture in situations in which an individual seeks relief following a final order of removal under Section 242 of the Immigration and Nationality Act, as authorized by Section 2242(d) of FARRA.

Section 2242(d) may only be used as a measure of last resort – it constitutes a form of relief for which applicants may apply only after all other forms of relief have been denied.

Moreover, although questions of law under the Convention Against Torture may be appealed, judicial review "shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the" Immigration and Nationality Act. 8 C.F.R. 208.18(e)(1).

i.2.a. Overall Procedure

The U.S. courts of appeals are "the sole and exclusive means" for review of any Convention Against Torture claim. 8 U.S.C. § 1252(a)(4) (codifying a provision in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231).[82] This appellate jurisdiction includes review of constitutional claims or questions of law. *Id.* § 1252(a)(2)(D).

What constitutes a question of law appropriate for review is unsettled in the circuits. *Cf. Jean-Pierre v. U.S. Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007) (in decision treating meaning of "torture" as mixed question, writings that courts must "apply a legal definition to a set of undisputed or adjudicated historical facts"); *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir.) (declining to "stretch reason" to find a question of law, in what the court held to be a factual question), *cert. denied*, 555 U.S. 1031 (2008).

[82] Codified in scattered sections of Title 8 of the U.S. Code, the 2005 REAL ID Act modified existing law regarding the standards for security, authentication, and issuance of drivers' licenses and identification cards. The Act also addressed certain immigration issues pertaining to terrorism.

Individuals subject to removal who believe they will be tortured upon their return normally raise the Convention Against Torture during removal proceedings. The treaty can be invoked either explicitly, when the individual requests relief from an Immigration Judge, or implicitly, when the individual presents evidence indicating that the individual may be tortured in the country of removal. 8 C.F.R. § 208.13(c)(1). A *non-refoulement* claim under the Convention hinges on the definition of "torture." The federal law implementing this treaty defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1).

The burden of proof lies with the applicant for withholding of removal; the applicant must show that it is more likely than not, based on consideration of all evidence "relevant to the possibility of future torture," that the applicant would be tortured if removed to the proposed country of removal. *Id*. § 208.16(c)(2)-(3). The pertinent federal regulation states that this burden can be met by the uncorroborated testimony of the applicant. *Id*. § 208.16(c)(2). At least one federal appellate court has held, however, that such testimony must offer "specific objective evidence" demonstrating that the applicant will be subject to torture. *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004).

On satisfying this burden, the applicant is entitled to protection under the Convention Against Torture, and withholding of removal must be granted, 8 C.F.R. § 208.16(d), unless one of the "mandatory denials," as listed *supra* § III.E.4.d.i.1, applies. 8 C.F.R. § 208.16 (d)(2). In such case, applicants are eligible only for deferral of removal, as detailed *infra* § III.E.4.d.i.3.

i.2.b. Diplomatic Assurances

During an immigration removal process involving a Convention Against Torture claim, the pertinent federal regulation permits the Secretary of State to intervene and forward to the Attorney General diplomatic assurances from the government of a specific country that "an alien would not be tortured there if the alien were removed to that country." *Id*. § 208.18(c)(1). The Attorney General, in consultation with the Secretary of State, determines whether the assurances are "reliable." *Id*. § 208.18(c)(2). If assurances are found to be reliable, the removal may proceed, and the alien's claim for protection under the Convention Against Torture may not be considered further by an immigration judge, by the Board of Immigration Appeals, or by an asylum officer. *Id*. § 208.18(c)(3).

One court of appeals has ruled that this regulation does not preclude judicial review of removal based on diplomatic assurances. *Khouzam v. Att'y Gen. of the United States*, 549 F.3d 235 (3d Cir. 2008). It reasoned that an applicant must be afforded "an opportunity to test the reliability of diplomatic assurances" that a foreign state has made. *Id*. at 259.

i.3. Deferral of Removal Under the Foreign Affairs Reform and Restructuring Act of 1998

Federal judges also may hear challenges to terminations of deferral-of-removal orders.

i.3.a. Overview

Under the Convention Against Torture, FARRA, and accompanying federal regulations, an alien who has been ordered removed but has met the burden of showing likelihood of torture on removal is entitled to protection under the Convention; specifically, to the mandatory accompanying remedy, deferral of removal. The alien remains subject to the mandatory categories for denial of withholding of removal, described *supra* § III.E.4.d.i.1. 8 C.F.R. § 1208.17(a).

A deferral may be terminated: either the Immigration and Customs Enforcement, or the original applicant, may file a motion to terminate in the immigration court that ordered the deferral of removal. *Id.* § 1208.17(d)(1) & (e)(1). When brought by Immigrations and Customs Enforcement, the motion should be supported by evidence – not presented at the previous hearing – relevant to the possibility that the alien would be tortured in the country to which removal has been deferred. Id. § 1208.17(d). The applicant bears the burden of showing that it is still more likely than not that the applicant will be tortured in the country to which removal has been deferred. *Id*. § 1208.17(d)(3). The judge should make a *de novo* determination. The hearing will have one of two results:

- Deferral will remain in place, or
- Having failed to meet the requisite burden, the applicant will be returned to the country at issue.

The applicant has a right to appeal the termination of deferral to the Board of Immigration Appeals. *Id.* § 1208.17(d)(4). The applicant also may appeal to the federal courts, although at least one court of appeals held that the determination by an immigration judge that a Convention Against Torture deferral of removal claim was not supported by substantial evidence is a factual determination "outside the jurisdictional purview" of the courts. *Bushati v. Gonzales*, 214 Fed. Appx. 556, 558-59 (6th Cir. 2007).

i.3.b. Diplomatic Assurances

As in the case of withholding of removal, discussed *supra* § III.E.4.d.i.2.b., a deferral of removal also may be terminated if the U.S. Secretary of State forwards adequate diplomatic assurances. 8 C.F.R. § 1208.17(f).

ii. *Non-refoulement* in the Context of Extradition

Judges also may be asked to consider *non-refoulement* in the context of extradition. Extradition is the judicial process by which a foreign country requests the transfer of a fugitive who has been found in the United States, in order that the fugitive may face criminal proceedings in the requesting country. This process occurs pursuant to two sources of law:

- Federal statutes, found at 18 U.S.C. §§ 3184-3196 (2006), that detail procedures for extradition; and

- The treaty applicable between the specific requesting country and the United States.

A person may seek to block extradition from the United States by raising claims about what might happen following transfer to the requesting country. Typically federal courts will apply what is known as the rule of non-inquiry, and so decline to examine the procedures or treatment awaiting a person in another country. *See Ahmad v. Wigen*, 910 F.2d 1063, 1066-67 (2d Cir. 1990); John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. Rev. 1973 (2010).

In dicta, one court reserved a possible exception to the rule of non-inquiry, if there were proof that the procedures or punishments that a detainee might experience on surrender would be "so antipathetic to a federal court's sense of decency as to require re-examination of the principle …." *Gallina v. Fraser*, 278 F.2d 77, 78 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). Despite the fact that a number of cases refer to this passage in *Gallina*, no authority exists for successfully invoking it to bar extradition. *See Cornejo-Barreto v. W.H. Siefert*, 379 F.3d 1075, 1088, *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004).

Should the person make the precise claim that he or she would suffer torture after transfer, that claim also invokes the *non-refoulement* provision of the Convention Against Torture, as discussed *supra* § III.E.4.b.ii. Pursuant to 22 C.F.R. § 95.2 (2012), the Secretary of State must consider whether a person is more likely than not to be tortured in the state requesting extradition when making the determination to extradite.

Whether the federal courts can review the determination of the Secretary of State is an open question. FARRA provides, in Section 2242(d), as reprinted in the notes following 8 U.S.C. § 1231 (2006):

> Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252).

Moreover, although a 2005 statute has not yet been addressed by the Supreme Court, lower courts have also cited the REAL ID Act of 2005, codified at 8 U.S.C. § 1252(a)(4). This legislation, which was directed at streamlining review in immigration cases, provides in part:

> Notwithstanding any other provision of law . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture . . . .

Writing for a unanimous Supreme Court in *Munaf v. Geren*, 553 U.S. 674, 703 n.6 (2008), Chief Justice John G. Roberts, Jr., acknowledged that "claims under the FARR Act may be limited to certain immigration proceedings." The Court did not reach the question of whether FARRA prohibited petitioners' transfer, holding that litigants had not properly raised that claim.

U.S. courts of appeals are divided on the issue of reviewing the likelihood of torture:

- The District of Columbia and the Fourth Circuits have held that the statute bars courts from reviewing *non-refoulement* claims made under the Convention and FARRA when extradition is at issue. *See Kiyemba v. Obama*, 561 F.3d 509, 514-15 (D.C. Cir. 2009) (in the context of detention), *cert. denied*, 559 U.S. 1005 (2010); *Mironescu v. Costner*, 480 F.3d 664, 673-77 (4th Cir. 2007), *cert. dismissed*, 552 U.S. 1135 (2008).

- The Ninth Circuit, sitting *en banc*, held that FARRA and the REAL ID Act do not affect federal habeas corpus jurisdiction over *non-refoulement* claims. *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (per curiam), *cert. denied*, 113 S. Ct. 845 (2013). The court further held: that the rule of non-inquiry has no impact on federal habeas jurisdiction; and, on the merits, that the Secretary of State must make the determination contemplated by 22 C.F.R. § 95.2. But once the Secretary demonstrates compliance with this obligation, the court wrote, no further review is available: "The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration." 683 F.3d at 957.

- The Third Circuit noted the possibility of Administrative Procedure Act review, but did not explicitly hold that it is available. *Hoxha v. Levi*, 465 F.3d 554, 565 (3d Cir. 2006).

iii. *Non-Refoulement* in Other Detention Contexts

Non-refoulement, and particularly claims regarding torture under FARRA, may arise in a range of circumstances related to detention. In particular, individuals held in U.S. custody in the wake of the September 11, 2001, terrorist attacks have invoked *non-refoulement* in an effort to avoid being transferred to another state, including their state of nationality.

In the context of extradition, in 2008, the Supreme Court rejected a *habeas* claim brought by U.S. citizens detained by coalition forces in Iraq. *Munaf v. Geren*, 553 U.S. 674, 703 (2008). The Court based its ruling on grounds other than FARRA. To be precise, the Court concluded

that the detainees had failed to raise a proper claim for relief under that statute: "Neither petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before this Court." *Munaf*, 553 U.S. at 703. Even if the claim properly had been raised, the Court wrote that it might have been barred on the grounds that: first, transferring someone already in Iraq to Iraq's government might not qualify on the ground that "such an individual is not being 'returned' to 'a country'"; and second, "claims under the FARR Act may be limited to certain immigration proceedings." *Id.* at 702-03 n.6.

In 2010, the Supreme Court declined to hear the case of a Guantánamo detainee who claimed that if he were returned to his native Algeria, he would be tortured. *Naji v. Obama*, 131 S. Ct. 32 (2010) (Roberts, C.J., denying stay). The detainee reportedly was returned despite this contention. Peter Finn, "Guantanamo detainee Naji sent back to Algeria against his will," *Wash. Post*, July 20, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/19/AR2010071904922.html.

Two U.S. courts of appeals have given limited application to the FARR Act:

- The District of Columbia Circuits stated that "the FARR Act and the REAL ID Act do not give military transferees . . . a right to judicial review of their likely treatment in the receiving country." *Omar v. McHugh*, 646 F.3d 13, 15 (D.C. Cir. 2011). Interpreting the plain language of Real ID Act (as quoted *supra* § III.E.4.d.ii.), the court concluded that "only immigration transferees have a right to judicial review of conditions in the receiving country, during a court's review of a final order of removal." *Id.* at 18.

The Fourth Circuit held that FARR Act allows claims only for immigration detainees facing removal. *Mironescu v. Costner*, 480 F.3d 664, 674-77 (4th Cir. 2007), *cert. denied*, 552 U.S. 1135 (2008).

Recommended citation:[1]

Am. Soc'y Int'l L., "Criminal Justice," in
Benchbook on International Law § III.F (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/crimjust.pdf

III.F. Criminal Justice

No less than in other areas of the law, globalization has affected criminal justice. U.S. police agencies now routinely cooperate with their counterparts abroad to gather evidence, locate fugitives, and otherwise investigate criminal matters with transnational aspects. These agencies act pursuant to criminal statutes that reach beyond U.S. borders – statutes sometimes enacted to implement treaties to which the United States belongs. Defendants likewise may invoke international law; for instance, to contest the government's exercise of criminal jurisdiction; to seek suppression of evidence obtained abroad; to challenge the government's request for extradition or return to another country; or to ask for a transfer so they may serve their postconviction sentence in their home country. *See generally* Ethan Nadelmann, *Cops across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993); Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 Ind. L.J. 809 (2000).

1. *Benchbook* Sections Related to Criminal Justice

This edition of the *Benchbook on International Law* discusses these matters in the course of broader discussions. Of particular significance are:

- § II.A, "Jurisdiction," which sets out principles or bases of extraterritorial jurisdiction, types and sources of jurisdiction, applicability in U.S. courts, and how to determine whether Congress intended a statute to have extraterritorial effect.

- § II.B, "Immunities and Other Preliminary Considerations," which treats *inter alia* immunities and the act of state and political question doctrines.

- § II.C, "Discovery and Other Procedures," which discusses the gathering of evidence both by the traditional method of letters rogatory and by the more contemporary method authorized in Mutual Legal Assistance Treaties, or MLATs.

- § III.B, "International Law Respecting Families and Children," which cites criminal statutes that implement treaties banning child-soldiering and sex tourism, and furthermore, in § III.B.4, details how courts adjudicate the federal criminal prohibition against the abduction of children by a parent.

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

- § III.E.3, the section in the chapter entitled "Human Rights" that details U.S. criminal, as well as civil, measures designed to combat human trafficking.

- § III.E.4, the section in the chapter entitled "Human Rights" that describes *non-refoulement*, or non-return, an international law principle that criminal defendants sometimes invoke in an effort to avoid being transferred to another country.

- § IV, "Research and Interpretive Resources," which describes the principal international law methodology for interpreting treaties, and further discusses print and online resources for researching international law.

2. Federal Criminal Statutes with Extraterritorial Reach

This edition of the *Benchbook* likewise discusses numerous federal criminal statutes that involve transnational offenses. These include:

- Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2, 122 Stat. 3735, 3735, codified as amended at 18 U.S.C.A. § 2442 (West Supp. 2010), discussed *supra* § III.B.1

- International Parental Kidnapping Crime Act, Pub. L. 103-173, § 2(a), 107 Stat. 1998, codified as amended at 18 U.S.C. § 1204 (2006), discussed *supra* § III.B.4

- Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. § 70501 *et seq*. (2006), discussed *supra* § II.A.4.a

- Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 *et seq*. (2006), discussed *supra* § II.A.4.a

- Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 990399, 100 Stat. 853, § 1202, codified at 18 U.S.C. § 2332 (2006), discussed *supra* § II.A.3.d

- Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. 108-21, § 105(c), 117 Stat. 650 (2003), codified at 18 U.S.C. § 2423(c) (2006), discussed *supra* §§ II.A.3.c, III.B.1

- Victims of Trafficking and Violence Prevention Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1466 (2000), codified as amended in chapter 77 of Title 18 of the U.S. Code), discussed *supra* § III.E.3

- 18 U.S.C. § 7 (2006) (special maritime and territorial jurisdiction), discussed *supra* § II.A.3.a.ii

- 18 U.S.C. § 1091 (2006) (genocide), discussed *supra* § II.A.3.e

- 18 U.S.C. § 1546 (2006) (visa fraud), discussed *supra* §§ II.A.3.b, III.E.3.e.iii

- 18 U.S.C. § 2381 (2006) (treason), discussed *supra* § II.A.3.c

- 18 U.S.C. § 1651 (2006) (piracy under the law of nations), discussed *supra* § II.A.3.e

- 18 U.S.C. § 2340A (2006) (torture), discussed *supra* § II.A.3.e

- 18 U.S.C. § 2441 (2006) (war crimes), discussed *supra* § II.A.3.e

3. International Treaties Concerning Criminal Justice

This edition of the *Benchbook* furthermore discusses numerous international treaties, to which the United States belongs, that deal with criminal justice matters. These include:

- Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations (1947), discussed *supra* § II.B.1.c

- Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (1984), discussed *supra* §§ III.E.2.b.ii.1, III.E.4.b.ii

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (1972), discussed *supra* § II.A.3.e

- Geneva Conventions on the laws and customs of war (1949), discussed *supra* § III.E.2.b.ii.2

- Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), discussed *supra* § II.A.3.e

- Inter-American Convention on Letters Rogatory (1975), discussed *supra* § II.C.1.a

- Inter-American Convention on Mutual Assistance in Criminal Matters (1992), discussed *supra* § II.C.2.b.v.3.a

- International Convention against the Taking of Hostages (1979), discussed *supra* § II.A.3.e

- Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), discussed *supra* § II.A.3.e

- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in Armed Conflict (2000), discussed *supra* § III.B.1

- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000), discussed *supra* § III.B.1

- Organization of American States Inter-American Convention against Corruption (1996), discussed *supra* § II.C.2.b.v

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime (2000), discussed *supra* § III.E.3.b

- Treaty between the United States of America and the Russian Federation on Mutual Assistance in Legal Matters (U.S.-Russia MLAT) (1999), discussed *supra* §§ II.C.2.b.v.1, II.C.2.b.v.3.a

- U.N. Convention Against Corruption (2000), discussed *supra* § II.C.2.b.v

- U.N. Convention Against Transnational Organized Crime (2001), discussed *supra* §§ II.C.2.b.v, III.E.3.b

- U.N. Model Treaty on Mutual Assistance in Criminal Matters (1990), discussed *supra* § II.C.2.b.v.3.a

- Vienna Convention on Consular Relations (1963), discussed *supra* § II.B.1.b and *infra* § IV.A.1

- Vienna Convention on Diplomatic Relations (1961), discussed *supra* §§ II.B.1.b, III.E.3.f.iv and *infra* § IV.A.1

- Vienna Convention on the Law of Treaties (1969), discussed *infra* § IV.A.1

4. Conclusion

In future editions of this *Benchbook*, the instant chapter will elaborate in greater detail the ways that U.S. courts encounter transnational criminal law.

Recommended citation:[1]

Am. Soc'y Int'l L., "Environment," in
Benchbook on International Law § III.G (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/environment.pdf

G. Environment

The U.S. statutory framework comprehends national environmental policy in areas such as clean air, disposal of nuclear and solid wastes, wilderness conservation, endangered species protection, mineral extraction, use of chemicals, and workplace safety.

This section considers one area of environmental concern, climate change. It first treats the issue within the context of U.S. law, as interpreted by U.S. courts. The section then outlines international efforts to combat climate change, including one treaty to which the United States belongs. The section concludes by observing that although litigants might cite U.S. participation in such international instruments, none imposes on the United States obligations enforceable in U.S. courts.

U.S. courts are unlikely to see cases directly invoking international legal instruments that pertain to climate change or global warming. Rather, climate change surfaces as an issue in cases brought under domestic environmental, administrative, or tort law. Given U.S. Supreme Court recognition of the global dimensions of climate change, familiarity with the international legal backdrop may inform consideration of domestic cases.

1. Domestic Law and Jurisprudence

The cases discussed here all arise under domestic law. They are related to international law on climate change to the extent that they help to determine the national policy and negotiating stance of the U.S. government.

The key judicial precedents in regulatory actions involving climate change are the decisions in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011). This section provides the statutory backdrop against which these decisions took place, and then summarizes both the decisions and some of the other types of regulatory cases brought under federal environmental law.

a. Relevant U.S. Statutory Framework

U.S. domestic law pertinent to greenhouse gas emissions predates the international climate change regime. Efforts at clean air regulation began with the Air Pollution Control Act of 1955, Pub. L. No. 84-159, 69 Stat. 322, codified as amended at 42 U.S.C. §§ 7401–7671q (2012).

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

The air pollution regime that now is applied to climate change consists of four statutes:

- Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7671q);
- Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, §§ 501-512, 89 Stat. 871, 901-16 (codified as amended at 49 U.S.C.A. §§ 32,901-32,916 (West 2009));
- Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, §§ 201-09, 79 Stat. 992, 992-96 (codified as amended at 42 U.S.C. §§ 7401-7671q); and
- Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (codified as amended at 42 U.S.C. §§ 7401-7671q).

Before the Court's 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), greenhouse gases were not explicitly included in the regulations promulgated under these laws; nevertheless, in promulgating these new post-*Massachusetts* regulations, U.S. federal agencies noted that these earlier regulatory decisions helped to determine the extent of U.S. greenhouse gas emissions. In a 2009 rulemaking notice, for example, the Obama administration explained: first, that the corporate average fuel economy, or CAFE, standards mandated fuel economy in vehicles; and second, that those CAFE standards thus influenced the extent of emissions. Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007 (May 22, 2009).

Beyond this air pollution regime, a limited number of U.S. statutes directly address climate change. The National Climate Program Act of 1978, 15 U.S.C. §§ 2901-07 (2006), mandates that the President establish a program to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications." *Id.* § 2902. Pursuant to that Act, President Jimmy Carter consulted the National Research Council, a private, nonprofit organization. Its 1979 report stated:

> If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible. . . . A wait-and-see policy may mean waiting until it is too late.

Climate Research Board, Carbon Dioxide and Climate: A Scientific Assessment viii (National Academy Press 1979), *available at* http://www.nap.edu/openbook.php?record_id=12181&page=R1.

Several years later, in the Global Climate Protection Act of 1987, Pub. L. No. 100-204, §§ 1101-06, 101 Stat. 1331, 1407, Congress called for the establishment of a "coordinated national policy" that would enhance U.S. leadership in international efforts to address climate change. See 15 U.S.C. § 2901 notes. The Act's goals have yet to be achieved; numerous efforts to create comprehensive climate change legislation have stalled in Congress.

Notwithstanding this legislative impasse, the U.S. Executive Branch, in accordance with

its obligations under the decision in *Massachusetts v. EPA*, reconsidered the appropriateness of regulation under the Clean Air Act. In 2009, the U.S. Environmental Protection Agency issued Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,406 (Dec. 15, 2009). This endangerment finding, along with subsequent rulemaking under that Act currently serve as the primary U.S. means to set binding limits on greenhouse gas emissions.[2]

b. Key Legal Issues in *Massachusetts v. EPA*

The decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), arose out of a challenge, brought under Section 202(a) of the Clean Air Act of 1970, 42 U.S.C. § 7521(a), to the denial of a petition that had asked the EPA to regulate motor vehicle greenhouse gas emissions. Plaintiffs included several states and local governments, one territory, and a number of nongovernmental organizations. In an opinion written by Justice John Paul Stevens, the Supreme Court held the denial to be "'arbitrary, capricious, . . . or otherwise not in accordance with law,'" under the judicial review provisions of the Clean Air Act, 42 U.S.C. § 7607(d)(9)(A). *Massachusetts v. EPA*, 549 U.S. at 534. At pages 534-35 of its decision, the Court faulted the agency for not giving a "reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change"; the EPA, it held, "must ground its reasons for action or inaction in the statute."

The case set important precedent regarding standing and substantive interpretation of the Clean Air Act, which the following sections detail.

i. Standing after *Massachusetts v. EPA*

The Supreme Court held that Massachusetts had standing to challenge the EPA's decision to deny petitioners rulemaking petition on two main grounds:

1. "[T]he rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts," as stated in plaintiffs' "uncontested affidavits"; and

2. The state faces a real risk, even if remote, of catastrophic harm which would be "reduced to some extent if petitioners received the relief they seek." 549 U.S. at 526.

To reach this standing conclusion, the Court:

1. Focused on "Massachusetts' stake in protecting its quasi-sovereign interests" together with its procedural right to challenge the rejection of its rulemaking petition. These, the Court wrote, entitled Massachusetts to "special solicitude in our standing analysis." *Id.* at

[2] Two examples of motor vehicle greenhouse gas emissions regulation pursuant to the endangerment finding, which bring together regulatory processes under two statutes cited in the text *supra* – that is, the Clean Air Act of 1963 and the Energy Policy and Conservation Act of 1975 – are the Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010), and the Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011). The U.S. EPA also has begun regulating greenhouse gas emissions in its permitting processes for major stationary sources, such as power plants and cement factories. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 40 C.F.R. 52 (2012).

518-20. The opinion does not clarify the extent to which that special solicitude influences its ultimate holding on standing.

2. Focused on injury, stating that the "harms associated with climate change are serious and well recognized." The Court ruled that the "widely shared" quality of climate change risks did "not minimize Massachusetts' interest in the outcome of this litigation," and focused on the harms that the state is experiencing and will experience from sea-level rise. *Id.* at 521-23.

3. Considered causation. Indicating that "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming," the Court ruled: "Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming." *Id.* at 523-25.

4. Focused on remedy. "While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it," the Court wrote, then added: "A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere." *Id.* at 525-26 (emphasis in original).

Together, these four steps created precedent for considering standing in a climate change context. According to these criteria a governmental entity, and particularly a state, that brings a claim of climate change harms likely will meet the standing requirements of injury, causation, and remedy. The focus of the Court in *Massachusetts v. EPA* on the state left open whether private parties might have standing to bring such a claim. This is an issue that the decision in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), discussed below, did not resolve, and on which lower courts have disagreed. *Compare WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 83-86 (D.D.C. 2012) (ruling that there was no standing) *with WildEarth Guardians v. U.S. Forest Service*, 828 F. Supp. 2d 1223 (D. Colo. 2011) (ruling that there was standing).

ii. Substantive Interpretation of General Environmental Provisions in *Massachusetts v. EPA*

The Court's substantive analysis in *Massachusetts v. EPA* focused on two main issues, as set forth at 549 U.S. at 528-34:

1. Is the EPA authorized to regulate greenhouse gas emissions under the Clean Air Act?
2. If yes, would the EPA be unwise to exercise that authority?

On the first question, the Court stated that the Clean Air Act's "sweeping definition of 'air pollutant,'" *id.* at 528, unambiguously included greenhouse gases like carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. No legislative history, nor any issue of overlapping regulatory authority, suggested an opposite conclusion.

On the second question, the Court held that the need to exercise judgment did not allow the EPA to "ignore statutory text," but only "to exercise discretion within defined statutory

limits." *Id.* at 533. It explained: "Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Id.* at 532-35.

Since the decision in *Massachusetts v. EPA*, the EPA has decided to regulate greenhouse gas emissions under the Clean Air Act. These regulations have been challenged, but to date no court has invalidated them. *See Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *cert. granted in part sub nom. Utility Air Regulatory Group v. EPA*, No. 12-1146, 134 S. Ct. 418 (Oct. 15, 2013) (argument scheduled for Feb. 24, 2014; *see* http://www.supremecourt.gov/oral_arguments/argument_calendars/monthlyargumentcalfeb%202014.pdf).

c. Other Types of Regulatory Actions

Many other regulatory actions regarding climate change have been filed in U.S. courts. They are too numerous to analyze in depth here. A Climate Change Litigation flow chart, maintained by Columbia Law Professor Michael B. Gerrard and Arnold & Porter lawyer J. Cullen Howe, is available at http://www.climatecasechart.com (last visited Dec. 9, 2013). This section discusses the two primary categories of regulatory action that the chart explores: compelling governmental action and stopping governmental action.

i. Suits to Compel Government Action

Cases attempting to compel the government to act to regulate major emitters of greenhouse gases have involved not only emissions from motor vehicles, but also from stationary sources, aircraft, ocean-going vessels, trains, and industrial and construction equipment. Many cases have invoked the Clean Air Act of 1970, 42 U.S.C. § 7401 *et seq*. Authorities invoked in other complaints:

- Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (2006)), in efforts to compel the government either to list species that are affected by climate change as endangered or threatened, or to take action to protect them;

- Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)), in suits regarding water pollution, coastal water impairment, ocean acidification, and harm to glaciers from melting sea ice;

- Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 (codified at 15 U.S.C. §§ 2931-38 (2006)), in a suit seeking to force timely production of a research plan and scientific assessment;

- Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C.A. § 552 (West 2011)), in various requests for information;

- Alternative Motor Fuel Act of 1988, Pub. L. No. 100–494, 102 Stat. 2441 (codified as amended at 42 U.S.C. §§ 6374-74E (2006)), in a challenge to extending special treatment to dual-fueled vehicles (ones that run on gasoline combined with either ethanol or methanol) on the basis that this extension results in less fuel efficient vehicles; and

- Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, Energy Policy Act of 2005, codified as amended at 42 U.S.C.A. §§ 13,201-574 (2011), Energy Policy Conservation Act of 1975, Energy Policy & Conservation Act, Pub. L. No. 94-163, § 502, 89 Stat. 871, 902 (1975) (codified as amended in scattered sections of 15 and 42 U.S.C.), and Energy Independence and Security Act of 2007 (EISA), Pub. L. No. 110-140, 121 Stat. 1492) (codified as amended in scattered sections of 15, 29, 42, and 49 U.S.C.), to compel enforcement of their provisions on energy efficiency, alternative fuel vehicles, and fuel efficiency.

These cases all ask the federal government to take action under the relevant statute, and at times have succeeded in compelling government action.

ii. Suits to Stop Government Action

Lawsuits attempting to stop governmental action have been filed in state as well as federal courts. Most of these suits have fallen into one of three categories:

1. Challenges, by a range of plaintiffs, to coal power plants projects, invoking a variety of legal theories, plus other actions challenging other types of plants;

2. Actions brought by a range of plaintiff under the National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852, codified as amended at 42 U.S.C. §§ 4321-70H, or similar state statutes, which have sought to require officials to consider climate change in environmental review processes.

3. Challenges to local, state, and federal greenhouse gas regulations, brought by corporate emitters of greenhouse gases under a variety of legal theories.

The first category of cases is the most common type of climate change litigation. Together with the second group of cases, it has slowed down or made more expensive coal fired power plant projects. The third category of cases, seeking to stop government action, has, when successful, blocked or limited regulations that reduce greenhouse gas emissions. These cases, which are numerous, can be accessed at http://www.climatecasechart.com (last visited Dec. 9, 2013).

d. Public Nuisance Suits Regarding Climate Change, and *American Electric Power Co. v. Connecticut*

Although smaller in number than their regulatory counterparts, public nuisance cases regarding climate change have generated federal litigation. Brought by governmental and private

petitioners against corporate greenhouse gas emitters, the suits have sought injunctive relief or damages on the asserted ground that the failure to limit emissions constitutes a public nuisance.

None of these cases has reached the merits. "The Clean Air Act and the Environmental Protection Agency action the Act authorizes . . . displace the claims the plaintiffs seek to pursue," the Supreme Court held in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011). Justice Sonia Sotomayor recused herself, and so only eight justices participated in the opinion and concurrences. The following, drawn from pages at 2535 to 2540 of the decision, summarizes key components:

- *Standing:* By a 4-4 plurality, the Court followed the *Massachusetts v. EPA* approach to standing discussed *supra*.

- *Political Question:* Lower court decisions had focused extensively on whether these suits violated the political question doctrine, with particular emphasis on "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"– the third of six factors set out in *Baker v. Carr*, 369 U.S. 186, 217 (1962). But the Court in *American Electric Power Co.* did not analyze political question issues.

- *Displacement:* The participating justices unanimously found that EPA's authority to regulate greenhouse gas emissions under the Clean Air Act displaced federal common law public nuisance actions. The opinion indicated that if EPA refused to regulate under that authority, the proper remedy would be an enforcement action under the Clean Air Act rather than a federal common law public nuisance action.

- *Preemption:* The Court remanded the question of whether the Clean Air Act regulatory authority preempts state law nuisance claims.

As a result of this decision, federal common law public nuisance claims regarding climate change will not succeed unless Congress eliminates the EPA's regulatory authority over greenhouse gas emissions under the Clean Air Act. The viability of such claims in that circumstance remains an open question.

2. Treaties and Other International Agreements

In addition to the U.S. domestic sources treated above, as discussed below, a number of multilateral international agreements also address climate change.

a. U.N. Framework Convention on Climate Change

The 1992 U.N. Framework Convention on Climate Change[3] comprises the foundation for multilateral international legal efforts on the issue. In this treaty, states parties, including the

[3] U.N. Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 (1992), 1771 U.N.T.S. 107, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf [hereinafter Framework Convention]. This treaty, which entered into force on Mar. 21, 1994, has 195 parties (194 countries and 1 regional economic

United States, have committed to work to avoid dangerous levels of atmospheric greenhouse gases.

This treaty follows a framework-protocol approach, common in international environmental law. States parties agreed to a "framework" for adopting mandatory emissions caps in future treaties, called "protocols"; these states did not commit to specific binding emissions reductions in the Framework Convention itself, however.

The United States – classified along with other industrialized countries as an Annex I party – committed in Article 4(2)(a) of this Convention to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." (Emissions are said to be "anthropogenic" if they derive from human activities rather than from other sources; "sinks" and "reservoirs" are mechanisms intended to remove harmful greenhouse gases from the atmosphere.)

But the Convention does not tie these commitments to specific action. U.S. obligations thus are limited to:

- Participating in subsequent Conference of the Parties meetings aimed at adopting protocols;
- Reporting on U.S. greenhouse-gas emissions and sinks; and
- Fulfilling its good-faith treaty commitment to avoid dangerous emissions levels.

In sum, although the Framework Convention creates binding obligations, the limited scope of those obligations means that the Convention has not been, nor is it likely to be, invoked in domestic litigation, except in reference to the general obligations of the United States to make constructive efforts to reduce its greenhouse gas emissions.

b. Kyoto Protocol to the U.N. Framework Convention on Climate Change

The 1997 Kyoto Protocol to the 1992 U.N. Framework Convention on Climate Change[4] is the only treaty to have established binding and specific commitments on emissions. Its first commitment period expired in 2012 and, as of the 2011 Durban negotiations, some of the Kyoto

integration organization, the European Union). U.N. Treaty Collection, *United Nations Framework Convention on Climate Change*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXVII~7&chapter=27&Temp=mtdsg3&lang=en (last visited Dec. 9, 2013). Among them the United States, which ratified on Oct. 15, 1992. *Id*.

[4] Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162, http://unfccc.int/essential_background/kyoto_protocol/items/1678.php [hereinafter Kyoto Protocol]. This treaty, which entered into force Feb. 16, 2005, has 192 parties (191 countries and 1 regional economic integration organization, the European Union). U.N. Treaty Collection, *Kyoto Protocol to the U.N. Framework Convention on Climate Change*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&lang=en (last visited Dec. 9, 2013). The United States is not among the parties to this treaty. *Id*.

Protocol parties committed to a second period, from 2013 to 2020. The Kyoto Protocol imposes no obligations on the United States – although the United States has signed the treaty, it has not ratified it – and so has little import in domestic cases.

c. Copenhagen Accord

The 2009 Copenhagen Accord[5] set different goals for developed and developing country parties, but did not make specific commitments. The United States and other member states negotiated the Accord during the meeting of the Conference of Parties to the Framework Convention that took place in Copenhagen, Denmark, in December 2009. The 2009 Conference took "note" of, but did not officially adopt, the Copenhagen Accord.

Pursuant to the Accord, the United States – using its 2005 emissions as a baseline and 2020 as the target date – committed to cut greenhouse gases "[i]n the range of 17%, in conformity with anticipated U.S. energy and climate legislation." U.S. Submission in Accordance with Copenhagen Accord, Jan. 28, 2010, http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/unitedstatescphaccord_app.1.pdf. Given contingent language in the Accord, the commitment that the United States submitted has minimal domestic legal effect.

International negotiations among the United States and other countries, in Cancun, Mexico, in 2010 and in Durban, South Africa, in 2011, made additional progress toward but did not result in the adoption of a binding agreement with more specific.

d. Conclusion

In sum, U.S. litigants might invoke Copenhagen Accord commitments, together with the Framework Convention, in an effort to establish a general U.S. obligation to make efforts to mitigate emissions. Neither instrument, however, entails specific obligations enforceable in courts of the United States.

[5] Copenhagen Accord (Dec. 18, 2009), Decision 2/CP.15, *in* Report of the Conference of the Parties on Its Fifteenth Session, Addendum, at 5, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010), *available at* http://unfccc.int/documentation/documents/advanced_search/items/3594.php?rec=j&priref=600005735#beg. Signing this Accord were the European Union and more than 100 countries, including the United States.

Recommended citation:[1]

Am. Soc'y Int'l L., "Judicial Interpretation of International or Foreign Instruments," in *Benchbook on International Law* § IV.A (Diane Marie Amann ed., 2014), available at www.asil.org/benchbook/interpretation.pdf

---

IV. Research and Interpretive Resources

This chapter provides a brief overview of resources that may aid research on issues with an international, comparative, transnational, or foreign law dimension. Also summarized are resources – beyond those typically used in U.S. litigation – that may prove useful for interpreting treaties and other international or foreign instruments.

A. Judicial Interpretation of International or Foreign Instruments

The primary treaty governing judicial interpretation of international agreements is discussed below.

1. Vienna Convention on the Law of Treaties

The primary international resource for judicial interpretation of foreign treaties or other instruments is the 1969 Vienna Convention on the Law of Treaties[2] – a treaty that the Supreme Court has cited on numerous occasions, as discussed below.

a. Background on the Vienna Convention on the Law of Treaties

The 1969 Vienna Convention on the Law of Treaties, which guides international lawyers' construction of treaty terms, is not to be confused with other multilateral agreements that also may be called simply "the Vienna Convention"; these include the 1961 Vienna Convention on Diplomatic Relations[3] and the 1963 Vienna Convention on Consular Relations.[4]

---

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

[2] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf [hereinafter Vienna Convention on Treaties]. This treaty, which entered into force on Jan. 27, 1980, has 113 states parties; however, the United States is not among them. U.N. Treaty Collection, *Vienna Convention on the Law of Treaties*, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Dec. 9, 2013).

[3] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, *available at* http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf. This treaty, which entered into force on Apr. 24, 1964, has 189 states parties; among them is the United States, which ratified on Nov. 13, 1972. *See* U.N. Treaty Collection, *Vienna Convention on Diplomatic Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en (last visited Dec. 9, 2013). The Convention has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006).This treaty is discussed *supra* § II.B.

[4] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77; T.I.A.S. 682, 596 U.N.T.S. 261, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf. This treaty, which entered into force on Mar. 24, 1967, has 176 states parties; among them is the United States, which ratified on Nov.

b. Status of the Vienna Convention on the Law of Treaties within the United States

The 1969 Vienna Convention on Treaties enjoys wide membership: more than half the countries of the world are states parties. The United States, however, is not. As explained at the State Department website:

> The United States signed the treaty on April 24, 1970. The U.S. Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on treaties.

U.S. Dep't of State, *Vienna Convention on the Law of Treaties*, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Dec. 9, 2013). The U.S. Court of Appeals for the Second Circuit has affirmed this position:

> Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it as an authoritative guide to the customary international law of treaties, insofar as it reflects actual state practices. The Department of State considers the Vienna Convention on the Law of Treaties an authoritative guide to current treaty law and practice.

Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir.) (internal quotation and citation omitted), *cert. denied*, 555 U.S. 943 (2008); *see Ozaltin v. Ozaltin*, 708 F.3d 355, 358 n.4 (2d Cir. 2013) (quoting first sentence of the passage above, in the course of relying on the Vienna Convention on the Law of Treaties definition of the term "depositary").

In a 1982 opinion for the Court, then-Justice William H. Rehnquist cited Article 2 of the Vienna Convention on Treaties to support the proposition that term "treaty," in international law, "ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force." *Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982). *See also Igartúa v. United States*, 626 F.3d 592, 624-25 (1st Cir. 2010) (relying on the Article 2 definition of a treaty "reservation"), *cert. denied*, 132 S. Ct. 2375 (2012); *Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 956 (9th Cir. 2006) (in international aviation case, relying on Article 40, which deals with treaty amendments).

A recent Supreme Court usage occurred in a dissent that cited Article 27 of the Vienna Convention on the Law of Treaties for the proposition that "treaty parties may not invoke domestic law as an excuse for failing to conform to their treaty obligations." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 391 (2006) (Breyer, J., joined by Stevens and Souter, JJ., dissenting).

24, 1969. *See* U.N. Treaty Collection, *Vienna Convention on Consular Relations*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last visited Dec. 9, 2013).This treaty is discussed *supra* § II.B.

c. Key Provisions on Interpretation in the Vienna Convention on the Law of Treaties

Articles 31, 32, and 33 of the 1969 Vienna Convention on the Law of Treaties have particular relevance to the interpretation of treaties. After quoting the text of each of these articles in turn below, this section addresses the use of these interpretive provisions in U.S. courts.

i. Article 31: General Rule of Interpretation

Article 31 of the 1969 Vienna Convention on the Law of Treaties states in full:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ii. Article 32: Supplementary Means of Interpretation

Article 32 of the 1969 Vienna Convention on the Law of Treaties states in full:

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

iii. Article 33: Interpretation of Treaties Authenticated in Two or More Languages

Article 33 of the 1969 Vienna Convention on the Law of Treaties states in full:

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

iv. Judicial Reliance on Interpretive Provisions of the Vienna Convention on Treaties

Notwithstanding that the United States is not a party to the 1969 Vienna Convention on Treaties, holdings in lower courts in the United States have relied on the treaty's interpretive provisions on a number of occasions; for example, to:

- Support the position that a treaty's preamble forms a party of the treaty, as set forth in

article 31(2) of the Vienna Convention on Treaties. *E.g.*, *Gandara v. Bennett*, 528 F.3d 823, 827 (11th Cir. 2008); *Mora v. New York*, 524 F.3d 183, 196 (2d Cir.), *cert. denied*, 555 U.S. 943 (2008); *Cornejo v. County of San Diego*, 504 F.3d 853, 858 (9th Cir. 2007).

Reliance on these interpretive provisions of the Vienna Convention on Treaties also appeared in dissenting opinions in two Supreme Court cases:

- *Abbott v. Abbott*, 560 U.S. 1, 40 n. 11 (2010) (Stevens, J., joined by Thomas and Breyer, JJ., dissenting) (quoting the provision in Article 32 of the Vienna Convention on Treaties by which courts may resort to supplementary materials when there is ambiguity or to avoid a "manifestly absurd" result); and

- *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting) (citing Article 31 of the Vienna Convention on Treaties for the proposition that "[i]t is well settled that a treaty must first be construed according to its 'ordinary meaning'").

Recommended citation:[1]

Am. Soc'y Int'l L., "Research Resources," in
Benchbook on International Law § IV.B (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/research.pdf

IV.B. Research Resources

Research resources that may aid decision in cases with a transnational dimension include online databases and print materials.

1. *Restatements* and Other Print Resources

Various print resources are discussed below.

a. *Restatements*

Numerous *Restatements* include coverage of issues surveyed in this *Benchbook*. Two are discussed in turn below.

i. *Foreign Relations Restatement*

A comprehensive digest of international law principles may be found in the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* (1987).[2] Like other American Law Institute projects, this *Restatement* reflects years of compilation and analysis by a committee of leading experts in the field; accordingly, U.S. courts frequently have consulted it on matters of international law. Recent Supreme Court judgments citing the *Restatement* include:

- *Republic of Philippines v. Pimentel*, 553 U.S. 851, 868 (2008) (Kennedy, J., in a portion of the opinion for the Court joined by Roberts, C.J., and Scalia, Thomas, Ginsburg, Breyer, Alito, and Souter, JJ)

- *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004) (opinion for the Court by Breyer, J., joined by Rehnquist, C.J., and Stevens, Kennedy, Souter, and Ginsburg, JJ.)

That said, although the *Restatement* is updated with an annual supplement, its core volumes date to a quarter-century ago – a quarter-century of rapid globalization and rapid changes in the international and transnational legal landscape. *See generally* Michael Traynor, *The Future of Foreign Relations Law of the United States*, 18 Sw. J. Int'l L. 5 (2011). For this reason,

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.
[2] In a few instances, resort to an earlier version, the *Restatement (Second) of the Foreign Relations Law of the United States* (1965), may be advised. This is particularly the case with regard to some immunities doctrines, as detailed *supra* § II.B.

provisions of the *Restatement* should be read with the caveat that some information may be out of date. Consultation of multiples resources is thus essential.

In 2012, the American Law Institute began work on a fourth *Restatement* in this area. Coordinating Reporters for the project are Professor Paul B. Stephan, University of Virginia School of Law (who also has contributed to preparation of this *Benchbook*), and Professor Sarah H. Cleveland, Columbia Law School; the full participants' list is at American Law Institute, *Current Projects*, http://www.ali.org/index.cfm?fuseaction=projects.members&projectid=28 (last visited Dec. 9, 2013).

ii. *Arbitration Restatement* Project

As detailed *supra* § III.A, a multiyear drafting process is under way for an initial compilation on arbitration, to be titled the *Restatement (Third) of the U.S. Law of International Commercial Arbitration*. Information about the project, including the text of tentative drafts, may be found at American Law Institute, *Current Projects*, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20 (last visited Dec. 9, 2013).

b. Additional Print Resources

Print resources providing brief introductions to international law include:

- Sean D. Murphy, *Principles of International Law* (2d ed., 2012)
- Curtis Bradley, *International Law in the U.S. Legal System* (2013)
- Anthony Aust, *Modern Treaty Law and Practice* (2d ed., 2007)
- Jordan J. Paust, *International Law as Law of the United States* (2d ed., 2003)
- Mark W. Janis, *International Law* (6th ed., 2012)
- David J. Bederman with Christopher J. Borgen & David A. Martin, *International Law: A Handbook for Judges* (American Society of International Law, 2003)
- *Nutshells* on international law and its subfields

2. Online Databases

Many online sources provide aids to international legal research. Several of these sites, each last visited on Dec. 9, 2013, are listed below.

a. Databases Maintained by the United Nations

Information about many treaties – including negotiating history and other background,

full text of the treaty and related documents, and ratification status – may be found at numerous websites maintained by the United Nations. For example:

- U.N. Treaty Collection database, http://treaties.un.org/Home.aspx?lang=en

- Historic Archives, Audiovisual Library of International Law, http://untreaty.un.org/cod/avl/historicarchives.html

- Research Library, Audiovisual Library of International Law, http://untreaty.un.org/cod/avl/researchlibrary.html

- United Nations Legal Publications Global Search (encompassing all U.N. yearbooks and reports and summaries of practices, arbitral awards, and judgments by bodies within the U.N. system), http://www.un.org/law/UNlegalpublications/index.html

b. U.S. Department of State *Digest of U.S. Practice*

The most recent edition, as well as decades of past editions, of the *Digest of United States Practice in International Law*, a publication of the U.S. Department of State, Office of the Legal Adviser, may be accessed at http://www.state.gov/s/l/2011/index.htm.

As stated at that page, the *Digest* is intended "to provide the public with a historical record of the views and practice of the Government of the United States in public and private international law."

c. Comprehensive Databases

Numerous sites compile source materials, laws, and decisions from the legal systems of many countries and international entities, sometimes grouped according to specific subfields of international law. These include:

- *Electronic Information System for International Law*, or EISIL, maintained by the American Society of International Law at http://www.eisil.org /. A useful source organized according to topics, such as Private International Law and International Human Rights.

- *Hague Conference on Private International Law*, at http://www.hcch.net/index_en.php. The Hague Conference, also known as HCCH, is an international, intergovernmental organization that works to develop multilateral legal instruments related to civil matters (including international family law), international legal cooperation, and commercial law. This website lists all treaties in force or concluded under HCCH auspices, including those to which the United States is a party. The database also contains preparatory and interpretive reports.

- *Private International Law*, maintained by the U.S. Department of State, at http://www.state.gov/s/l/c3452.htm. This site complements the just-described database of

the Hague Conference on Private International Law.

- *Global Legal Monitor*, maintained by the Law Library of Congress, at http://www.loc.gov/lawweb/servlet/lloc_news?home. This site is compiled by lawyers in residence who are legal specialists from countries around the world. It provides regional and national legal news and developments, such as English summaries of important international law cases and legislative developments.

- *International Law Library*, maintained by the World Legal Information Institute, at http://www.worldlii.org/int/special/ihl/.

d. Databases Organized by Country or Region

Online resources that collect legislation, decisions, and practices of countries or regions include:

- *World Legal Information Institute*, at http://www.worldlii.org/. Unique among free online resources, this database has a LawCite module for generating a list of international law cases that cite other cases (including from national courts), as well as journal articles. It is a type of "Shepardizing" function for cases within the database.

- *Juriglobe – World Legal Systems*, maintained by the University of Ottawa in Canada, at http://www.juriglobe.ca/eng/index.php. This site provides context for legal systems of the world, via text and an interactive map. The database includes the civil law as well as the common law tradition, as well as statistical information on various systems.

- *Oxford Reports on International Law*, maintained by Oxford University Press, at http://www.oxfordlawreports.com/. This is a searchable, regularly updated database of summaries of decisions applying international law, rendered by courts in many national systems. As detailed at the site, the database is for paid subscribers. Free trial subscriptions are available.

- Laws and decisions of other countries may be found, in English, at, for example:

    - Australia: http://www.austlii.edu.au /

    - Canada: http://www.canlii.org/en/index.php
      http://www.scc-csc.gc.ca/decisions/index-eng.asp

    - France: http://www.worldlii.org/fr/
      http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations

    - Germany: http://www.iuscomp.org/gla/

    - India: http://liiofindia.org/

http://judis.nic.in/supremecourt/chejudis.asp

- Ireland: http://www.bailii.org / http://www.courts.ie/Judgments.nsf/
- Israel: http://elyon1.court.gov.il/eng/home/index.html
- New Zealand: http://www.nzlii.org/
- United Kingdom: http://www.bailii.org/ http://www.supremecourt.gov.uk/decided-cases/index.html

e. Databases on Regional or International Courts or Tribunals

Websites compiling decisions and other information on international courts or tribunals include:

- *Project on International Courts and Tribunals*, at http://www.pict-pcti.org/index.html. This database includes descriptions of myriad international courts and tribunals; for example, the International Court of Justice, the International Tribunal for the Law of the Sea, the World Trade Organization dispute settlement bodies, the International Criminal Court and *ad hoc* tribunals concerned international criminal law, regional human rights courts, and arbitration panels.

- English-language judgments issued by selected regional and international entities are available at:

  - African Commission on Human and Peoples' Rights, http://www.achpr.org/english/_info/decisions_en.html
  - African Court on Human and Peoples' Rights, http://www.african-court.org/en/#
  - European Court of Human Rights, http://www.echr.coe.int/ECHR/Homepage_EN
  - European Court of Justice, http://curia.europa.eu/jcms/jcms/T5_5123/
  - Inter-American Court of Human Rights, http://www.corteidh.or.cr/index.php/en/jurisprudencia
  - Inter-American Commission on Human Rights, http://www.cidh.oas.org/casos.eng.htm
  - International Criminal Court,

http://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx

- International Court of Justice,
  http://www.icj-cij.org/homepage/index.php

- International Tribunal on the Law of the Sea,
  http://www.itlos.org/index.php?id=10&L=0

- World Trade Organization dispute settlement bodies,
  http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

f. Databases on Specific Topics

Databases dealing with specific subfields of international law or topics within those subfields include:

- *ASIL Insights*, produced by the American Society of International Law, at http://www.asil.org/insights. *Insights* are timely and brief casenotes or comments that outline the content and significance of major international decisions and developments.

- *Human Rights Treaties and Jurisprudence – Selected Resources*, maintained by Northwestern University School of Law, at http://www.law.northwestern.edu/library/coursesupport/instructionalservices/instructionalmaterials/hrjurisprudence/.

Death Penalty Worldwide, maintained by Northwestern University School of Law, at http://www.deathpenaltyworldwide.org/. This site provides English-language summaries, status, and details on capital punishment in legal systems around the world.

Recommended citation:[1]

Am. Soc'y Int'l L., "Contributors," in
Benchbook on International Law § V (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/contributors.pdf

V. Contributors

This *Benchbook* owes much to the many practitioners, academics, and others who contributed their expertise as coordinators, advisors, authors, editors, and peer reviewers. This section profiles those contributors. All contributed in their personal capacities exclusively, and not on behalf of any entity or organization with which they are affiliated.

Diane Marie Amann is the Emily and Ernest Woodruff Chair in International Law at the University of Georgia School of Law and the International Criminal Court Prosecutor's Special Adviser on Children in and affected by Armed Conflict. Previously she was Professor of Law, Martin Luther King Jr. Hall Research Scholar, and founding Director of the California International Law Center at the University of California-Davis School of Law. She clerked for U.S. District Judge Prentice H. Marshall in Chicago and for U.S. Supreme Court Justice John Paul Stevens, and practiced at Morrison & Foerster LLP and the Office of the Federal Public Defender in San Francisco. She serves on the Members Consultative Group of the American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States* project. An American Society of International Law Judicial Advisory Board member and past Vice President, Amann is the Editor-in-Chief of this *Benchbook*.

Hillary W. Amster is Manager and Counsel at Fontheim International LLC in Washington, D.C. Previously, she served: as an International Law Fellow at the American Society of International Law; as a Law Fellow at the Tibetan Centre for Human Rights and Democracy in Dharamsala, India; and as the Day Laborer Wage Clinic Coordinator at Connecticut Legal Services. She earned her B.A. in philosophy and Italian studies from Tufts University and her J.D. degree from the University of San Francisco School of Law, where she was President of the International Law Society, an editor of the Journal for Global Justice, and a participant in the Frank C. Newman International Human Rights Clinic.

Elizabeth (Betsy) Andersen is Executive Director of the American Society of International Law, a position she has held since 2006. She serves on the governing boards of the Friends of the Law Library of Congress, the International Law Institute, the American Bar Association Rule of Law Initiative, and Williams College, and she is an adjunct professor of law at American University Washington College of Law. She was previously Executive Director of the American Bar Association's Central European and Eurasian Law Initiative, and of Human Rights Watch's Europe and Central Asia Division. Earlier in her career, she was a law clerk to Judge Georges Abi-Saab of the International Criminal Tribunal for the former Yugoslavia and to Judge Kimba M. Wood of the U.S. District Court of the Southern District of New York. Andersen is a

[1] For what this section contains, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

graduate of Yale Law School (JD), Princeton University (MPA), and Williams College (BA).

Kaitlin M. Ball, who expects to receive her J.D. degree from the University of Georgia School of Law in 2014, is the current Student President of the International Law Students Association. She has served as a legal intern for the Organisation for Security and Cooperation in Europe's Mission to Bosnia and as an extern for the Office of the Legal Adviser at the U.S. Department of State. She was graduated from the College of Wooster in 2011 with honors in both her majors, Russian Studies and History.

Kent Barnett is an Assistant Professor of Law at the University of Georgia School of Law, where he specializes in contracts, consumer law, and administrative law. He previously was the inaugural Visiting Assistant Professor of Law at the University of Kentucky College of Law. Before entering academia, Professor Barnett served as a law clerk for Judge John M. Rogers of the U.S. Court of Appeals for the Sixth Circuit and practiced complex commercial law at Weil, Gotshal & Manges.

Gary Born is the Chair of the International Arbitration and International Litigation Groups at Wilmer Cutler Pickering Hale and Dorr LLP, based in London. He has served as counsel in more than 550 international arbitrations and sat as arbitrator in more than 150 arbitrations. He has taught and published widely on international arbitration, international litigation, and other forms of dispute resolution. His books include *International Arbitration: Law and Practice* (2012), *International Commercial Arbitration* (2009), and *International Civil Litigation in U.S. Courts* (4th ed. 2011). He is a Vice President of the American Society of International Law, as well as an Adviser on the American Law Institute *Restatement (Third) of the U.S. Law of International Commercial Arbitration* project and on the *Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction/Enforcement* project.

Curtis Bradley, the William Van Alstyne Professor of Law, Professor of Public Policy Studies, and Senior Associate Dean for Faculty & Research at Duke Law School, has published widely on international law and U.S. foreign relations law. His most recent book is *International Law in the U.S. Legal System* (2013). Bradley is a Vice President of the American Society of International Law and a member of the Board of Editors of the *American Journal of International Law*, and serves as a Co-Reporter for the American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States: Treaties* project. Bradley, who was Counselor on International Law, U.S. Department of State, in 2004, also serves on the Secretary of State's Advisory Committee on International Law. He clerked for Judge David Ebel of the U.S. Court of Appeals for the Tenth Circuit and for U.S. Supreme Court Justice Byron H. White.

David D. Caron is the Dean of The Dickson Poon School of Law, King's College London. From 2010 to 2012, while he was a faculty member at the University of California-Berkeley School of Law, he served as the President of the American Society of International Law. Caron is a member of: the World Economic Forum Global Agenda Council on the Rule of Law; the Executive Council of the American Bar Association Section on International Law; the U.S. Department of State Advisory Committee on Public International Law; and the Board of Editors of the *American Journal of International Law*. He serves as Counselor for the American Law Institute *Restatement (Third) of the Foreign Relations Law of the United States* project and an

Adviser for *Restatement (Third) of the U.S. Law of International Commercial Arbitration* project.

Tai-Heng Cheng is a Partner at Quinn Emanuel Urquhart & Sullivan LLP in New York, specializing in international arbitration, trade, and litigation. Previously, he was Professor of Law and Co-Director of the Institute for Global Law, Justice and Policy at New York Law School, as well as Senior Legal Advisor to Houget Newman Regal & Kenney, LLP. He earned J.S.D. and LL.M degrees from Yale and M.A. and B.A. degrees from Oxford. His publications include *When International Law Works: Realistic Idealism after 9/11 and the Global Recession* (2012). Cheng also serves on the Executive Committee and Academic Council of the Institute for Transnational Arbitration, and on the Members Consultative Committee of the American Law Institute *Restatement (Third) of the U.S. Law of International Commercial Arbitration* project. Cheng's service to the American Society of International Law includes: Executive Council member; 2011 Annual Meeting Co-Chair; and 2012 Awards Committee Chair.

Harlan G. Cohen is an Associate Professor of Law at the University of Georgia School of Law, where he teaches Public International Law, Foreign Affairs and National Security Law, International Human Rights, International Trade, and Global Governance. Immediately prior to coming to Georgia, he was a Furman Fellow at New York University School of Law. A member of the Executive Council of the American Society of International Law and Co-Chair of the ASIL-Southeast regional interest group, he is a past Co-Chair of the Society's Annual Meeting. Cohen also serves on the Members Consultative Group, American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States* project. Before entering the academy, he practiced at Cleary Gottlieb Steen & Hamilton and clerked for Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit.

William S. Dodge is a Professor of Law and the Associate Dean for Research at the University of California, Hastings College of the Law. He serves as a Co-Reporter for the American Law Institute *Restatement (Fourth) of Foreign Relations Law: Jurisdiction and Judgments* project. Previously the Counselor on International Law to the Legal Adviser at the U.S. Department of State, he is currently a member of the State Department's Advisory Committee on International Law. Dodge is a co-author of the coursebook *Transnational Business Problems* (4th ed. 2008) and a co-editor of *International Law in the U.S. Supreme Court: Continuity and Change*, which won the American Society of International Law's 2012 Certificate of Merit. He received his B.A. and J.D. degrees from Yale University and clerked for Judge William A. Norris of the U.S. Court of Appeals for the Ninth Circuit and for U.S. Supreme Court Justice Harry A. Blackmun.

Kathleen A. Doty is the Attorney-Editor of the American Society of International Law. She manages several ASIL publications, including *International Legal Materials*, *ASIL Insights*, and *International Law in Brief*. She joined the Society staff in 2011 as the Publications Manager, supervising the *American Journal of International Law*. Previously, Doty was a Fellow at the California International Law Center, the University of California-Davis School of Law. She also has served as a law clerk to the Honorable Alexa D.M. Fujise on the Hawai'i Intermediate Court of Appeals. Doty was graduated *cum laude* from Smith College and earned her J.D. degree from the University of California-Davis School of Law.

Kristen E. Eichensehr is an Associate at Covington & Burling LLP, where she specializes in international and national security matters and appellate litigation. She has served as a Special Assistant to the Legal Adviser, U.S. Department of State. After earning her J.D. from Yale, Eichensehr served as a law clerk to Chief Judge Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit and for Justices Sandra Day O'Connor and Sonia Sotomayor of the U.S. Supreme Court.

Erika Furlong is a Research Fellow at the University of Georgia School of Law, from which she earned her J.D. degree *cum laude* in 2013. She has been a Summer Associate at Keller and Heckman LLP in Washington, D.C., as well as a Legal Extern at the U.S. Environmental Protection Agency in Atlanta and at Freedom, Legality and Rights in Europe, a network of anti-organized-crime groups that is based in Turin, Italy. Furlong was graduated from the University of Delaware with a dual major in French and biology.

Kirsten A. Harmon expects to receive her J.D. degree in 2014 from the Georgetown University Law Center, where she is a Global Law Scholar as well as a member of the Editorial Board of the *Georgetown Journal of International Law* and the Barristers' Council Alternative Dispute Resolution Division. She was a 2013 Summer Associate at Simpson Thacher & Bartlett LLP. Previously, Harmon served as a Princeton in Latin America Fellow with the Arias Foundation for Peace and Human Progress in Costa Rica, focusing on arms control issues. In 2009, she was graduated *summa cum laude* and Phi Beta Kappa with a B.A. degree in Comparative Literature from Georgetown University.

Kenzie Johnson earned her J.D. degree from the University of Minnesota Law School in 2013 with a concentration in environmental and energy law. Johnson completed her B.A. degree in political science and B.S. degree in environmental sciences, policy, and management at the University of Minnesota in 2010.

Chimène Keitner is a Professor of Law at the University of California Hastings College of the Law in San Francisco. Her teaching and scholarship explore the intersection of international law and domestic litigation; publications include *The Paradoxes of Nationalism* (2007). She is a Co-Chair of the International Law in Domestic Courts Interest Group of the American Society of International Law and a past Co-Chair of ASIL's Annual Meeting. She serves as an Adviser on the American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States* project. Professor Keitner earned a bachelor's degree from Harvard, a J.D. from Yale, and a doctorate in international relations from Oxford, where she was a Rhodes Scholar. Before becoming a law professor, she clerked for Chief Justice Beverley McLachlin of the Supreme Court of Canada, and practiced law in San Francisco.

Steven Arrigg Koh is an International Law Fellow at the American Society of International Law. He has previously served as an Associate Legal Officer at the International Criminal Tribunal for the former Yugoslavia, Visiting Professional at the International Criminal Court, and law clerk to the Honorable Carolyn Dineen King of the U.S. Court of Appeals for the Fifth Circuit. He earned his J.D. degree from Cornell Law School, M.Phil. degree from the University of Cambridge, England, and A.B. degree from Harvard College.

Rukesh Korde is a Partner at Covington & Burling LLP who represents policyholders in transnational insurance coverage disputes. He earned a bachelor's degree from Columbia University and M.A. and J.D. degrees from the University of Pennsylvania. Korde clerked for Judge Louis H. Pollak of the U.S. District Court for the Eastern District of Pennsylvania.

Alexandra F. Levy is an attorney at The Human Trafficking Pro Bono Legal Center. A graduate of the University of Chicago Law School, Levy has contributed to widely used instructional materials on trafficking litigation. She created the first comprehensive database of cases litigated under the civil trafficking provisions of the 2003 Trafficking Victims Protection Reauthorization Act, and provides consulting to law firms representing trafficking victims. Levy's research and writing have focused on trafficking and diplomatic immunity. Levy also serves as an Adjunct Professor at the Notre Dame School of Law.

Houston Putnam Lowry is the managing shareholder of Brown & Welsh PC in Meriden, Connecticut. He is a patron of the American Society of International Law, a Liveryman of the Worshipful Company of Arbitrators, London and Fellow of the Chartered Institute of Arbitrators. He currently serves on the American Law Institute's Members Consultative Group for the *Restatement (Third) of the U.S. Law of International Commercial Arbitration* project and *Restatement (Fourth) of the Foreign Relations Law of the United States* project. Lowry clerked for Judge William M. Acker, Jr. of the U.S. District Court for the District of Alabama.

Mipe Okunseinde is an Associate in the Washington, D.C., office of Covington & Burling LLP, where she advises and represents clients on a range of issues related to their compliance with international trade controls, anti-corruption laws, and related federal laws and regulations. In addition, she advises domestic and foreign individuals, nongovernmental organizations, and government agencies on a range of international human rights issues including access to justice, anti-corruption, freedoms of association and expression, good governance, and minority rights. Okunseinde also serves on the Board of Directors of Global Rights, a nongovernmental human rights organization headquartered in Washington. She is a graduate of Harvard College, the University of Cambridge, and Harvard Law School.

Hari M. Osofsky is a Professor of Law and the 2013-14 Chair in Urban and Regional Affairs at the University of Minnesota Law School. She also is on the faculty of the Conservation Biology Graduate Program; an Adjunct Professor in the Department of Geography, Environment and Society; and a Fellow with the Institute on the Environment at the University of Minnesota. Osofsky, who earned a Ph.D. in geography from the University of Oregon and a B.A. and J.D. at Yale, served as a law clerk to Judge Dorothy Nelson of the U.S. Court of Appeals for the Ninth Circuit. She is a member of the American Society of International Law Executive Council and co-chairs the Society's ASIL-Midwest Interest Group and Membership Committee. She previously co-chaired the Society's 2010 Annual Meeting and its Rights of Indigenous Peoples Interest Group.

John T. Parry is a Professor of Law at Lewis & Clark Law School, where he teaches civil procedure, civil rights litigation, conflict of laws, and federal courts. His scholarly work also encompasses foreign relations law, international law, and criminal law. He is the author of *Understanding Torture* (2010), co-author of a casebook on criminal law, and co-editor of *The*

Constitution and the Future of Criminal Justice in America (forthcoming 2013). Before entering academia, Parry practiced law at Williams & Connolly in Washington, D.C. He is a member of the American Law Institute. Parry clerked for Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit.

Cymie Payne is an Assistant Professor at Rutgers University, focusing on international and environmental law. As a teacher and scholar, she was Director of the Global Commons Project at the Center for Law, Energy and the Environment at the University of California-Berkeley School of Law. She has appeared before the International Tribunal for the Law of the Sea and served as an attorney with the U.S. Department of the Interior, the law firm of Goodwin, Procter, and the environmental reparations program of the U.N. Compensation Commission. Payne holds an M.A. degree from The Fletcher School of Law and Diplomacy and a J.D. degree from the University of California, Berkeley. She serves as a member of the Executive Committee and the Executive Council of the American Society of International Law and as an editor of *ASIL Insights*.

Julia J. Peck is Of Counsel at Quinn Emanuel Urquhart & Sullivan LLP in New York, where she concentrates her practice on complex commercial and business litigation, and domestic and international arbitration. She earned a B.A. degree *summa cum laude* from the University of California-Los Angeles and a J.D. from Yale Law School.

Alison Plenge is an Associate in the international corporate group of the Washington, D.C., office of Fulbright & Jaworski LLP (Norton Rose Fulbright). She is a graduate of Wesleyan University and the University of California-Davis School of Law. Plenge served as a 2009 American Society of International Law Fellow, supporting the development of international law resources and educational program outreach to judiciary. She then worked as the Jurisprudence Collections Coordinator at the War Crimes Research Office of American University Washington College of Law. There she managed the implementation of the Office's Gender Jurisprudence Collections.

Marylin Johnson Raisch is the Associate Law Librarian for International and Foreign Law at the Georgetown Law Library. She received her J.D. degree from Tulane University School of Law in 1980, with work in both civil and common law courses as well as international law and Roman law. She holds degrees in English literature from Smith College (B.A., *magna cum laude*, 1973) and St. Hugh's College, Oxford (M.Litt., 1978). Raisch received her M.L.S. degree from Columbia University School of Library Service in 1988 and worked at the Columbia University School of Law as International and Foreign Law Librarian for fifteen years. She is the author and editor of numerous works, including conference proceedings, articles, bibliographies, reviews, and book chapters.

Jaya Ramji-Nogales is an Associate Professor of Law and Co-Director of the Institute for International Law and Public Policy at Temple University Beasley School of Law, where she teaches refugee law and policy. She is the co-author of *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (2009), a book based on an empirical study of the U.S. asylum system, the findings of which were featured on the front page of *The New York Times*. A second book by Ramji-Nogales and her co-authors, entitled *Lives in the Balance: Asylum*

Adjudication by the Department of Homeland Security, is forthcoming in 2014. Among other legal experience, Ramji-Nogales practiced as a Staff Attorney at the ACLU Reproductive Freedom Project and as an Associate at Debevoise & Plimpton, both in New York. Her professional activities include service on the Helton Fellowship Selection Committee of the American Society of International Law.

Anjanette (Angie) Raymond is an Assistant Professor in the Department of Business Law and Ethics at the Kelley School of Business, Indiana University, and an Adjunct Assistant Professor of Law at Indiana University Maurer School of Law. She is a Visiting Fellow in International Commercial Law at the Centre for Commercial Law Studies, Queen Mary, University of London, as well as a Professor in the International Business Law Program at the University of Navarra, Spain. Raymond, who has published widely on international arbitration and international commercial law, served as a research assistant to the U.S. delegate to the U.N. Commission on International Trade Law (UNCITRAL) and to the Reporter for the revision of the sales and leases articles of the Uniform Commercial Code.

Lucy Reed, a Partner at Freshfields Deringer Bruckhaus and head of the firm's global international arbitration group, represents private and public clients and sits as arbitrator in international arbitrations under the major rules. Reed sat on the Eritrea-Ethiopia Claims Commission. While at the U.S. Department of State, she was the United States' agent to the Iran-U.S. Claims Tribunal. Among many publications, Reed is co-author of the *Freshfields Guide to Arbitration Clauses in International Contracts* (3d ed. 2011) and the *Guide to ICSID Arbitration* (2d ed. rev. 2010). She holds degrees from Brown University and the University of Chicago Law School, and clerked for Judge Barrington D. Parker, Sr., of the U.S. District Court for the District of Columbia. As President of the American Society of International Law from 2008 to 2010, Reed often participated in judicial training.

Vikki Rogers is the Director of the Institute of International Commercial Law at Pace Law School. She represents the Institute as a nongovernmental organization observer in Working Group II and III at U.N. Commission on International Trade Law (UNCITRAL), and has been invited as an expert advisor at UNCITRAL for Working Group III on Online Dispute Resolution. She maintains the Institute's online Convention on the International Sale of Goods (CISG) Database and is an Editor of the UNCITRAL CISG Digest. Before entering academia, Rogers practiced international commercial arbitration and construction law. Her areas of expertise, on which she has published, lectured, and consulted, include online dispute resolution, international arbitration, and international sales law.

Natalya Scimeca is an Attorney-Adviser in the State Department Office of the Legal Adviser, Office of Human Rights and Refugees. Her work focuses on the Convention Against Torture, and the intersections among human rights, the laws of war, and national security. Prior to joining the State Department in 2012, Scimeca served as an attorney in the U.S. Department of Justice, where she worked on national security issues; before that, she was a litigation associate in the Washington, D.C., office of Wilmer Cutler Pickering Hale and Dorr LLP. After graduating from Columbia Law School in 2003, Scimeca served as a law clerk for Judge Roanne Mann of the U.S. District Court for the Eastern District of New York and for Judge Thomas Buergenthal at the International Court of Justice.

David Sloss is a Professor of Law at Santa Clara University School of Law, where he serves as the Director of the Center for Global Law and Policy. He is the editor of *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) and a co-editor of *International Law in the U.S. Supreme Court: Continuity and Change*, which won the American Society of International Law's 2012 Certificate of Merit. He has published numerous articles on the history of U.S. foreign affairs law and the judicial enforcement of treaties in domestic courts. Sloss serves on the Members Consultative Group of the American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States* project. Before entering academia, he clerked for Senior Judge Joseph T. Sneed of the U.S. Court of Appeals for the Ninth Circuit and practiced law at Wilson, Sonsini, Goodrich & Rosati.

Barbara Stark is a Professor of Law and Research Fellow and the Associate Dean for Intellectual Life at the Maurice A. Deane School of Law at Hofstra University in New York. Her publications include dozens of chapters and law review articles, as well as several books, including *International Family Law: An Introduction* (2005), *Global Issues in Family Law* (with Ann Estin, 2007) and *Family Law in the World Community* (with Marianne Blair et al., 2009). Stark has served on the Executive Council of the American Society of International Law and on the Executive Committees of the Sections of International Law and Family Law, Association of American Law Schools. She is a former Chair of the AALS Family Law Section and current Chair of the Family Law Committee of the International Law Association.

Paul B. Stephan III is the John C. Jeffries, Jr., Distinguished Professor, and the David H. Ibbeken '71 Research Professor at the University of Virginia School of Law. During 2006-2007 he served as Counselor on International Law to the Legal Adviser of the Department of State. Stephan also has taught at Columbia Law School and at universities in Australia, Austria, China, France, Germany, Israel, Russia, and Switzerland. A member of the Executive Council of the American Society of International Law, he is a Co-Coordinating Reporter for the American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States* project and serves on the Members Consultative Group for the *Restatement (Third) of the U.S. Law of International Commercial Arbitration* project. Stephan clerked for Judge Levin Campbell of the U.S. Court of Appeals for the First Circuit and for U.S. Supreme Court Justice Lewis F. Powell, Jr.

David P. Stewart is a Visiting Professor of Law at Georgetown University Law Center, where he directs the Global Law Scholars Program and co-directs the Center on Transnational Business & Law. He joined that faculty after retiring from the Office of Legal Adviser, U.S. Department of State, where he served for over thirty years. Stewart is a member of the Board of Editors, *American Journal of International Law*; Executive Council, American Society of International Law; Executive Council, American Bar Association Section of International Law; and the Inter-American Juridical Committee. President-Elect of the American Branch of the International Law Association, he serves as a Co-Reporter for the American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States: Sovereign Immunity* project and on the Members Consultative Group for the Restatement (Third) of the U.S. Law of International Commercial Arbitration project. Previously he practiced with Donovan, Leisure in New York.

Louise Ellen Teitz is First Secretary, Hague Conference on Private International Law, with primary responsibility for family law areas. Visiting Professor of Law at Boston University School of Law in Spring 2014, and Professor of Law at Roger Williams School of Law, Bristol, Rhode Island, her expertise includes private international law, international family law, international litigation/dispute resolution, and comparative law. Professor Teitz has served on U.S. Department of State treaty-conference delegations, and was a Co-Reporter on a uniform law, promulgated by the Uniform Law Commission/National Conference of Commissioners on Uniform State Laws and aimed at implementation of the Hague Choice of Court Convention. She is a member of the: Council, American Bar Association Section of International Law; American Society of International Law; Executive Committee, American Branch of the International Law Association; and Members Consultative Group, American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States* project.

Garrett N. Traub is an Associate at Slevin & Hart PC, and a graduate of Princeton University and Georgetown University Law Center. While at Georgetown, he was both Articles Editor and Symposium Editor for the *Georgetown Journal of International Law*. He has worked on the intersection of business and human rights, with a special focus on the Alien Tort Statute. Traub also worked on Alien Tort Statute litigation for the Human Rights Law Foundation, a Washington-based nonprofit.

Peter D. Trooboff is Senior Counsel in the Washington office of Covington & Burling LLP and a member of the Curatorium of the Hague Academy of International Law. His practice concentrates on private and public international law matters. He was president of the American Society of International Law from 1990 to 1992, and is an honorary editor of the *American Journal of International Law*. Trooboff served for many years on the U.S. delegation to the Hague Conference on Private International Law. In 2010, the American Bar Association Section of International Law presented him with its Leonard J. Theberge Award for Private International Law. He serves as an Adviser on the American Law Institute *Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction/Enforcement* project and on the Members Consultative Group for the *Restatement (Third) of the U.S. Law of International Commercial Arbitration* project.

Jason Tutrone is an Associate at Thompson Hine LLP in Washington, D.C. He advises multinational corporations, trade associations, and transportation intermediaries on domestic and international matters involving logistics services and transportation. These matters include: regulatory compliance; regulatory enforcement; agency rulemaking; legislative concerns; service issues; loss and damage claims; transportation security; contract drafting and negotiation; and rate disputes before the Surface Transportation Board. Tutrone's practice involves air, motor, ocean, and rail transportation, and encompasses a wide variety of logistics services. Before practicing law, Tutrone was an airline pilot. He holds aircraft dispatcher, commercial pilot, and certified flight instructor certificates.

Martina E. Vandenberg is the founder and president of The Human Trafficking Pro Bono Legal Center. She established the Center with a generous fellowship from the Open Society Foundations. Previously, she was a Partner in the Litigation Department of Jenner and Block LLP, where she focused on complex commercial litigation, Foreign Corrupt Practices Act

matters, and pro bono representation of trafficking victims in U.S. federal courts. A former researcher with Human Rights Watch, she is the author of two Human Rights Watch reports, *Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution* (2002) and *Kosovo: Rape as a Weapon of "Ethnic Cleansing"* (2000). A Rhodes Scholar and Truman Scholar, Vandenberg has taught a course on human trafficking as an adjunct faculty member at the American University Washington College of Law, Washington, D.C.

Beth Van Schaack is a Visiting Scholar with the Center on International Security and Cooperation at Stanford University while on leave from Santa Clara University School of Law, where she is Professor of Law. The former Deputy to the Ambassador-at-Large for War Crimes Issues, Office of Global Criminal Justice, U.S. Department of State, Van Schaack serves on the State Department's Advisory Council on International Law and was a member of the U.S. delegation to the 2010 International Criminal Court Review Conference in Kampala, Uganda. Her publications include the co-authored *International Criminal Law and Its Enforcement: Cases and Materials* (2d ed. 2010). Van Schaack practiced at Morrison & Foerster LLP and the Center for Justice & Accountability, and served as a law clerk with the Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia. She is a past Co-Chair of the American Society of International Law's International Criminal Law Interest Group.

Dan Werner is a Senior Supervising Attorney at the Southern Poverty Law Center Immigrant Justice Project. He represents immigrants in labor exploitation and civil rights cases throughout the United States and advocates for related policy reforms. He co-authored *A Guide to Civil Litigation on Behalf of Victims of Human Trafficking* (2008) and has lectured and testified, in the United States, Europe, Asia, and the Pacific Islands, on human trafficking and other severe labor exploitation. After eight years representing farmworkers in New York and Florida, Werner co-founded the Workers' Rights Law Center of New York with an Echoing Green fellowship.

Edwin Williamson retired as a Partner of Sullivan & Cromwell LLP and became Senior Counsel as of December 31, 2006, having spent his entire professional career with that firm except for his service as U.S. State Department Legal Adviser from 1990 to 1993. Williamson's practice included international financing and transactions, corporate governance, economic sanctions and government ethics. He participates on panels and other forums involving public international law and national security issues, including the use of force, the International Criminal Court, the law of the sea and the war against terrorism, and he recently advised the World Bank group on its privileges and immunities.

Bruce Zagaris is a Partner with the law firm of Berliner, Corcoran & Rowe LLP, Washington, D.C. His criminal work has included counseling on testifying as an expert in international criminal cases involving evidence gathering, extradition, prisoner transfers, money laundering and tax crimes, and counseling of witnesses for grand jury investigations. Since 1985, he has edited the *International Enforcement Law Reporter*, a monthly journal. He has been an adjunct professor at several law schools. Zagaris has authored and edited several books, including *International White Collar Crime: Cases and Materials* (2010), and hundreds of articles on international law.

David M. Zionts is an Associate at Covington & Burling LLP, where his practice focuses on litigation and international matters. He is a graduate of Harvard Law School. He previously was a Special Advisor to the Legal Adviser at the U.S. Department of State. Zionts served as a law clerk to Judge Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit and to Justice Stephen G. Breyer of the U.S. Supreme Court.

Recommended citation:[1]

Am. Soc'y Int'l L., "Acknowledgments," in
Benchbook on International Law § VI (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/acknowledgments.pdf

VI. Acknowledgments

The American Society of International Law gratefully acknowledges the manifold contributions of dozens of its member experts to this *Benchbook*.

Professor Diane Marie Amann, Emily and Ernest Woodruff Chair in International Law at the University of Georgia School of Law, deserves principal credit for this valuable contribution to the adjudication of international legal questions in United States courts. It was Professor Amann who conceived of the project and provided editorial leadership throughout its multiyear development.

Contributors included authors, editors, and peer reviewers, drawn from practice and academia, listed *supra* § V. We also benefited immensely from the insights and guidance of the Society's Judicial Advisory Board, chaired by Justice Ruth Bader Ginsburg and comprising a judicial representative from each circuit of U.S. Court of Appeals and three state supreme courts. We particularly acknowledge Judge Rosemary Barkett (ret.) who, in November 2010, convened a group of her judicial colleagues from the Southern District of Florida for in-depth discussion of an initial draft.

Providing invaluable editorial and administrative support were Professors David P. Stewart and Beth Van Schaack, along with ASIL Attorney-Editor Kathleen A. Doty. The staff of the Alexander Campbell King Law Library at the University of Georgia School of Law gave extensive research support.

The *Benchbook* will be subject to ongoing updates by members of an editorial committee, and we look forward to their additional contributions.

[1] For topics covered in this volume, see the Detailed Table of Contents, http://www.asil.org/benchbook/detailtoc.pdf.

Am. Soc'y Int'l L., "Index and Tables,"[1] in
Benchbook on International Law § VII (Diane Marie Amann ed., 2014), available at
www.asil.org/benchbook/index.pdf

VII. Index and Tables

The contents of this *Benchbook* are detailed in the tables beginning on the next page. Included are a:

- Table of Treaties and Other International Instruments
- Table of Cases
- Table of National Laws, Legislative Materials, Jury Instructions, and Uniform Laws
- Table of Scholarly Writings
- Keyword Index

[1] For what is included in this *Benchbook*, see the Detailed Table of Contents, *available at* http://www.asil.org/benchbook/detailtoc.pdf .

A. Table of Treaties and Other International Instruments

Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations (Headquarters Agreement), II.B-16, III.F-3

Chicago Convention (Convention on International Civil Aviation), I.B-5, II.A-12, III.D-2
CISG (United Nations Convention on Contracts for the International Sale of Goods), III.B-11, III.C-1 to III.C-23
Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, III.E-31 to III.E-32, III.E-38, III.E-51 to III.E-53, III.E-56 to III.E-60
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, II.A-12, III.D-2, III.F-3
Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention of 1929), III.D-1 to III.D-16
Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention of 1999), II.A-13, III.D-1 to III.D-5
Convention on the Elimination of All Forms of Discrimination Against Women, III.B-1, III.B-2, III.E-38
Convention on International Civil Aviation (Chicago Convention), III.C-12, III.D-2, III.F-3
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, II.A-13, III.F-3
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), II.B-7, II.B-30, III.A-1 to III.A-8, III.A-11 to III.A-15, III.A-20 to III.A-28
Convention on the Rights of the Child, I.C-5, III.B-1, III.B-2, III.E-38
Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention, also known as Washington Convention), III.A-6, III.A-19, III.A-20
Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, III.C-4
Convention Relating to the Status of Refugees, III.E-50 to III.E-52
Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara Convention), III.D-3, III.D-8, III.D-9
Copenhagen Accord, III.G-9

Geneva Conventions of 1949 for the Protection of Victims of War, I.B-3, III.E-31, III.E-32, III.F-3
Guadalajara Convention (Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier), III.D-3, III.D-8, III.D-9

Hague Convention for the Suppression of Unlawful Seizure of Aircraft, II.A-12, III.F-3
Hague Convention on Civil Aspects of International Child Abduction, II.C-5, III.B-3 to III.B-38, III.B-46, III.B-47
Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, III.B-3
Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, II.C-2
Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, II.C-5, II.C-7, II.C-8
Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, III.D-3, III.D-7 to III.D-9
Headquarters Agreement (Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations), II.B-16, III.F-3

ICSID Convention (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, also known as Washington Convention), III.A-6, III.A-19, III.A-20
Inter-American Convention on International Commercial Arbitration (Panama Convention), III.A-2 to III.A-5, III.A-7, III.A-8, III.A-14, III.A-15, III.A-21 to III.A-25, III.A-28

Inter-American Convention on Letters Rogatory, II.C-2, III.F-3
Inter-American Convention on Mutual Assistance in Criminal Matters, II.C-9, II.C-10, III.F-3
International Air Transport Association Inter-Carrier Agreements, III.D-5
International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, I.B-14, III.A-18
International Centre for Dispute Resolution Guidelines for Arbitrators Concerning Exchanges of Information, III.A-18
International Convention against the Taking of Hostages, II.A-13, III.F-3
International Covenant on Civil and Political Rights, I.B-6, I.B-7, III.E-5, III.E-51, III.E-53, III.E-38

Kyoto Protocol to the U.N. Frameowrk Convention on Climate Change, III.G-8, III.G-9

Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, III.D-4
Montreal Convention of 1999 (Convention for the Unification of Certain Rules for International Carriage by Air), II.A-13, III.D-1 to III.D-5
Montreal Convention of 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation, II.A-12, III.D-2, III.F-3

New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards), II.B-7, II.B-30, III.A-1 to III.A-8, III.A-11 to III.A-15, III.A-20 to III.A-28

Optional Protocol to the Convention on the Rights of the Child on the Involvement of children in Armed Conflict, III.B-2, III.F-3
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, I.C-5, III.B-2, III.F-4
Organization of American States Inter-American Convention against Corruption, II.C-9, III.F-4

Palermo Convention (United Nations Convention Against Transnational Organized Crime), II.C-8, III.E-39
Panama Convention (Inter-American Convention on International Commercial Arbitration), III.A-2 to III.A-5, III.A-7, III.A-8, III.A-14, III.A-15, III.A-21 to III.A-25, III.A-28
Protocol Relating to the Status of Refugees (Refugee Protocol), III.E-50 to III.E-53
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime (Trafficking Protocol), III.E-37, III.E-39, III.F-4

Refugee Protocol (Protocol Relating to the Status of Refugees), III.E-50 to III.E-53
Rome Statute of the International Criminal Court, III.E-38

Statute of the International Court of Justice, I.B-1, I.B-2, I.B-8, I.B-10 to I.B-13

Trafficking Protocol (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime), III.E-37, III.E-39, III.F-4
Treaty between the United States of America and the Russian Federation on Mutual Legal Assistance in Criminal Matters, II.C-9, III.F-4

UNIDROIT Principles of International Commercial Contracts, III.C-1, III.C-15 to III.C-17, III.C-23
United Nations Charter, I.B-1, I.B-10, I.B-12, II.A-3
United Nations Convention against Corruption, II.C-9
United Nations Convention Against Transnational Organized Crime (Palermo Convention), II.C-8, III.E-39
United Nations Convention on Contracts for the International Sale of Goods (CISG), III.B-11, III.C-1 to III.C-23
United Nations Framework Convention on Climate Change, III.G-8, III.G-9
United Nations Model Treaty on Mutual Assistance in Criminal Matters, II.C-11, III.F-4
United Nations' Standard Minimum Rules for the Treatment of Prisoners, I.B-13
Universal Declaration of Human Rights, I.B-13, I.C-9, III.E-38

Vienna Convention on Consular Relations, II.B-11, II.B-14 to II.B-16, III.F-4, IV.A-1, IV.A-2
Vienna Convention on Diplomatic Relations, II.B-11 to II.B-16, III.E-47, III.F.-4, IV.A-1
Vienna Convention on the Law of Treaties, I.B-4 to I.B-10, III.D-8, III.F-4, IV.A-1 to IV.A-5

Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage by Air), III.D-1 to III.D-16

Washington Convention (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, also known as ICSID Convention), III.A-6, III.A-19, III.A-20

B. Table of Judicial Decisions

1. International Courts

a. International Court of Justice

Advisory Opinion on Reparations for Injuries Suffered in Service of the United Nations, I.A-2
Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), II.B-11

Interhandel Case (Switz v. U.S.), II.B-23

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), II.B-3

2. National Courts

a. United States

i. U.S. Supreme Court

Abbott v. Abbott, I.B-7, III.B-4, III.B-11 to III.B-17, III.B-19, III.B-23 to III.B-25, IV.A-5
Aetna Life Ins. Co. v. Tremblay, II.B-25
Air France v. Saks, III.D-12, III.D-16
Alfred Dunhill of London, Inc. v. Republic of Cuba, II.B-17
Allstate Ins. Co. v. Hague, II.B-25
American Electric Power Co. v. Connecticut, III.G-1, III.G-4, III.G-6 to III.G-7
Argentine Republic v. Amerada Hess Shipping Corp., II.B-2, II.B-6, III.E-2, III.E-19
Atkins v. Virginia, I.C-9

Baker v. Carr, II.B-18, II.B-19, III.E-22, III.G-7
Baldwin v. Franks, I.C-3
Bank of Augusta v. Earle, II.B-24
Beneficial Nat'l Bank v. Anderson, III.D-10
Berizzi Bros. Co. v. The Pesaro, II.B-23
BG Group plc v. Republic of Argentina, III.A-10
Bond v. United States, I.C-6
Breard v. Greene, I.C-3
Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., III.E-14
Buckeye Check Cashing v. Cardegna, III.A-9

Chafin v. Chafin, III.B-4, III.B-8, III.B-10, III.B-11, III.B-13, III.B-14, III.B-16, III.B-19, III.B-25, III.B-36, III.B-37
Chan v. Korean Airlines, Ltd., III.D-14
Cook v. United States, I.C-4

Daimler AG v. Bauman, II.A-7
Dole Food Co. v. Patrickson, II.B-4

Eastern Airlines v. Floyd, III.D-1, III.E-12, III.D-16
EEOC v. Arabian American Oil Co., II.A-16
El Al Israel Airlines v. Tsui Yuan Tseng, III.D-10, III.D-15, III.D-16
Estelle v. Gamble, I.C-9

F. Hoffman-La Roche Ltd v. Empagran S.A., I.C-8, II.A-13, II.A-18, II.A-19, II.B-24, IV.B-1
Ferens v. John Deere Co., II.B-24
First Nat'l City Bank v. Banco Nacional de Cuba, II.B-17 to 18, III.E-20, III.E-21
First Options of Chicago, Inc. v. Kaplan, III.A-10
Foster v. Neilson, I.C-3, I.C-4

Goldwater v. Carter, II.B-19
Goodyear Dunlop Tires Operations v. Brown, II.A-6
Graham v. Florida, I.C-8, I.C-9
Graham v. Louisiana, I.C-9, III.B-2
Grutter v. Bollinger, III.B-2
Gulf Oil Corp. v. Gilbert, II.B-22

Hall Street Assocs., L.L.C. v. Mattel, Inc., III.A-27, III.A-28
Hamdan v. Rumsfeld, I.C-6, I.C-8
Hartford Fire Ins. Co. v. California, II.A-15, II.A-19
Head Money Cases, I.C-3
Hoffman Plastic Compounds, Inc. v. NLRB, III.E-48

INS v. Aguirre-Aguirre, III.E-51, III.E-54
INS v. Cardoza-Fonseca, III.E-52, III.E-54
INS v. Stevic, III.E-55
Intel Corp. v. Advanced Mirco Devices, Inc., II.C-11, II.C-12, III.A-19
International Shoe Co v. Washington, II.A-6

Japan Whaling Ass'n v. Am. Cetacean Soc'y, II.B-20

Kiobel v. Royal Dutch Petroleum Co., II.A-16, II.E-2, II.E-3, III.E-7 to III.E-10, III.E-12, III.E-15 to III.E-18, III.E-21, III.E-25, III.E-27, III.E-28
Klaxon Co. v. Stentor Elec. Mfg., II.B-24

Landgraf v. USI Film Prods., III.E-34
Lawrence v. Texas, I.C-9
Lozano v. Montoya Alvarez, III.B-4, III.B-5, III.B-11 to III.B-13, III.B-16, III.B-34, III.B-35
Ludecke v. Watkins, II.B-19

Massachusetts v. EPA, III.G-1 to III.G-5, III.G-7
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., II.C-7
Medellín v. Texas, I.B-13, I.C-3, III.B-12
Metro. Life Ins. Co. v. Taylor, III.D-10
Microsoft Corp. v. AT&T Corp., II.A-19
Milliken v. Meyer, II.A-6
Missouri v. Holland, I.C-5
Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., III.A-9, III.A-11
Mohamad v. Palestinian Auth., III.E-2, III.E-11, III.E-13, III.E-27, III.E-28, III.E-32, III.E-33, III.E-35
Morrison v. National Australian Bank, II.A-15, II.A-16, III.E-16, III.E-28
Munaf v. Green, III.E-60, III.E-61

Naji v. Obama, III.E-61

Oetjen v. Cent Leather Co., II.B-19
Olympic Airways v. Husain, III.D-12, III.D-16

Permanent Mission of India to the United States v. City of New York, II.B-2
Piper Aircraft v. Reno, II.B-21
Prima Paint Corp v. Flood & Conklin Mfg. Co., III.A-9

Republic of Austria v. Altmann, II.B-3, II.B-4, II.B-24
Republic of Philippines v. Pimentel, IV.B-1
Respublica v. De Longchamps, III.E-10
Rodriguez de Quijas v. Shearson/American Express, Inc., III.A-27
Roper v. Simmons, I.C-9, III.B-2

Sale v. Haitian Centers Council, Inc., II.A-16, III.E-54, IV.A-5
Samantar v. Yousuf, I.C-8, II.B-2, II.B-10 to II.B-12, II.B-15, III.E-2, III.E-19, III.E-27
Sanchez-Llamas v. Oregon, I.B-13, I.C-3, IV.A-2
Scherk v. Alberto-Culver Co., III.A-3
The Schooner Exchange v. McFaddon, II.A-2, II.A-3, II.A-8, II.B-2
Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., II.B-20
Smith v. United States, I.A-1, II.A-16, III.E-6
Societe Nationale Industrielle Aerospatiale v. U.S. District Court, II.B-23, II.C-7, III.E-25
Sosa v. Alvarez, I.A-1, I.B-13, I.C-5, I.C-8, I.C-9, II.A-12, III.E-2 to III.E-5, III.E-8, III.E-10, III.E-12, III.E-13, III.E-17, III.E-23, III.E-25 to III.E-27
Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp, III.A-28
Strassheim v. Daily, II.A-9
Sumitomo Shoji America, Inc. v. Avagliano, III.B-12

Trop v. Dulles, I.C-9

Underhill v. Hernandez, II.B-17
United States v. Bowman, II.A-4, II.A-10, II.A-17
United States v. California, I.B-13
United States v. First Nat'l City Bank, II.C-6
United States v. Kozminski, III.E-37
United States v. Louisiana, I.B-13
United States v. Maine, I.B-13
United States v. Smith, I.A-1, III.E-6
Utility Air Regulatory Group v. EPA, III.G-5

Verlinden B.V. v. Cent. Bank of Nigeria, II.B-3, II.B-4
Vieth v. Jubelirer, II.B-19

W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., II.B-17, III.E-20
Warren v. United States, I.C-4
Washington v. Glucksberg, I.C-9
Weinberger v. Rossi, IV.A-2
Wilko v. Swan, III.A-27

Zivotosky v. Clinton, II.B-19

ii. U.S. Courts of Appeals

Abdulaziz v. Metro Dade Cty, II.B-13
Abdullahi v. Pfizer, II.B-21, III.E-8, III.E-13, III.E-14
Abiodun v. Martin Oil Service, Inc., III.E-9
Acosta v. Acosta, III.B-27
Aguinda v. Texaco, III.E-25
Ahmad v. Wigen, III.E-59
Aldana v. Del Monte Fresh Produce, N.A., Inc., III.E-4, III.E-8, III.E-14, III.E-24, III.E-30
Aldinger v. Segler, III.B-36
Alperin v. Vatican Bank, II.B-19, II.B-20, III.E-23
Ario v. Underwriting Members of Syndicate 53 at Lloyds, III.A-25
Arriba Ltd. v. Petroleos Mexicanos, II.B-10
Avero Belgium Ins. v. American Airlines, Inc., III.D-7
Aziz v. Alcolac, Inc., I.C-8

Baloco *ex rel.* Tapia v. Drummond, III.E-29
Banco De Seguros del estado v. Mut. Marine Office, Inc., III.A-15
Banco Nacional de Cuba v. Sabbatino, II.B-17, II.B-18, III.E-20, III.E-21
Bancoult v. McNamara, III.E-22
Baran v. Beaty, III.B-27, III.B-30, III.B-31
Baravati v. Josephthal, Lyon & Ross, Inc., III.A-27
Baxter v. Baxter, III.B-26, III.B-28, III.B-30, III.B-31

Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., III.C-18
Bel-Ray Co. v. Chemrite (Pty) Ltd., II.B-24
Benjamins v. British European Airways, III.D-9
Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, II.B-18
Big Sky Network Canada, Ltd., v. Sichuan Provincial Government, II.B-4
Blondin v. Dubois, III.B-27, III.B-30
Bodum USA, Inc. v. La Cafetiere, Inc., II.B-24
Borden, Inc. v. Meiji Milk Prods. Co., III.A-13
BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, III.C-10
Brink's Ltd. v. South African Airways, III.D-10
Buchanan v. City of Bolivar, Tenn., III.E-37
Buell v. Mitchell, I.C-8
Bushati v. Gonzales, III.E-58

C9 Ventures v. SVC-West, L.P., III.C-2
Cabello v. Fernandez-Larios, III.E-7, III.E-15, III.E-24, III.E-33 to III.E-35
Cantor v. Cohen, III.B-18
Chandler v. United States, II.A-10
Chavez v. Carranza, III.E-33
Chicago Prime Packers, Inc. v. Norham Food Trading Co., III.C-13
China Trade & Dev't Corp. v. M.V. Choong Yong, III.A-14
Chubb & Son v. Asiana Airlines, III.D-8
Citigroup Global Markets, Inc. v. Bacon, III.A-28
Coalition for Responsible Regulation v. EPA, III.G-5
Comedy Club, Inc. v. Improv West Assoc., III.A-28
COMSAT Corp v. Nat'l Sci. Found., III.A-18
Continental Ins. Co. v. Federal Express Corp., IV.A-2, III.D-7
Cornejo v. County of San Diego, IV.A-5
Cornejo-Barreto v. W.H. Siefert, III.E-59
Corrie v. Caterpiller, Inc., II.B-20, III.E-22
Cuellar v. Joyce, III.B-36

Danaipour v. McLarey, III.B-10, III.B-31
de Silva v. Pitts, III.B-31
Deiulemar Compagnia di Navigazione S.P.A. v. M/V/ Allegra, III.A-14
Delchi Carrier SPA v. Rotorex Corp., III.C-12, III.C-13
Deutsch v. Turner Corp., III.E-24
Ditullio v. Boehm, III.E-45, III.E-47
Doe I v. Unocal Corp., III.E-13, III.E-21
Doe v. Exxon Mobil Corp., III.E-5, III.E-15, III.E-25

El-shifa Pharm. Indus. Co. v. United States, II.B-20, III.E-9
Enahoro v. Abubakar, III.E-4, III.E-30, III.E-34
Estate of Amergi v. Palestinian Auth., III.E-9
Estate of Ford v. Garcia, III.E-33

FG Hemisphere Assoc., LLC v. Democratic Republic of Congo, II.B-7
Filártiga v. Peña-Irala, III.E-10
First City, Texas-Houston, N.A. v. Rafidain Bank, II.B-10
Flomo v. Firestone Natural Rubber Co., LLC, III.E-7, III.E-9, III.E-12, III.E-25
Flores v. Southern Peru Copper Corp., III.E-5
Forestal Guarani S.A. v. Daros, Int'l, III.C-16
Friedrich v. Friedrich, III.B-27, III.B-30, III.B-31

Gallina v. Fraser, III.E-59
Gitter v. Gitter, III.B-19, III.B-21
Gonzalez-Caballero v. Mena, III.B-28
Gov't of India v. Cargill Inc., III.A-27
Guzzo v. Cristofano, III.B-16

Hamid v. Price Waterhouse, III.E-9
Haven v. Rzeczpospolita Polska, II.B-5
Hay Group, Inc. v. E.B.S. Acquisition Corp., III.A-17
Hilao v. Estate of Marcos, III.E-24, III.E-35
Hilton v. Guyot, II.B-23, II.B-24, III.E-25
Hoxha v. Levi, III.E-60
Husmann v. Trans World Airlines, Inc., III.D-10
Hwang Geum Joo v. Japan, III.E-23

Igartua v. United States, IV.A-2
In re B. Del C.S.B., III.B-35
In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA),Inc., III.A-19
In re Estate of Ferdinand E. Marcos Human Rights Litig., III.E-23
In re French, II.A-13
In re Marc Rich & Co., II.C-6
In re Sec. Life Ins. Co. of Am., III.A-17
Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, III.A-25
Iragorri v. United Techs. Corp., II.B-21
Iran Aircraft Indus. v. Avco Corp., III.A-25

Jean v. Dorelien, III.E-24, III.E-25, III.E-35
Jean-Pierre v. U.S. Att'y Gen., III.E-56
Joseph v. Office of Consulate General of Nigeria, II.B-5

Kadić v. Karadžić, II.B-18, II.B-20, III.E-4, III.E-13, III.E-14, III.E-20 to III.E-23
Kaepa, Inc. v. Achilles Corp., III.A-14
Kalamazoo Spice Extraction Co v. Provisional Military Gov't of Socialist Ethiopia, II.B-18
Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, III.A-20, III.A-24

Karkkainen v. Kovalchuck, III.B-21
Khouzam v. Att'y Gen of the United States, III.E-58
Khulumani v. Barclay Nat'l Bank Ltd., III.E-15
Kijowska v. Haines, III.B-21
Kiyemba v. Obama, III.E-60
Koch v. Koch, III.B-21

Laker Airways, Ltd. v. Sabena, II.A-10
Life Receivables Trust v. Syndicate 102 at Lloyd's of London, III.A-17
Lozano v. Alvarez, III.B-35

Made in the USA Found. v. United States, II.B-19
Madeira v. Affordable Hous. Found., Inc., III.E-48
Mamani v. Berzain, III.E-20
MCC-Marble Ceramic Ctr v. Ceramica Nuova d'Agostino, III.C-18, III.C-19
McCreary Tire & Rubber Co v. CEAT, S.p.A., III.A-13
Miller v. Miller, III.B-19
Mironescu v. Costner Omar v. McHugh, III.E-60, III.E-61
Mohammad v. Bin Tarraf, III.E-8, III.E-9
Mora v. New York, IV.A-2, IV.A-5, III.E-9
Mozes v. Mozes, III.B-21

Nat'l Board Co., Inc. v. Bear Stearns & Co., III.A-19
Nicolson v. Pappalardo, III.B-21, III.B-27, III.B-28
Nunez-Escudero v. Tice-Menley, III.B-32

Ozaltin v. Ozaltin, III.B-18, IV.A-2

Papa v. United States, III.E-24
Paramedics Electronmedicina Comercial, LTD v. GE Med Sys Info Techs., III.A-14
Park v. Shin, III.E-47
Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, III.A-24
Phipps v. Harding, I.C-8
Price v. Socialist People's Libyan Arab Jamahiriya, III.E-31

Ramos-Santiago v. United Parcel Service, III.A-28
Republic of Argentina v. BG Group PLC, III.A-10
Republic of Kazakhstan v. Biederman Int'l, III.A-19
Reyes v. Jeffcoat, III.B-16
Robert v. Tesson, III.B-21
Romero v. Drummond Co., III.E-12, III.E-15, III.E-33
Ruiz v. Tenorio, III.B-21

Saintha v. Mukasey, III.E-56
Sarei v. Rio Tinto, III.E-7 to III.E-9, III.E-12, III.E-15, III.E-21, III.E-25
Schneider v. Kissinger, II.B-20, III.E-22
Sealed Appellant v. Sealed Appellee, III.B-26
Siderman de Blake v. Republic of Argentina, II.B-5, III.E-21
Simcox v. Simcox, III.B-31
Sinaltrainal v. Coca-Cola, III.E-8, III.E-13, III.E-33
Souratgar v. Lee, III.B-30, III.B-32
Stern v. Stern, III.B-21
Swarna v. Al-Awadi, III.E-8, III.E-47, III.E-49

Tabion v. Mufti, III.E-47
Tachiona v. United States, III.E-12
Tel-Oren v. Libyan Arab Republic, III.E-6, III.E-9, III.E-13
TMR Energy Ltd. v. State Prop. Fund of Ukraine, II.B-7
Trans World Airlines, Inc. v. Franklin Mint Corp, I.C-4, III.D-4, III.D-10
Trinidad y Garcia v. Thomas, III.E-60

Ungaro-Benages v. Dresdner Bank AG, II.B-24, III.E-23
United States v. Afolabi, III.E-48
United States v. Alahmad, III.B-42, III.B-45
United States v. Aluminum Co. of America, II.A-9
United States v. Amer, III.B-44, III.B-45
United States v. Belfast, III.E-31
United States v. Benitez, II.A-11
United States v. Calimlim, III.E-46
United States v. Clark, II.A-11
United States v. Cummings, III.B-44, III.B-45
United States v. Dallah, III.B-40, III.B-45
United States v. Daniels, III.E-49
United States v. Davis, II.C-6, II.C-11
United States v. Dire, I.C-8
United States v. Farrell, III.E-47, III.E-49
United States v. Fazal-Ur-Raheman-Fazal, III.B-42
United States v. Felix-Gutierrez, II.A-17
United States v. Field, II.C-6
United States v. Frank, II.A-18
United States v. Garcia, II.C-11
United States v. Jeong, I.C-8
United States v. Marcus, III.E-42, III.E-47
United States v. Martinez, III.E-46, III.E-48
United States v. Miller, III.B-40, III.B-43
United States v. Neil, II.A-17
United States v. Nippon Paper Industries Co., Ltd, II.A-17
United States v. Peterson, II.A-10
United States v. Rommy, II.C-11
United States v. Sardana, III.B-41, III.B-42, III.B-44, III.B-46
United States v. Shabban, III.B-41
United States v. Ventre, III.B-38, III.B-39
United States v. Vilches-Navarete, II.A-10
United States v. Yousef, II.A-10, II.A-18
United States v. Hill, II.A-17

Valenzuela v. Michel, III.B-21
Van De Sande v. Van De Sande, III.B-31
Van Straaten v. Shell Oil Products Co. LLC, I.C-9
Van Tu v. Koster, III.E-24
Velez v. Sanchez , III.E-4, III.E-47
Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., III.E-4, III.E-8, III.E-9

Walsh v. Walsh, III.B-31
West v. Dobrev, III.B-30, III.B-31
West v. Multibanco Comermex, II.B-9
Whallon v. Lynn, III.B-23, III.B-32
White v. White, III.B-25
Whiteman v. Dorotheum GmbH & Co. KG, II.B-19, III.E-23
Ye v. Zemin, II.B-11, II.B-12
Yousuf v. Samantar, I.C-8, II.B-12, II.B-14, III.E-19
Yuen Jin v. Mukasey, III.E-53
Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" US, Inc., III.A-25

iii. U.S. District Courts

Abiola v. Abubakar, III.E-21
Adhikari v. Daoud & Partners, III.E-8, III.E-13
Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., III.C-10
Ali Shafi v. Palestinian Auth., III.E-9
Almog v. Arab Bank, III.E-8, III.E-14
Aranda v. Serna, III.B-35
Arndt v. UBS AG, III.E-9
Asante Technologies, Inc. v. PMC-Sierra, Inc., III.C-5, III.C-10

Barrera Casimiro v. Pineda Chaves, III.B-29
Bolchos v. Darrel, III.E-10

Claudia v. Olivieri Footwear Ltd., III.C-18

Demaj v. Sakaj, III.B-35
Doe v. Islamic Salvation Front, III.E-13
Doe v. Israel, III.E-25
Doe v. Nestle, III.E-7, III.E-8
Doe v. Rafael Saravia, III.E-7
Doe v. Siddig, III.E-46, III.E-47

East Sussex Children Services v. Morris, III.B-24
ECEM Eur. Chem. Mktg. B.V. v. Purolite Co., III.C-18
Estate of Manook v. Research Triangle, Ltd., III.E-8

Fercus, S.R.L. v. Palazzo, III.C-18
Flomo v. Firestone Natural Rubber Co., LLC, III.E-7, III.E-9, III.E-12, III.E-25

Gang Chen v. China Cent. TV, III.E-9
Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., III.C-14
Genpharm Inc. v. Pliva-Lachema A.S., III.C-13

Hanwha Corp v. Cedar Petrochemicals, Inc., III.C-19
Hirst v. Tiberghien, III.B-19

Impuls I.D. Internacional S.L. v. Pion-teklogix, Inc., III.C-2
In re Air Crash at Lexington, Kentucky, III.D-10
In re D.T.J., III.B-19, III.B-28, III.B-35
In re Kim, III.B-28
In re Koc, III.B-35
In re S. Afr. Apartheid Litig., III.E-7 to III.E-9
In re Terrorist Attacks on September 11, 2001, III.E-8
In re Xe Servs. Alien Tort Litig., III.E-8
Interamerican Refining Corp. v. Texaco Maracaibo, Inc., II.C-7

Jane Doe I. v. Reddy, III.E-8, III.E-13
John Roe I v. Bridgestone Corp., III.E-8

Kaplan v. Central Bank of Iran, III.E-18
Krishanthi v. Rajaratnam, III.E-9

Lafontant v. Aristide, II.B-11
Lev v. Arab Bank, III.E-8

Manliguez v. Joseph, III.E-37
Mazengo v. Mzengi, III.E-45
Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L., III.C-12
Mesfun v. Hagos, III.E-48
Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GMBH, III.C-18
Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB, III.C-18
Mujica v. Occidental Petroleum Corp., III.E-4, III.E-30
Mwani v. bin Laden, III.E-18

Narkiewicz-Laine v. Scandinavian Airlines Sys., III.D-11
Orthotex, LLC v. Eurosurgical, S.A., III.C-2
Osorio v. Dole Food Co., II.B-26

P.F.V. v. Vittini Cordero, III.B-25
Presbyterian Church of Sudan v. Talisman Energy, Inc., II.B-18, III.E-7, III.E-8, III.E-15, III.E-21 to III.E-22

Saperstein v. Palestinian Auth., III.E-8 to 9, III.E-14
Sexual Minorities Uganda v. Lively, III.E-7, III.E-15, III.E-18

St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmBH, III.C-11

Tachiona v. Mugabe, III.E-12
TeeVEE Toons, Inc. v. Gerhard Schubert GmBH, III.C-9
Themis Capital, LLC v. Democratic Republic of Congo, II.B-5
Trudrung v. Trudrung, III.B-29
Tsai-Yi Yang v. Fu-Chiang Tsui, III.B-27, III.B-28
Turedi v. Coca Cola Co, II.B-20

United States v. Fazal, III.B-45
United States v. Hasan, I.C-8
United States v. Homaune, III.B-41, III.B-45, III.B-46
United States v. Huong Thi Kim Ly, III.B-40, III.B-43, III.B-44
United States v. McNulty, II.C-6
United States v. Palestine Liberation Org., I.A-2
United States v. Paris, III.E-48
United States v. Shahani-Jahromi, III.B-45

Viera v. Eli Lilly & Co. III.E-9
Vision Sys., Inc. v. EMC Corp., III.C-2

Weiss v. Am. Jewish Comm., III.E-9
Wildearth Guardians v. Salazar, III.G-4
Wildearth Guardians v. U.S. Forest Service, III.G-4
Wiwa v. Royal Dutch Petroleum Co., III.E-8, III.E-13, III.E-24

Zapolski v. F.R.G., III.E-9

iv. U.S. Bankruptcy Courts

Societe Nationale Algerienne Pour La Recherche v. Distrigas Corp., III.A-3

b. Countries Other Than the United States

i. Austria

Oberlandesgericht, III.C-20
Oberster Gerichtshof, III.C-5, III.F-8

ii. Canada

United States v. Schneider, II.C-11

iii. Germany

Bundesgerichtshof, III.C-7, III.C-12

LG München, III.C-9

iv. Italy

Jazbinsek GmbH v. Piberplast S.p.A. (Italy), III.C-9

v. Switzerland

Bezirksgericht St Gallen (Switzerland), III.C-19

RA Laufen des Kantons Berne (Switzerland), III.C-12

C. Table of National Laws, Legislative Materials, Jury Instructions, and Uniform Laws

1. U.S. Constitution

Article I, § 8
Foreign Commerce Clause, I.C-6, II.A-6, III.B-44

Article II, § 2
Treaty Clause, I.C-1, I.C-6

Article III, III.E-22

Article IV, § 1
Full Faith and Credit Clause, II.B-25

Article VI , § 2
Supremacy Clause, I.C-2 to 3, I.C-6

Amendment I
Free Exercise Clause, III.B-45

Amendment V
Due Process Clause, II.A-6
equal protection component, III.B-45

Amendment VIII, I.C-9

Amendment XIII, III.E-37, III.E-41

Amendment XIV
Due Process Clause, I.C-9, II.A-6, II.A-7

2. U.S. Statutes

a. Statutes by Name

Air Pollution Control Act, III.G-1, III.G-5
Air Quality Act, III.G-2
Alien Tort Statute, III.E-1 to III.E-26, III.E-29, III.E-30, III.E-33
Alternative Motor Fuel Act, III.G-6
Anti-Terrorism Act, III.E-1

Child Soldiers Accountability Act, III.B-2, III.F-2
Civil Rights Act (1964, Title VII), II.A-1
Clean Air Act (1963), III.G-2 to III.G-5, III.G-7
Clean Air Act (1970), III.G-3 to III.G-5, III.G-7
Clean Water Act, III.G-5
Communications Act, II.B-29

Diplomatic Relations Act, II.B-11 to II.B-16, III.E-47, IV.A-1

Endangered Species Act, III.G-5
Energy Independence and Security Act, III.G-6
Energy Policy Act, III.G-6
Energy Policy Conservation Act, III.G-2, III.G-3, III.G-6

Fair Labor Standards Act, III.E-43, III.E-45
Federal Arbitration Act, II.B-30, III.A-1, III.A-3 to III.A-28
Federal Rules of Civil Procedure, II.B-24, II.B-27, II.C-1 to II.C-6, II.C-12, II.C-13, III.A-13, III.A-14, III.A-17, III.A-18, III.B-23
Federal Rules of Criminal Procedure, II.C-5, II.C-6
Foreign Affairs Reform and Restructuring Act (FARRA), III.E-52, III.E-56 to III.E-61
Foreign Sovereign Immunities Act (FSIA), II.B-2 to II.B-15, II.B-22, III.E-12, III.E-19
Freedom of Information Act, III.G-5

Global Change Research Act, III.G-5
Global Climate Protection Act, III.G-2

International Child Abduction Remedies Act (ICARA), I.C-6, III.B-4 to III.B-36
International Organizations Immunities Act, II.B-11, II.B-16
International Parental Kidnapping Crime Act, III.B-4, III.B-37 to III.B-46, III.F-2

Maritime Drug Law Enforcement Act (MDLEA), II.A-14, III.F-2
Military Extraterritorial Jurisdiction Act (MEJA), II.A-15, III.F-2
Motor Vehicle Air Pollution Control Act, III.G-2

National Climate Program Act, III.G-2
National Defense Authorization Act (2008), II.B-9
National Environmental Policy Act (NEPA), III.G-6
National Labor Relations Act, III.E-48

Omnibus Diplomatic Security and Antiterrorism Act, II.A-11, III.F-2

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), I.C-5, I.C-6, II.A-11, II.A-17, III.B-2, III.E-44, III.F-2

Refugee Act, III.E-52, III.E-54 to III.E-56

Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), II.B-28

Torture Victim Protection Act, II.B-17, II.B-22, II.B-23, III.E-1 to III.E-4, III.E-10, III.E-11, III.E-14, III.E-15, III.E-19, III.E-24 to III.E-36
Trading with the Enemy Act, II.A-11

Uniform Code of Military Justice, I.C-6, II.A-15
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), III.E-56

Victims of Trafficking and Violence Prevention Act (TVPA), III.E-36 to III.E-38, III.F-2

William Wilberforce Trafficking Victims Protection Reauthorization Act, III.E-1, III.E-26, III.E-37, III.E-38

b. Statutes by Citation

5 U.S.C.
§ 552, III.G-5

8 U.S.C.
§ 1101, III.E-52, III.E-54 to III.E-56
§ 1158, III.E-54, III.E-55
§ 1182, III.E-56
§ 1227, III.E-54, III.E-55
§ 1231, III.E-52, III.E-55, III.E-56, III.E-59
§ 1252, III.E-54, III.E-56, III.E-59, III.E-60

9 U.S.C.
§ 1 *et seq*., II.B.-30, III.A-1, III.A-3 to III.A-28

10 U.S.C.
§ 801 *et seq*., I.C-6, II.A-15

15 U.S.C.
§ 2901 *et seq*., III.G-2
§ 2931 *et seq*., III.G-5

16 U.S.C.
§ 1531 *et seq*., III.G-5

18 U.S.C.
§ 7, II.A-9
§ 1204, III.B-4, III.B-37 to III.B-46, III.F-2
§ 1651, II.A-12, III.F-3
§ 2332, II.A-11, III.F-2
§ 2333, III.E-1
§ 2381, II.A-10, III.F-3
§ 2423, I.C-5, I.C-6, II.A-11, II.A-17, III.B-2, III.E-44, III.F-2
§ 2441, II.A-12, III.G-6, III.F-3
§ 2442, III.B-2, III.F-2
§ 3184 *et seq*., III.E-59
§ 3261 *et seq*., II.A-15, III.F-2
§ 3271, III.E-46
§ 3663, III.E-43
§ 3771, III.E-42

22 U.S.C.
§ 254a *et seq*., II.B-11 to II.B-16, III.E-47, IV.A-1
§ 288 *et seq*., II.B-11, II.B-16
§ 6501 *et seq*., III.E-52, III.E-56 to III.E-61
§ 7101 *et seq*., III.E-1, III.E-26, III.E-37, III.E-38

26 U.S.C.
§ 7402, II.C-6

28 U.S.C.
§ 1 *et seq*., II.B-28
§ 1331, III.C-3, III.D-9 to III.D-11
§ 1350, III.E-1 to III.E-26, III.E-29, III.E-30, III.E-33
note following § 1350, II.B-17, II.B-22, II.B-23, III.E-1 to III.E-4, III.E-10, III.E-11, III.E-14, III.E-15, III.E-19, III.E-24 to III.E-36
§ 1404, II.B-20
§ 1441 *et seq*., II.B-3, III.B-17, III.D-10
§ 1601 *et seq*., II.B-2 to II.B-14, II.B-15, II.B-22, III.E-12, III.E-19
§ 1608, II.B-9, II.C-3
§ 1696, II.C-4
§ 1781, II.C-2, II.C-8
§ 1782, II.C-8, II.C-12, II.C-13, III.A-16, III.A-18, III.A-19
§ 1783, II.C-4 to 5
§ 4102, II.B-29

29 U.S.C.
§ 151 *et seq*., III.E-48
§ 201 *et seq*., III.E-43, III.E-45

33 U.S.C.
§ 1251 *et seq*., III.G-5

42 U.S.C.
§ 1983, III.E-14, III.E-33
§ 2000e, II.A-14
§ 4321 *et seq*., III.G-6
§ 7401 *et seq*., III.G-1, III.G-2, III.G-5
§ 7521, III.G-3 to III.G-5, III.G-7
§ 11601 *et seq*., I.C-6, III.B-4 to III.B-36
§ 13201 *et seq*., III.G-6

46 U.S.C.
§ 70501 *et seq*., II.A-14, III.F-2

47 U.S.C.
§ 230, II.B-29

50 U.S.C.
§ 5, II.A-11
§ 16, II.A-11

3. U.S. Regulations

Cuban Assets Control Regulations, II.A-11

Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, III.G-3

8 C.F.R.
§ 208, III.E-53, III.E-55 to III.E-58

14 C.F.R.
§ 203, III.D-8, III.D-9

22 C.F.R.
§ 92.85, II.C-1
§ 94.1 *et seq*., III.B-4, III.B-7, III.B-46
§ 95.2, III.E-59, III.E-60

31 C.F.R.
§ 515, II.A-11

40 C.F.R.
§ 52, III.G-3

4. U.S. Legislative Materials

S. Exec. Rep. 108-8 (108th Cong., Exec. Rpt., 1st Sess.), III.D-4, III.D-9
S. Rep. No. 91-702 (91st Cong., 1st Sess.), III.A-4
S. Rep. No. 249 (102d Cong., 1st Sess.), III.E-4, III.E-26, III.E-29, III.E-30 to III.E-35

5. U.S. Jury Instructions

Modern Federal Jury Instructions – Criminal (2013), III.B-39 to III.B-41, III.B-43

6. Uniform Laws

Uniform Child Custody Jurisdiction and Enforcement Act, III.B-39, III.B-42
Uniform Commercial Code, III.C-3 to III.C-4, III.C-6, III.C-7, III.C-9, III.C-12, III.C-13
Uniform Foreign Money Judgments Recognition Act, II.B-25 to II.B-27
Uniform Foreign-Country Money Judgments Recognition Act, II.B-25 to II.B-27
Uniform Law on the Formation of Contracts for the International Sale of Goods, III.C-4

D. Table of Scholarly Writings

1. Books

Michael Abbell, Obtaining Evidence Abroad in Criminal Cases (2010), II.C-9

American Law Institute, Restatement (Second) Conflict of Laws (1971), II.B-24

—, Restatement (Third) of the Foreign Relations Law of the United States (1987), I.A-2 to I.A-3, I.B-1 to I.B-3, I.B-6 to I.B-11, I.B-13, II.A-1 to II.A-13, II.A-18 to II.A-19, II.B-6, II.B-12 to II.B-18, II.B-23 to II.B-24, III.E-7, III.E-21, III.E-27, IV.B-1 to IV.B-2

—, Restatement (Third) of the U.S. Law of International Commercial Arbitration, Tentative Draft (2012), III.A-26, III.A-29

Aust, Anthony, Modern Treaty Law and Practice (2d ed. 2007), IV.B-2

Beaumont, Paul R. & Peter E. McEleavy, The Hague Convention on International Child Abduction (1999), III.B-15

David J. Bederman with Christopher J. Borgen & David A. Martin, International Law: A Handbook for Judges (Am. Soc'y Int'l Law, 2003), IV.B-2

Blackaby, Nigel, Constantine Partasides, Alan Redfern & Martin Hunter, Redfern & Hunter on International Arbitration (2009), III.A-29

Black's Law Dictionary (9th ed. 2009), II.A-1, II.A-5 to II.A-6, II.B-5, II.B-23

Blackstone, William, Commentaries on the Laws of England (1765-69), I.A-1, III.E-11

Born, Gary B., International Arbitration and Forum Selection Agreements: Drafting and Enforcing (3d ed. 2010), III.A-29

—, International Commercial Arbitration (2009), III.A-10, III.A-29

Bradley, Curtis A., International Law in the U.S. Legal System (2013), IV.B-2

Bradley, Curtis A. & Jack L. Goldsmith, Foreign Relations Law (4d ed. 2011), I.A-3, I.B-9, I.B-10

Brand, Ronald A., Recognition and Enforcement of Foreign Judgments (Fed. Judicial Ctr. 2012), II.B-25

Brownlie, Ian, Public International Law (7th ed. 2008), I.B-5, I.B-11

Buck, Trevor, Alisdair A. Gillespie, Lynne Rosse & Sarah Sargent, International Child Law (2d ed. 2010), III.B-3, III.B-14, III.B-46

Cohen, Morris L. & Robert C. Berring, How to Find the Law (8th ed. 1983), I.A-3, I.A-4

Federal Judicial Cener, Benchbook for U.S. District Court Judges (6th ed., 2013), i

Folsom, Ralph H., Michael W. Gordon & John A. Spanogle, International Business Transactions (2d ed. 2001), III.C-4, III.C-6, III.C-8, III.C-13, III.C-17, III.C-21

Franck, Thomas M., Michael J. Glennon, Sean D. Murphy & Edward T. Swaine, Foreign Relations and National Security Law (4th ed. 2011), I.A-3

Gallagher, Anne T., The International Law of Human Trafficking (2010), III.E-38

Garbolino, James, D., The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges (Fed. Judicial Ctr. 2012), III.B-32, III.B-46

Hawkland UCC Series, vol. 10A (CISG) (2013), III.C-7

Honnold, John O., Uniform Law for International Sales under the 1980 United Nations Convention (3d ed. 1999), III.C-13

—, Uniform Law for International Sales under the 1980 United Nations Convention (Harry M. Fletcher ed., 4th ed. 2009), III.C-21

International Commercial Arbitration in New York (James H. Carter & John Fellas eds. 2010), III.A-8, III.A-15, III.A-20, III.A-22

International Contract Manual (Albert Kritzer, Sieg Eiselen, Francesco Mazzotta & Allison Butler eds. 2007-2013), III.C-21

International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms, vol. 2 (M. Cherif Bassiouni, 3d ed. 2008), II.A-4

Janis, Mark Weston, International Law (6th ed. 2012), I.B-4, I.B-8, I.B-13, I.C-3

Jessup, Philip C., Transnational Law (1956), I.A-4

Lookofsky, Joseph, Understanding the CISG in the USA (2d ed. 2004), III.C-2, III.C-6, III.C-14, III.C-21

Mattei, Ugo A., Teemu Ruskola & Antonio Gidi, Schlesinger's Comparative Law (7th ed. 2009), I.A-4

McMahon, John P., Applying the CISG: Guides for Business Managers and Counsel (online volume; rev. May 2010), III.C-13

Morley, Jeremy D., The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers (Am. Bar Ass'n 2012), III.B-31, III.B-46
Murphy, Sean D., *Principles of International Law* (2d ed., 2012), IV.B-2

Nadelmann, Ethan, Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement (1993), III.F-1

Paust, Jordan J., International Law as Law of the United States (2d ed. 2003), IV.B-2

Reed, Lucy, Jan Paulsson & Nigel Blackaby, Guide to ICSID Arbitration (2d ed. rev. 2010), III.A-20, III.A-29

Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (Ingeborg Schwenzer, 3d ed. 2010), III.C-7, III.C-20
Schuz, Rhona, The Hague Child Abduction Convention (2013), III.B-46
Stark, Barbara, International Family Law: An Introduction (2005), III.B-46
Story, Joseph, Commentaries on the Conflict of Laws (1834), II.B-24
—, Commentaries on Equity Jurisprudence as Administered in England and America (Melville Bigelow, 13th ed. 1886), III.A-3
Strong, S.I., International Commercial Arbitration: A Guide for U.S. Judges (Fed. Judicial Ctr. 2012), III.A-30

The Rules, Practice, and Jurisprudence of International Courts and Tribunals (Chiara Giorgetti ed., 2012), I.B-12
The United Nations Convention on Contracts for the International Sale of Goods (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011), III.C-5, III.C-10, III.C-17
Tompkins, George N. Jr., Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States: From Warsaw 1929 to Montreal 1999 (2010), III.D-8

UNHCR's Global Consultations on International Protection (Erika Feller, Volker Türk & Frances Nicholson eds. 2003), III.E-53, III.-54

2. Chapters

Blakesley, Christopher, "Extraterritorial Jurisdiction," in 2 International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms (M. Cherif Bassiouni, 3d ed. 2008), II.A-4
Brekoulakis, Stavros, "Article 10," in The United Nations Convention on Contracts for the International Sale of Goods (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011), III.C-5

Fellas, John, "Enforcing International Arbitration Agreements," in International Commercial Arbitration in New York (James H. Carter & John Fellas eds. 2010), III.A-8

Harris, Steven L., Kathleen Patchel & Frederick H. Miller, "Contracts Governed by CISG: Excluded Contracts," in 10A Hawkland UCC Series (CISG) (2013), III.C-7

King, Brian, Alexander Yanos, Jessica Bannon Vanto & Phillip Riblett, "Enforcing Awards Involving Foreign Sovereigns," in International Commercial Arbitration in New York (James H. Carter & John Fellas eds. 2010), III.A-20

Lauterpacht, Elihu & Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion," in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (Erika Feller, Volker Türk & Frances Nicholson eds. 2003), III.E-53, III.-54

Mistelis, Loukas, "Article 6," in The United Nations Convention on Contracts for the International Sale of Goods (Stefan Kröll, Loukas A. Mistelis & Maria del Pilar Perales Viscacillas eds., 2011), III.C-10
Murphy, Sean D., "The International Court of Justice," in The Rules, Practice, and Jurisprudence of International Courts and Tribunals ((Chiara Giorgetti ed., 2012), I.B-12

Pérez-Vera, Elisa, "Explanatory Report on the 1980 Child Abduction Convention," in Hague Conference on Private International Law, Actes et documents de la Quatorzième session/Acts and documents of the Fourteenth Session, vol. 3 (1980), III.B-15, III.B-16, III.B-21, III.B-28, III.B-35, III.B-36

Pierce, John V.H. & David N. Cinotti, "Challenging and Enforcing International Arbitral Awards in New York Courts," in International Commercial Arbitration in New York (James H. Carter & John Fellas eds. 2010), III.A-22

Schwenzer, Ingeborg & Paschal Hachem, "General Provisions," in Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (Ingeborg Schwenzer, 3d ed. 2010), III.C-20

—, "Sphere of Application," in Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (Ingeborg Schwenzer, 3d ed. 2010), III.C-7

Smit, Robert H. & Tyler B. Robinson, "Obtaining Preliminary Relief," in International Commercial Arbitration in New York (James H. Carter & John Fellas, eds. 2010), III.A-15

Spohnheimer, Frank, "Sphere of Application," in The United Nations Convention on Contracts for the International Sale of Goods (Stefan Kröll, Loukas A. Misteli, & Maria del Pilar Perales Viscacilles eds., 2011), III.C-17

3. Articles

Amann, Diane Marie, Harmonic Convergence? Constitutional Criminal Procedure in an International Context, 75 Ind. L.J. 809 (2000), III.E-11, III.F-1

Bodenheimer, Brigitte M., The Hague Draft Convention on International Child Abduction, 14 Fam. L.Q. 99 (1980-81), II.B-8

Bradley, Curtis A., The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L.J. 479 (1997), II.A-18

Bradley, Curtis A. & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997), I.C-7

Dodge, William S., The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context, 42 Va. J. Int'l L. 687 (2002), III.E-10

Donoghue, Joan E., The Role of the World Court Today, 47 Ga. L. Rev. 181 (2012), I.B-12

Fletcher, William A., International Human Rights in American Courts, 3 Va. L. Rev. 653 (2007), I.C-7

Gabriel, Henry Deeb, The Buyer's Performance under the CISG: Articles 53-60 Trends in Decision, 25 J.L. & Commerce 273 (2005), III.C-13

Hague Conference on Private International Law, Case Comments and Perspectives, in 17 Judges' Newsletter on Int'l Child Protection (2011), III.B-11

Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. 439, II.A-2

Hathaway, James C., Leveraging Asylum, 45 Texas Int'l L.J. 503 (2010), III.E-54

Juenger, Friedrich K., The American Law of General Jurisdiction, 2001 U. Chi. Legal Forum 141, II.A-7

Koh, Harold Hongju, Is International Law Really State Law?, 111 Harv. L. Rev. 1824 (1998), I.C-7

McGreal, Paul E., In Defense of Complete Preemption, 156 U. Pa. L. Rev. Pennumbra 147 (2007), III.D-11

Morrison, Trevor W., Complete Preemption and the Separation of Powers 155 U. Pa. L. Rev. Pennumbra 186 (2007), III.D-11

Parry, John T., International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty, 90 B.U. L. Rev. 1973 (2010), III.E-59

Pickelman, Matthew, Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time?, 65 J. Air L. & Com. 273 (1998-99), III.D-5

Schwelb, Egon, Some Aspects of International Jus Cogens as Formulated by the International Law Commission, 61 Am. J. Int'l L. 946 (1967), I.B-9

Seinfeld, Gil, The Puzzle of Complete Preemption, 155 U. Pa. L. Rev. 537 (2007), III.D-11
Silberman, Linda, Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence, 8 U.C. Davis L. Rev. 1049 (2005), III.B-15, III.B-16, III.B-21, III.B-22, III.B-24, III.B-29, III.B-30, III.B-35
—, International Decision: Abbott v. Abbott, 105 Am. J. Int'l L. 108 (2011), III.B-11, III.B-25
Stark, Barbara, The Internationalization of American Family Law, 24 J. Am. Acad. Matrimonial L. 467 (2012), III.B-11, III.B-25

Traynor, Michael: The Future of Foreign Relations Law of the United States, 18 Sw. J. Int'l L. 5 (2011), IV.B-1
Trooboff, Peter & Frederike E.M. Stikkelbroeck, Reflections on the Hague Conference on Private International Law, 25 Hague Ybk. Int'l L. 59 (2013), III.B-3

Zagaris, Bruce, British Columbia Court Denies U.S. MLAT Request Due to Abuse of Process, 18 Int'l Enforcement L. Rep. 422 (2002), II.C-11

Zeller, Bruno, The UN Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Sales Law, 12 Pace Int'l L. Rev. 79 (2000), III.C-14

4. Other

Hague Conference on Private International Law, Actes et documents de la Quatorzième session/Acts and documents of the Fourteenth Session (1980), III.B.-14, III.B-15, III.B-21, III.B-28, III.B-36
—, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice (2003), III.B.-14
—, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement (2010), III.B.-14
—, Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice (2008), III.B.-14

International Law Commission, Report on the work of its fifty-eighth session (2006), II.A-8, II.A-9

U.S. Department of State, Digest of U.S. Practice (annual), IV.B-3

E. Keyword Index

This keyword index is intended to point the reader to terms and concepts contained in this *Benchbook*. It does not replicate the tables immediately above. In order to find a precise document, therefore, please consult the appropriate table *supra*, as follows: treaty or other international instrument, § VII.A; case, § VII.B; national law, legislative material, jury instruction, or uniform law, § VII.C; scholarly writing, § VII.D.

abduction (of child), III.B-1 to III.B-46
access (or visitation right, in child abduction case), III.B-5, III.B-7 to III.B-9, III.B-16 to III.B-19, III.B-22
accession (to treaty), I.B-3 to I.B-7, I.C-2, III.B-6, III.C-3
active nationality, II.A-2 to II.A-4, II.A-8, II.A-10, II.A-14
act of state, II.B-16 to 18, III.E-28, III.E-34
adoption: intercountry adoption of child, III.B-1, III.B-3; states' adoption of treaty, I.B-3, I.B-4
African Commission on Human and Peoples' Rights, IV.B-5
African Court on Human and Peoples' Rights, IV.B-5
age: as consideration in child abduction case, III.B-26, III.B-28, III.B-35; as consideration in human trafficking case, III.E-45, III.E-49
agency law, II.B-4, III.E-14, III.E-33, III.E-49
air (clean), III.G-1 to III.G-7
air transportation, I.B-3, I.C-4, II.A-13, III.A-1, III.D-1 to III.D-16, III.E-45
alien tort, I.A-2, I.C-6, I.C-8, II.A-12, II.A-16, II.B-1, II.B-16, II.B-18, II.B-20, II.B-22 to II.B-23, III.E-1 to III.E-30, III.E-33 to III.E-35, III.E-49
Alito, Samuel A., III.E-28, III.E-17, IV.B-1
Amann, Diane Marie, III.F-1, V-1, VI-1
ambassadors (rights of, in alien tort case), II.B-13, III.E-11
American Bar Association, III.B-46, III.C-3, III.C-21
American Law Institute, I.A-2, II.A-1, II.B-6, III.E-25, III.E-26, III.A-29, III.C-13, III.E-7, IV.B-1, IV.B-2
American Society of International Law, i, IV.B-2, IV.B-3, IV.B-6, VI-1
Amster, Hillary W., V-1
Andersen, Elizabeth (Betsy), V-1
anti-suit injunction, III.A-6, III.A-14
antitrust, II.A-15, II.A-19, III.A-11
arbitrability, III.A-10
arbitral award (recognition and enforcement of), II.B-7, II.B-29, III.A-1 to III.A-4, III.A-9 to III.A-16, III.A-20 to III.A-28, III.C-22, IV.B-3
arbitration, I.B-3, I.B-5, I.B-14, II.B-4, II.B-7, II.B-29, II.B-30, III.A-1 to III.A-30, III.C-17, III.C-23, IV.B-2, IV.B-5
armed conflict (involvement of children in), III.B-2, III.F-3
artificial person, III.E-10 to III.E-12, III.E-32
attachment (of foreign state property), II.B-9, II.B-10
authority (actual or apparent/color of law), III.E-26 to III.E28, III.E-32, III.E-33
aviation (treaties aimed at protecting), II.A-12, III.F-3, III.D-1 to III.D-16

Ball, Kaitlin M., V-2
bankruptcy, II.A-13
Barkett, Rosemary, VI-1
Barnett, Kent, V-2
bilateral investment treaty (BIT), III.A-10
bilateral treaties, I.B-3, I.B-5, I.B-7, II.C-8 to II.C-11, III.A-10, III.A-19
Bederman, David J., dedication, IV.B-2
Born, Gary, III.A-10, III.A-29, V-2
Bradley, Curtis, I.A-3, I.B-9, I.B-10, I.C-7, II.A-18, IV.B-2, V-2
Breyer, Stephen G., I.C-9, II.A-12, III.B-13 to III.B-16, III.E-8, III.E-16, III.E-17, III.E-29, IV.A-2, IV.A-5, IV.B-1

Caron, David D., V-2
Case Law on UNCITRAL Texts (CLOUT): described, III.C-21, III.C-22; other references, III.C-8 to III.C-10, III.C-12, III.C-14, III.C-19, III.C-20
Central Authority, II.C-2, II.C-7 to II.C-9, III.B-5 to III.B-9, III.B-12, III.B-15, III.B-18, III.B-23, III.B-27, III.B-30, III.B-34, III.B-47
Charming Betsy canon, II.A-16, II.A-18
Cheng, Tai-Heng, V-3
child abduction (or kidnapping), III.B-1 to III.B-46
child custody, III.B-1 to III.B-46
child labor, III.E-7, III.E-9

child law, III.B-1 to III.B-48
children's rights, I.C-5, III.B-1, III.B-2
child pornography, I.C-5, III.B-2, III.F-4
child prostitution, I.C-5, III.E-40, III.E-44, III.E-48, III.E-49
child soldier, III.B-2, III.F-1, III.F-2
child support, III.B-1
child trafficking, III.E-37 to III.B-42, III.E-44, III.E-48
choice of law, I.C-8, II.B-1, II.B-24, III.C-4, III.C-10, III.C-16, III.D-1
civilized world (as customary international law consideration), I.B-10, I.C-8, III.E-5, III.E-6
civil law (counterpart of common law), I.A-4, II.C-4, III.B-23, IV.B-4
civil procedure, II.B-24, II.B-27, II.B-29, III.B-22, II.C-1 to II.C-13, III.A-13, III.A-14, III.A-17, III.A-18, III.D-10, III.D-11
civil rights, II.A-14, III.E-14, III.E-33
climate change, III.G-1 to III.G-9
Cleveland, Sarah H., IV.B-2
Clinton, William J., III.B-38
CLOUT (Case Law on UNCITRAL Texts): described, III.C-21, III.C-22; other references, III.C-8 to III.C-10, III.C-12, III.C-14, III.C-19, III.C-20
coercion (in human trafficking case), III.E-37, III.E-40, III.E-44 to III.C-49
color of law, II.B-14, III.E-14, III.E-26 to III.E-28, III.E-32, III.E-33
Cohen, Harlan G., V-3
comity, I.A-2, I.B-9, II.A-1, II.A-5, II.A-7, II.A-13, II.B-1, II.B-2, II.B-23 to II.B-25, II.C-7, III.E-3, III.E-16, III.E-25, III.E-27
commercial activity (as exception to foreign sovereign immunity), II.B-4 to II.B-6, II.B-10
common law, I.A-4, I.C-3, II.B-2, II.B-10 to II.B-17, II.B-25, II.C-8, III.A-4, III.B-25, III.C-3, III.C-9, III.E-11, III.E-12, III.E-19, III.E-20, III.G-7, IV.B-4
common law immunities, II.B-10 to II.B-16, III.E-12, III.E-19
comparative law, I.A-2 to I.A-4, II.A-1
conduct-based immunity, II.B-12, II.B-14, III.E-20
confirmation (of arbitral award), III.A-15, III.A-20 to III.A-24
conflict of laws, I.A-3, II.B-22, II.B-24, II.C-6, III.B-3
consent: as defense in human trafficking case, III.E-46, III.E-48; as exception in child abduction case, III.B-24 to 28; as exception to immunity, II.B-15, II.B-16; of state to be bound to treaty, I.B-3 to I.B-6, I.B-10, II.B-19, I.C-1, I.C-2, IV.A-2
conspiracy, II.A-18, III.E-15, III.E-33
consular immunity, II.B-1, II.B-14 to II.B-16, III.E-47
consular relations, II.B-11, II.B-14 to II.B-16, IV.A-1, IV.A-2, III.E-47, III.F-4
consultation (by U.S. courts of foreign and international law), I.C-1, I.C-9, III.E-15
contracting party, I.B-7
contracts (mixed, in international sales of goods), III.C-1 to III.C-23, III.A-3, III.A-4, III.A-9, III.A-10, III.D-5
contributory negligence (air transportation), III.D-15
corporation: as non-natural/artificial/juridical person, II.A-7, II.A-10, II.A-11, II.A-14, II.C-3, III.C-5, III.E-10 to III.E-12, III.E-32; as state instrumentality, II.B-4; service of process on, II.A-7, II.C-1 to II.C-3, II.C-6
corruption, II.C-9, III.A-26, III.F-4
counterfeiting, II.A-3
covenant (as type of treaty), I.B-3
crimes against humanity, II.A-12, III.E-7, III.E-13
criminal procedure, II.C-5, III.E-59, III.F-1
criminal jurisdiction, I.C-5, II.A-1 to II.A-4, II.A-12, II.A-17, II.A-18, II.B-11, II.B-13, III.E-44, III.E-46
criminal justice, III.A-1, III.F-1 to III.F-4
criminal penalties, III.B-37, III.B-45, III.B-46
cruel, inhuman or degrading treatment, III.E-8, III.E-21, III.E-31, III.E-38, III.E-51 to III.E-53
cultural defense, III.E-46, III.E-48
custody right (in child abduction case), III.B-8, III.B-22 to III.B-26, III.B-41 to III.B-44
customary international law, I.B-1, I.B-2, I.B-4, I.B-8 to I.B-11, I.C-1, I.C-5, I.C-7, I.C-8, II.B-3, II.B-11, II.B-23, III.E-5, III.E-49, III.E-53 to III.E-54, IV.A-2

damages, II.B-6, II.B-8, II.B-9, III.E-2, III.E-3, III.D-15, III.E-2, III.E-25 to III.E-27, III.E-35, III.E-43, III.E-45
Death Penalty Worldwide, II.A-11, IV.B-6
declaration (as part of treaty ratification), I.B-5, I.B-6, I.C-2, I.C-5, III.B-2, III.B-6, III.B-10, III.C-22
defamation, II.B-20, II.B-28, II.B-29
denationalization or denaturalization, III.E-7
detention, III.E-7 to III.E-9, III.E21, III.E-50, III.E-54, III.E-60
diplomats: diplomatic assurances, III.E-57, III.E-58; diplomatic immunities, II.B-10 to II.B-16, III.E-47; diplomatic protection and security, II.A-11, III.F-2; diplomatic relations, II.B-11 to II.B-16, III.E-46, III.E-47, III.F-4
discovery, II.A-1, II.B-10, II.C-1 to II.C-13, III.A-3, III.A-4, III.A-14 to III.A-20, III.F-1
discrimination: against women, III.B-2, III.E-38; racial, III.E-9, III.E-21

dissolution of marriage, III.B-1
document (request or subpoena for), II.C-4 to II.C-12, III.A-15 to III.A-19
Dodge, William S., III.E-10, V-3
domestic violence, III.B-1, III.B-43, III.B-44
Donoghue, Joan E., I.B-12
Doty, Kathleen A., V-3, VI-1
drug trafficking (statute aimed at combating), II.A-14, II.A-15, III.F-2
dualism (and domestic implementation of treaties), I.C-3, I.C-4
due process (U.S. Constitution), I.C-9, II.A-6, II.A-7, II.B-29, II.C-6

education, III.B-1, III.B-30
effects doctrine (extraterritoriality), II.A-3, II.A-8, II.A-9
Eichensehr, Kristen E., V-4
Electronic Information System for International Law (EISIL), IV.B-3
endangered species, III.G-1, III.G-5
energy (and environment), III.G-2, III.G-3, III.G-6, III.G-9
enforcement (and recognition): arbitral award, II.B-4, II.B-7, II.B-29, II.B-30, III.A-1, III.A-2, III.A-4 to III.A.6, III.A-12, III.A-15, III.A-20 to III.A-29; foreign judgment, II.B-1, II.B-25 to II.B-30, III.A-20
enslavement, III.E-8
entry into force (of treaty), I.B-3, I.B-6, I.B-7, III.C-22
environment, III.G-1 to III.G-9
Environmental Protection Agency, III.G-1 to III.G-5, III.G-7
equal protection (U.S. Constitution), III.B-45
equitable tolling, III.B-34
equity, I.C-3, I.B-11, III.A-7, III.E-14
espionage, II.A-3
estoppel (air transportation), III.D-15
European Court of Human Rights, III.E-36, IV.B-5
European Court of Justice, IV.B-5
European Union, I.C-9, II.A-7, III.G-8, III.G-9
evidence (taking of), I.B-14, II.C-4 to II.C-12, III.A-17, III.A-18
ex parte proceedings, III.A-12, III.A-13
expropriation (as exception to foreign sovereign immunity), II.B-4, II.B-6, II.B-17, II.B-18, III.E-21
exhaustion of remedies, III.E-3, III.E-16, III.E-24, III.E-25, III.E-28, III.E-34, III.E-35
extradition, III.E-50, III.E-54, III.E-59 to III.E-61
extrajudicial killing, III.E-3, III.E-4, III.E-8, III.E-13, III.E-20, III.E-26 to III.E-31, III.E-33, III.E-35
extraterritorial jurisdiction, II.A-2 to II.A-5, II.A-8 to II.A-19, III.E-46
extraterritoriality (presumption against), II.A-16 to II.A-18, III.E-3, III.E-16 to III.E-18

false documents, II.A-3
family law, III.B-1 to III.B-48
federalism, III.E-41
Federal Judicial Center, i, II.B-25, III.A-30, III.B-32, III.B-35, III.B-38, III.B-46
federal jurisdiction, I.C-3, II.A-6, II.B-3, III.E-4, III.E-5, III.E-60
force (human trafficking), III.E-8, III.E-40
forced labor, III.E-8, III.E-40, III.E-44, III.E-49
Foreign Commerce Clause (U.S. Constitution), I.C-6, II.A-6, III.B-44
foreign judgment (recognition and enforcement of), II.B-24 to II.B-30
foreign law: definition, I.A-3; proof of, II.B-24, III.B-22, III.B-23
foreign relations, I.A-3, IV.B-1, IV.B-2, II.B-19, II.B-20
foreign relations law, I.A-3, II.B-19
foreign officials' immunities, II.B-1, II.B-10 to II.B-16, III.E-19, III.E-20
foreign sovereign immunities, II.B-2 to II.B-10, II.B-24, II.C-3, III.E-12, III.E-19, III.E-32
forum non conveniens, II.A-1, II.B-1, II.B-20 to II.B-22, III.E-3, III.E-15, III.E-23 to III.E-24
fraud (human trafficking), III.E-40
Furlong, Erika, V-4

general principles of international law, I.C-8, I.C-9
genocide, I.B-10, II.A-12, III.E-8, III.E-13, III.E-21, III.E-55, III.F-2
Ginsburg, Ruth Bader, I.C-9, II.A-7, III.A-19, III.B-14, III.B-16, III.E-16, IV.B-1, VI-1
global governance, I.A-5
global law, I.A-2, I.A-5
Global Legal Monitor, IV.B-4
good faith, I.B-3, I.B-11, III.C-11 to III.C-15
grave risk of harm (exception in child abduction case), III.B-26, III.B-29 to III.B-32
greenhouse gases, III.G-1 to III.G-9

habeas corpus, III.E-60, III.E-61
habitual residence (in child abduction case), III.B-21, III.B-22
Hague Conference on Private International Law, I.B-5, I.B-7, II.C-1, II.C-2, II.C-5, II.C-7, III.B-3, III.B-5, III.B-14, III.B-15, III.B-46, III.B-47, IV.B-3, IV.B-4
"hard law," I.A-2
Harmon, Kirsten A., V-4
head of state immunity, II.B-11, II.B-12, III.E-19, III.E-20
health, III.B-1, III.E-9

hijacking, II.A-12, III.E-8, III.E-13
Holmes, Oliver Wendell Jr., I.C-6, II.A-8
hostage taking, II.A-13, II.B-8, III.F-3
human rights: general, III.E-1; breach of fundamental human rights as exception in child abduction case, III.B-26, III.B-32, III.B-33
human trafficking, III.E-36 to III.E-49

immigration: and child abduction, III.B-35; and human trafficking, III.E-36; and *non-refoulement* or nonreturn doctrine, III.E-54
immunities, II.B-1 to II.B-30
implementation (in United States of international law), I.C-1 to I.C-10
implementing legislation, I.C-2, I.C-5, I.C-6

INCADAT (International Child Abduction Database), III.B-14, III.B-47
incorporation (in United States of international law), I.C-1, I.C-5 to I.C-7
independent contractor, III.E-49
individual (in torture victim suit), III.E-32
injunction or provisional measures, III.A-13 to III.A-15
Institute of International Commercial Law (Pace Law School), III.C-16, III.C-22
instrumentality, II.B-4, II.B-6, II.B-9 to II.B-10, II.C-3, III.E-19
inter-carrier agreements (air transportation), III.D-1, III.D-4, III.D-5, III.D-7 to III.D-9
interim measures or relief, III.A-11, IIII.A-15
Inter-American Commission on Human Rights, IV.B-5
Inter-American Court of Human Rights, IV.B-5
international agreement, I.B-3
International Air Transport Association, III.D-5, III.D-8
International Bar Association, I.B-14, III.A-18
International Centre for Dispute Resolution, III.A-2, III.A-18
International Centre for Settlement of Investment Disputes (ICSID), III.A-19, III.A-20, III.A-29
International Chamber of Commerce, I.A-5, III.C-11
International Child Abduction Database (INCADAT), III.B-14, III.B-47
International Civil Aviation Organization, I.B-5, I.B-8, III.D-2
International Committee of the Red Cross, I.B-5
International Court of Justice (World Court), I.A-4, I.B-1, I.B-2, I.B-10 to I.B-13, IV.B-6
International Criminal Court, IV.B-5, III.E-38
International Institute for the Unification of Private Law (UNIDROIT), III.C-1, III.C-15 to III.C-17, III.C-23
international law: definition, I.A-1 to I.A-5; sources, I.B-1 to I.B-14; uses, I.C-1 to I.C-10
International Law Commission, II.A-8
international organization, I.A-2, I.A-5, I.B-13, II.B-1, II.B-11, II.B-16
international sales of goods, III.C-1 to III.C-23
International Tribunal on the Law of the Sea, IV.B-5, IV.B-6
interpretation (of treaties), IV.A-1 to IV.A-5
intolerable situation (in child abduction case), III.B-26, III.B-29 to III.B-32
investor-state arbitration, III.A-10
investment (foreign): III.A-10, III.A-19, III.A-20
involuntary servitude, III.E-8, III.E-37, III.E-38, III.E-41, III.E-44, III.E-45, III.E-49

Johnson, Kenzie, V-4
judicial decisions (as source of international law), I.B-11 to I.B-13
juridical person, I.A-2, III.E-10 to III.E-12, III.E-32
Juriglobe – World Legal System, IV.B-4
jurisdiction, II.A-1 to II.A-19
jurisdiction *ratione materiae* (subject matter), II.A-1, II.A-5, II.A-6
jurisdiction *ratione personae* (personal), II.A-1, II.A-6, II.A-7
jurisdiction to adjudicate, II.A-1
jurisdiction to prescribe, II.A-1
jus cogens, I.C-8

Kagan, Elena, III.E-16
Keitner, Chimène, V-4
Kennedy, Anthony M., III.B-12 to III.B-15, III.B-24, III.E-28
kidnapping (of child), III.B-4, III.B-37 to III.B-46
Koh, Steven Arrigg, V-4
Korde, Rukesh, V-5

labor law, III.C-8 to III.C-10, III.E-43, III.E-45
later-in-time rule, I.C-3, I.B-10
law of nations, I.A-1, III.E-2 to III.E-5, III.E-10 to III.E-12, III.E-18
law of the sea, IV.B-5, IV.B-6
law of war, I.C-6, III.E-31
League of Nations, I.B-12
letters rogatory, II.C-2, II.C-4, II.C-5, II.C-8, II.C-9
Levy, Alexandra F., V-5
liability (mode of, in alien tort case), III.E-3, III.E-14, III.E-15
Lowry, Houston Putnam, V-5

maritime: special jurisdiction, II.A-3, II.A-8 to II.A-10, II.A-14 to II.A-15, III.F-2; law of the sea, IV.B-5, IV.B-6
marriage, III.B-1
Marshall, John, I.C-3, I.C-4, II.A-2, II.A-3, II.A-8, II.A-18, II.B-2
member state, I.B-7
military commissions, I.C-6, I.C-8
monetary remedies, III.E-45
monism (and domestic implementation of treaties), I.C-4
mootness, III.B-36
multilateral treaties, I.B-3
Mutual Legal Assistance Treaty (MLAT), I.B-3, II.C-8 to II.C-11

National Conference of Commissioners on Uniform State Laws (also known as Uniform Law Commission), II.B-25, III.B-43
nationality (as jurisdictional principle), II.A-3, II.A-4
natural person, III.E-10, III.E-11, III.E-32
ne exeat order, III.B-24, III.B-25
negotiation (of treaty), I.B-3, I.B-4
non-natural person, III.E-11, III.E-12
non-refoulement (nonreturn doctrine), III.E-50 to III.E-61
nonretroactivity, III.E-33, III.E-34
non-self-execution (of treaties), I.C-3 to I.C-5
nonstate (private) actor, III.E-12 to III.E-13

objective territoriality, II.A-8, II.A-9
O'Connor, Sandra Day, I.C-10
Offences Clause (U.S. Constitution), II.A-6
Okunseinde, Mipe, V-5
opinio juris sive necessitatis (as component of customary international law), I.B-9
organization (as non-natural/artificial/juridical person), I.A-2, III.E-11, III.E-12
Organization of American States, I.B-5
organized crime, II.C-8, III.E-37, III.E-39 to III.E-41, III.F-4
Osofsky, Hari M., V-5
overbreadth (as constitutional defense in human trafficking case), III.E-46
Oxford Reports on International Law, IV.B-4

pacta sunt servanda, I.B-3
parol evidence rule (absence in international sale of goods case), III.C-18
Parry, John T., V-5
passive personality, II.A-2, II.A-4, II.A-11
Payne, Cymie, V-6
Peck, Julia, V-6
peremptory norm, I.C-8
Pérez-Vera, Elisa, III.B-13, III.B-15, III.B-16
perjury, II.A-3
Permanent Court of International Justice, I.B-12
personal jurisdiction (*ratione personae*), II.A-1, II.A-6, II.A-7
piracy, I.A-1, II.A-12, III.E-6, III.E-11, III.F-3
Plenge, Alison, V-6
political question, II.B-1, II.B-18 to II.B-20
presumption in favor of arbitration, III.A-11
presumption against extraterritoriality, II.A-16 to II.A-18, III.E-3, III.E-15 to III.E-18
prisoners (U.N. standards on treatment of), I.C-9
private(nonstate) actor, III.E-12 to III.E-14
private international law, I.A-3
pornography (child), I.C-5, III.B-2, III.F-4
preemption, III.D-10, III.D-11, III.D-15
prostitution (child), III.B-2, III.E-44, III.F-4
protective principle, II.A-3, II.A-8, II.A-10
protocol (as type of treaty), I.B-3
provisional measures, III.A-11 to III.A-15
public international law, I.A-3, I.A-4
publicists' writings (scholarly writings), I.B-2, I.B-13
public nuisance suit, III.G-6, III.G-7

racial discrimination, III.E-9, III.E-21
Raisch, Marylin Johnson, V-6
Ramji-Nogales, Jaya, V-6
ratification (of treaty), I.B-5
ratione materiae (subject-matter) jurisdiction, II.A-1, II.A-5, II.A-6
ratione personae (personal) jurisdiction, II.A-1, II.A-6, II.A-7
Raymond, Anjanette (Angie), V-7
recognition and enforcement: of arbitral award, II.B-7, II.B-29, II.B-30; of foreign judgment, II.B-25 to II.B-30
Reed, Lucy, III.A-20, III.A-29, V-7
refugees, III.E-50 to III.E-53
Rehnquist, William H., I.C-10, II.A-13, IV.A-2, IV.B-1
religion (U.S. Constitution), III.B-45
remedies: civil damages, III.E-35, III.E-45; criminal penalties, III.B-37, III.B-45, III.B-46; monetary, III.E-45; return (in child abduction case), III.B-33 to III.B-36
removal: deferral or withholding of removal, in immigration case, III.E-56 to III.E-58; removal of lawsuit to federal court, II.B-3; wrongful removal, in child abduction case, III.B-22 to III.B-26
request (or subpoena) for documents or testimony, III.A-15 to III.A-20
reservation (as part of treaty ratification), I.B-5 to I.B-6
res judicata, I.B-11

Restatements: described, IV.B-1, IV.B-2; conflict of laws, II.B-24; international commercial arbitration, III.A-26, III.A-29; U.S. foreign relations law, I.A-2 to I.A-3, I.B-1 to I.B-3, I.B-6 to I.B-11, I.B-13, II.A-1 to II.A-13, II.A-18 to II.A-19, II.B-6, II.B-12 to II.B-18, II.B-23 to II.B-24, III.E-7, III.E-21, III.E-27, IV.B-1, IV.B-2
restraining order, III.A-13, III.B-24
retention (wrongful, in child abduction case), III.B-7
return (as remedy for child abduction), III.B-33 to III.B-36
right of access (or visitation, in child abduction case), III.B-5, III.B-7 to III.B-9, III.B-16 to III.B-19, III.B-22
right of custody (in child abduction case), III.B-4, III.B-5, III.B-8 to III.B-10, III.B-12, III.B-13, III.B-16 to III.B-27, III.B-39, III.B-41, III.B-42
Roberts, John G. Jr., II.A-16, II.B-19, III.B-8, III.E-16, III.E-17, III.E-60, III.E-61, IV.B-1
Rogers, Vikki, V-7

safe conduct, III.E-11
sales of goods (international), III.C-1 to III.C-23
Scalia, Antonin, I.C-10, III.B-14, III.B-16, III.E-6, III.E-29, IV.B-1
scholarly writings (writings of publicists), I.B-2, I.B-13
Scimeca, Natalya, V-7
seizure of person or property, II.A-12, II.C-6, II.C-10, III.F-3
self-execution (of treaties), I.C-3 to I.C-6
service of process, II.C-1 to I.C-4
settled in new environment (in child abduction case), III.B-34 to III.B-36
severable clause, III.A-9
sex tourism, III.B-2, III.F-1
sexual exploitation, III.E-38, III.E-40
sexual slavery, III.B-1, III.E-8, III.E-40
signatory, I.B-7
signature (of treaty), I.B-3 to I.B-5
slavery: general, III.E-37, III.E-38; and human trafficking defense, III.E-49; enslavement, III.E-8; involuntary servitude, III.E-8, III.E-37, III.E-38, III.E-44, III.E-45; sexual slavery, III.E-8, III.E-40; slave trading or trafficking, I.B-10, II.A-12, III.E-37 to III.E-49
Sloss, David, V-8
"soft law," I.C-7, I.C-9
Sotomayor, Sonia, II.A-7, III.E-11, III.E-16, III.E-29, III.G-7
sources (of international law), I.C-1 I.C-7 to I.C-9
special drawing rights, III.E-3, III.D-13, III.D-14
special maritime and territorial jurisdiction, II.A-9, II.A-10, II.A-15
sphere of application (in international sale of goods case), III.C-3, III.C-4 to III.C-7
standing, III.E-48, III.G-3, III.G-4, III.G-7
stare decisis, I.B-12
Stark, Barbara, III.B-11, III.B-25, III.B-46, V-8
state (sovereign country, as non-natural/artificial/juridical person), III.E-11, III.E-12, III.E-32
state action, III.E-14
state actor, III.E-12, III.E-13
state party, I.B-7 I.C-2
state practice (as component of customary international law), I.B-1, I.B-8, I.B-9, I.B-11, I.C-7
status-based immunity, II.B-11 to II.B-14, III.E-20
Stephan, Paul B. III, IV.B-2, V-8
Stevens, John Paul, I.C-9, II.B-25, III.B-15 III.G-3, IV.A-2, IV.A-5, IV.B-1
Stewart, David, V-8, VI-1
Stone, Harlan Fiske, II.A-6
Story, Joseph, II.B-24, III.A-3
Souter, David, I.C-9, III.E-27, III.E-5, IV.A-2, IV.B-1
subject-matter jurisdiction (*ratione materiae*), II.A-1, II.A-5, II.A-6
subpoena (or request for documents or testimony), II.C-4 to II.C-12, III.A-15 to III.A-19
summary execution (also see extrajudicial killing), III.E-8, III.E-13

Taft, William Howard, II.A-10
Teitz, Louise Ellen, V-2
territoriality, II.A-2 to 3, II.A-8 to II.A-10
terrorism: statutes aimed at combating, II.A-11, III.E-56, III.F-2; as exception to foreign sovereign immunity, II.B-8, II.B-9
testimony (request or subpoena for), II.C-4 to II.C-6
Thomas, Clarence, I.C-10, III.B-13, III.B-15, III.E-17, IV.A-5, IV.B-1
time bar: general, including limitations periods, II.B-22, III.E-24, III.E-35; and equitable tolling, III.B-34
tort: as exception to foreign sovereign immunity, II.B-6, II.B-7; public nuisance suits, III.G-6, III.G-7
torture, III.E-26 to III.E-35
trade usage, III.C-20
trafficking: child, III.E-39 to III.E-43, III.E-48, III.E-49; drug, II.A-14; human, III.E-36 to III.E-49; slave, III.E-37 to III.E-49
transnational law, I.A-4, I.A-5
Traub, Garrett N., V-9
treason, II.A-10, III.F-3

treaties and other international agreements: general, I.B-2 to I.B-8; interpretation, IV.A-1 to IV.A-5 (to locate a precise treaty or other agreement, see table *supra* § VII.A)
treaty power (U.S. Constitution), I.C-1, I.C-6
Trooboff, Peter D., III.B-3, V-9
Tutrone, Jason, V-9

UNCITRAL (U.N. Commission on International Trade Law), II.B-29, III.A-2, III.C-2, III.C-14, III.C-15, III.C-20 to III.C-22
UNICEF, I.A-4, I.A-5
UNIDROIT (International Institute for the Unification of Private Law): described, III.C-1, III.C-16; other references, III.C-1, III.C-15, III.C-17, III.C-23
UNILEX: described, III.C-23; other references, III.C-5, III.C-8
Uniform Commercial Code, III.C-3, III.C-4, III.C-6, III.C-7, III.C-9, III.C-12, III.C-13
Uniform Law Commission (also known as National Conference of Commissioners on Uniform State Laws), II.B-25 to II.B-29, III.B-43
uniform laws, II.B-25 to II.B-29, III.B-39, III.B-42, III.C-6, III.C-7, III.C-13
uniformity (as goal of treaty interpretation), III.C-12
United Nations, I.A-2, I.A-4, I.A-5, I.B-5, I.B-7, I.B-10, I.B-12, I.C-9, II.B-3, III.E-31, III.F-3, IV.B-2, IV.B-3
U.N. Commission on International Trade Law (UNCITRAL), II.B-29, III.A-2, III.C-2, III.C-14, III.C-15, III.C-20 to III.C-22
U.N. Economic and Social Council, I.A-5
U.N. General Assembly, I.B-12
U.N. Security Council, I.B-12
U.N. Treaty Collection (described), I.B-7
U.S. Congress, I.A-3, I.C-6, I.C-8, II.A-6, II.A-12, II.A-14 to II.A-18, II.B-7, II.B-17, II.B-20, III.E-28 to III.E-31, III.E-52
U.S. Constitution, I.B-3, I.C-1 to I.C-9, II.A-1, II.A-2, II.A-6, II.A-7, II.B-17 to II.B-19, II.B-29, III.B-2, III.B-44, III.B-45, III.E-22, III.E-37, III.E-46, III.E-56
U.S. Department of Justice, II.E-13, III.B-38, III.E-53
U.S. Department of State, I.A-4, I.B-4, I.B-8, I.B-12, I.C-2, II.B-12, III.B-4, III.B-5, III.B-7, III.B-11 to III.B-13, III.B-18, III.B-30, III.B-34, III.B-35, III.B-46, III.B-47, III.E-21, III.E-36, III.E-53, IV.A-2, IV.B-3
U.S. Executive Branch, I.B-4, I.C-1, I.C-2, I.C-5, II.B-2, II.B-12 to II.B-14, II.B-18, III.E-7, III.E-23, III.B-12
U.S. President, I.A-3, I.C-1 to I.C-2
U.S. Senate, I.C-1 to 3, I.C-5
U.S. Supreme Court, I.C-3, I.C-8 to I.C-10
understanding (as part of treaty ratification), I.B-5 to I.B-6
universality (jurisdictional principle), II.A-2, II.A-4, II.A-8, II.A-12
universal treaties, I.B-3, III.E-32
University of Georgia School of Law (Alexander Campbell King Law Library), VI-1
use of force, I.B-10

vacatur (request for, arbitral award), III.A-15, III.A-16, III.A-21, III.A-24, III.A-28, III.A-29
Vandenberg, Martina E., V-9
Van Schaack, Beth, V-10, VI-1
venue, II.B-20, II.B-22, III.D-11
violence against women or children, III.B-1
visitation (or access right, in child abduction case), III.B-5, III.B-7 to III.B-9, III.B-16 to III.B-19, III.B-22
waiver (as exception to foreign sovereign immunity), II.B-4, II.B-5
war: law of, I.C-6, III.E-31; protection of victims in time of, I.B-3
war crimes, II.A-12, II.B-20, III.E-8, III.E-13, III.F-3
water (clean), III.G-5
Werner, Dan, V-10
Williamson, Edwin, V-10
women's rights, III.B-1, III.B-2
World Court (International Court of Justice), I.A-4, I.B-1, I.B-2, I.B-10 to I.B-13, IV.B-6
World Health Organization, I.A-5
World Legal Information Institute, IV.B-4
World Trade Organization, I.A-5, IV.B-5, IV.B-6
wrongful death, II.B-20, III.E-26, III.E-27, III.E-29
wrongful removal or retention (in child abduction case), III.B-4., III.B-5, III.B-9, III.B-19, III.B-22, III.B-25, III.B-33, III.B-34

Zagaris, Bruce, II.C-11, V-10
Zionts, David M., V-11