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THE INTERNATIONAL LAW EXCEPTION TO THE ACT OF STATE DOCTRINE: REDRESSING HUMAN RIGHTS ABUSES IN PAPUA NEW GUINEA

Joshua Gregory Holt[†]

Abstract: In *Sarei v. Rio Tinto*, the Ninth Circuit reversed the dismissal of Papua New Guinea residents' alleged human rights violations and environmental tort claims under customary international law and the Alien Tort Claims Act. The Ninth Circuit decided that *jus cogens* norms precluded application of the Act of State Doctrine. The United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino* decided that U.S. courts could apply the Act of State Doctrine, absent an unambiguous and controlling international rule of law, to avoid judging foreign sovereigns' acts within their own territories. This comment argues that crystallized legal norms that meet *Sosa v. Alvarez-Machain's* standard, but have not yet attained *jus cogens* status, also cannot be barred by the doctrine because they constitute an unambiguous rule of law. Furthermore, courts violate separation of powers principles when they choose not to resolve properly-presented claims on the merits because judicial resolution potentially could interfere with the political branches' conduct of foreign relations. The courts do not impermissibly interfere in foreign relations when they apply international law, whether treaty provisions or customary norms, created by the political branches. If judicial resolution is not preferred, the political branches may exercise their constitutional powers to conclude an international agreement that resolves the litigants' claims. Courts further considering Papua New Guinea residents' claims under the Alien Tort Claims Act should not apply the Act of State Doctrine where crystallized legal norms exist, because doing so would be contrary to the logic of *Sabbatino*.

I. INTRODUCTION

In 2002, residents of Bougainville, an island in Papua New Guinea (“PNG”), brought a class action suit in the Central District of California against Rio Tinto PLC, an international mining conglomerate. They sought redress for over three decades of human rights violations perpetrated by Rio Tinto through its strip mining operations and its participation in the PNG government's violent suppression of civil dissent. The victims brought their claims under the Alien Tort Claims Act (“ATCA”)¹ in *Sarei v. Rio Tinto PLC*,² alleging violations of customary international law (“CIL”) norms

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¹ The ATCA, 28 U.S.C.A. § 1350 (2006), is a grant of jurisdiction to the district courts for “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States”; the statute itself does not create a statutory cause of action. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

² *Sarei v. Rio Tinto PLC*, 221 F. Supp.2d 1116 (C.D. Cal. 2002).

prohibiting severe environmental devastation, racial discrimination, genocide and crimes against humanity, and unlawful targeting of civilians during armed conflict. By relying in part on the Act of State Doctrine (“ASD”), the federal district court granted defendant Rio Tinto’s motion to dismiss, barring a full determination on the merits.³ On appeal, the Ninth Circuit reversed the dismissal, deciding that the ASD cannot bar claimed violations of non-derogable CIL norms, and remanded for reconsideration of whether the ASD may apply to claims based on less developed norms.⁴

This case represents a broader misunderstanding in U.S. courts that the ASD applies whenever adjudication of claims derived from international human rights law may adversely impact the political branches’ conduct of foreign policy. Although the PNG residents based their claims on firmly-established international legal rules, the district court in *Sarei* applied the ASD in light of concerns expressed by the PNG government and the U.S. executive that continued litigation could impede the peace process concluding the decade-long civil war. A correct understanding of the ASD, however, recognizes that courts may only apply the doctrine in the absence of applicable treaty provisions or widely-accepted CIL rules, because these rules represent obligations to which the U.S. and other sovereigns have mutually consented. Further, applying the ASD creates the anomalous situation in which a court presumes the legal validity of Rio Tinto’s joint conduct with the PNG government, conduct that is prohibited under international human rights law.

In *Banco Nacional de Cuba v. Sabbatino*⁵ the Supreme Court held that the ASD would bar judicial scrutiny of a foreign state’s act to avoid potential interference with the political branches’ conduct of foreign relations, absent a treaty or other unambiguous agreement on a controlling rule of international law. International human rights law comprises international treaties and widely-accepted CIL rules defining individuals’ fundamental rights vis-à-vis states. Therefore, the availability of a widely accepted CIL rule defining a specific obligation precludes courts from applying the ASD. An “international law” exception to the doctrine for treaty obligations and crystallized CIL norms that represent unambiguous agreement between states on controlling points of law exists.

Federal courts must apply both the domestic and international legal rules created by the political branches. In *Sarei v. Rio Tinto*, PNG residents brought their claims under the congressionally-enacted ATCA, which

³ *Id.* at 1120.

⁴ *Sarei v. Rio Tinto*, 456 F.3d 1069, 1086 (9th Cir. 2006).

⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

invokes CIL norms to which the U.S. and PNG have consented at the international level. Federal courts should proceed with the litigation, unless preempted by an international agreement between the U.S. and PNG concerning the claims. This is consistent with the federal judiciary's responsibilities under the U.S. Constitution, and preserves the equal status CIL shares with explicit international agreements.

Part II of this comment describes the factual basis of the PNG residents' racial discrimination and environmental tort claims—the alleged joint conduct between Rio Tinto and the PNG government in the operation of the Panguna mine and during the country's recent civil war. Part III explains that the judicially-created ASD cannot prevent adjudication on the merits of politically sensitive cases according to governing international law. Part IV argues that separation of powers principles do not compel the ASD when a clear international rule is on point, because the political branches have participated in the creation and maintenance of that rule. Part V asserts that courts cannot give dispositive weight to the executive's Statements of Interest; instead, the political branches may take steps to resolve litigants' claims through political channels if judicial resolution is not preferred. Part VI argues that international human rights law and the separated powers structure of the U.S. Constitution entitles the PNG residents in *Sarei* to a full consideration on the merits of their claims. Part VII concludes this Comment.

II. RIO TINTO'S ALLEGED JOINT CONDUCT WITH THE PNG GOVERNMENT VIOLATES INTERNATIONAL HUMAN RIGHTS LAW

From the 1960s until 1999, the residents of Bougainville suffered human rights abuses from Rio Tinto's strip mining operations, which were officially sanctioned by the PNG government, and from the PNG military operations, which were assisted by Rio Tinto. Although PNG has a functioning and constitutionally independent judicial system, the Bougainville Peace Agreement and succeeding legislation frustrated effective redress through local courts.

A. *The Strip Mining Operations Were Conducted with Wanton Disregard for Bougainvilleans' Ways of Life and Wrought an Environmental Disaster*

In the 1960s, Rio Tinto, an international mining group headquartered in London, commenced plans to build a copper mine on the island of

Bougainville in Papua New Guinea (“PNG”).⁶ The PNG government officially sanctioned Rio Tinto’s operations in exchange for 19.1% of the mine’s profits.⁷ Through the “Mining (Bougainville Copper Agreement) Act of 1974” (“the Copper Act”) the PNG government formally agreed to allow a Rio Tinto subsidiary, Bougainville Copper Ltd. (“BCL”), to develop the island’s naturally occurring mineral deposits.⁸ Residents of Bougainville have claimed that this arrangement effectively turned the copper mine into a joint venture between the PNG government and Rio Tinto, allowing Rio Tinto to act under the color of state law in its conduct of the mine’s operations and treatment of the local residents.⁹

Constructing the mine required displacing villages and destroying over ten thousand hectares of rainforest with chemical defoliant and bulldozers. From Rio Tinto’s first steps on the island in 1965, Bougainville residents consistently resisted efforts to build the mine. In response, the Australian administrative government imprisoned two hundred native residents and explained that their land would be taken without compensation if they refused Rio Tinto’s offer of \$105 per acre and \$2 per coconut tree.¹⁰ The residents did refuse, and one hundred riot police were sent in August of 1969 to attack the unarmed villagers and force them off their land.¹¹

Construction began once the residents were removed from the site, and the mine became operational in 1972.¹² It soon became one of the world’s largest copper mines and one of Rio Tinto’s most profitable projects, producing both copper and gold.¹³ Rio Tinto attracted about 6,300 foreign workers to Bougainville between 1966 and 1971.¹⁴ The corporation’s employment practices systematically discriminated against indigenous workers: “local Bougainvilleans, who were black, were paid significantly lower wages than white workers recruited off island.”¹⁵ In 1969, the Australian Minister of Labor accused Rio Tinto of paying black laborers “slave wages” after visiting Bougainville.¹⁶ The local residents alleged Rio

⁶ *Sarei*, 221 F. Supp.2d at 1121.

⁷ *Id.*

⁸ *Id.* at 1122.

⁹ *Id.* at 1121.

¹⁰ *Id.* at 1122.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1123.

¹⁴ *Id.* at 1124.

¹⁵ *Id.*

¹⁶ *Id.*

Tinto treated the land with wanton disregard and intentionally violated their human rights because it viewed them as inferior.¹⁷

The mine's impact on the environment is staggering: "[s]urrounded by dense rainforest and tropical stillness lies one of the world's largest man-made holes in the ground. . . . It would take two Golden Gate Bridges to span the hole, and if the Empire State Building were set at the bottom, only the antenna on top would rise above the rim of the mine."¹⁸ Poisonous gasses from the mine's copper concentrator mixed into dust clouds that polluted the island's atmosphere.¹⁹ The mine also poured more than one billion tons of waste rock and tailings into the Kawerong-Jaba river system.²⁰ As the waste permeated the river system, "[f]ertile river valleys were turned into wasteland, entire forests died, and three thousand hectares of land were completely destroyed."²¹ Villages could no longer sustain themselves through subsistence agricultural activities.²² The Jaba River deposited substantial amounts of discharged tailings into Empress Augusta Bay, killing the fisheries which provided a major source of food for Bougainvilleans.²³ In March 1988 PNG's Minister of the Environment, Perry Zeipi, described the destruction of all aquatic life by chemicals and waste as "dreadful and unbelievable" and found that the river water was not safe for drinking or even bathing.²⁴ In total, the pollution has crippled the island's crops and agricultural production, destroyed fish populations, and forced animals out of their habitats. It has also caused the indigenous population to suffer asthma, respiratory infections, and, especially among children, health problems resulting from the diminished food supply.²⁵ "Rio Tinto's destruction of the island's land and environment 'ripped apart' the culture, economy, and life of Bougainville."²⁶

B. *Civilians Were Unlawfully Harmed During the Civil War*

In 1988, the local population became increasingly restive, organizing a march against Rio Tinto, presenting a petition that demanded that the

¹⁷ *Id.*

¹⁸ *Id.* at 1123.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1124. Discharge into the river included xanthates (ingestion of which is harmful), methyl isobutyl carbinol (a severe skin irritant in concentrate form), and polyacrylmide monomer (toxic and absorbable through the skin). *Id.*

²⁵ *Id.*

²⁶ *Id.*

corporation localize employment and control over environmental degradation, and orchestrating a sit-in which stopped mining operations for one day.²⁷ Rio Tinto responded by hiring a consulting company to report on the mine's impact, but the document, labeled a "whitewash," skirted critically important issues.²⁸ Local militants then sabotaged the mine's machinery, blowing up some of its infrastructure.²⁹

The violence escalated into a popular uprising against Rio Tinto and the PNG government.³⁰ A Rio Tinto executive indicated to the PNG government that "Rio would seriously reconsider future investment in PNG in light of . . . the acts of terrorism on Bougainville resulting from . . . unrealistic expectations on the part of landowners"; Rio Tinto "intended that this ultimatum result in military action by PNG . . . even if it meant the death and/or injury of residents."³¹ Fearful that Rio Tinto might actually divest its holdings on the island, the PNG government took its words "as commands."³²

PNG sent in the Defense Force ("PNGDF") in 1989, inaugurating the civil war.³³ On February 14, 1990, the PNG army launched what has become known as the St. Valentine's Day massacre.³⁴ Rio Tinto assisted the army by supplying logistical support intended to enable the military to quash the rebellion so the mine could be reopened.³⁵ Local resistance cohered to form the Bougainville Revolutionary Army ("BRA"), and "the struggle to close the mine became a struggle for independence" from PNG.³⁶

The conflict between the residents, PNG, and Rio Tinto lasted for ten years, resulting in "atrocious human rights abuses and war crimes."³⁷ To quell the rebellion and enable the mine to reopen, the PNG army initiated a blockade in April 1990 that deprived local residents of medicine, clothing, humanitarian aid, and other essentials for seven years.³⁸ Bomb, gun, grenade, and ammunition attacks on the natives' homes were hidden from

²⁷ *Id.* at 1124-25.

²⁸ *Id.* at 1125.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1126.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

international scrutiny, thus allowing PNG troops to commit human rights violations with impunity.³⁹

In addition to PNG's attacks, deaths from preventable diseases accrued as a result of the blockade. The local Red Cross estimated that in November 1992 more than 2,000 children had died due to a lack of medical care and vaccines.⁴⁰ When the war officially ended in 1999, an estimated 15,000 civilians, or 10% of the population, had been killed.⁴¹ Those who survived suffered health problems and about 67,000 lived in refugee camps.⁴² Human rights violations committed by PNG included aerial bombardments of and ground attacks against civilian targets, wanton killings and acts of cruelty, burning of homes and villages, outrages upon personal dignity, rape, humiliating and degrading treatment, perfidious uses of the Red Cross emblem, and pillages.⁴³

C. The Bougainville Peace Agreement and Succeeding Legislation Frustrated Attempts to Redress Human Rights Violations in PNG Courts

In September 2000, PNG residents initiated a class action lawsuit in U.S. courts seeking redress for human rights violations allegedly committed by Rio Tinto and the PNG government acting in concert. While PNG residents are able to seek redress from a constitutionally-secured independent judiciary, the ability to obtain effective judicial redress in PNG courts has not gone without scrutiny from Mr. Bacre Waly N'diaye, United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions.⁴⁴

The "Compensation (Prohibition of Foreign Legal Proceedings) Act of 1995" required PNG residents to seek redress in local courts for all claims of injury arising from mining activities.⁴⁵ The Act criminalized the pursuit of

³⁹ *Id.* at 1127.

⁴⁰ *Id.* at 1126.

⁴¹ *Id.* at 1127.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ United Nations Economic and Social Council, E/CN.4/1996/4/Add.2 (February, 27 1996) (stating that violations of human rights by the PNGDF and BRA have not been adequately investigated; the PNGDF commits brutal reprisals against civilians; the Constitution provides for civilian control over the armed forces, but the National Execution Council has failed to review the excesses of the PNGDF; the offices of Public Prosecutor and Public Solicitor have not initiated any cases to provide legal aid to the families of the victims; while a circuit court convenes periodically on Bougainville, the infrequency of its sittings "reflects the lack of a permanent legal structure to hear cases of violations of human rights carried out with impunity, thus precluding access to legal recourse where justified.")

⁴⁵ Compensation (Prohibition of Foreign Legal Proceedings) Act, No. 41 (1995) (Papua N.G.).

foreign proceedings, and punished such behavior with a substantial fine, imprisonment or both.⁴⁶ If claims were originally filed in the courts of a foreign country, this legislation rendered any foreign judgment obtained unenforceable in PNG.⁴⁷

Peace negotiations following the worst of the violence, beginning in July 1997 and concluding with the Bougainville Peace Agreement on August 30, 2001, further insulated Rio Tinto and the PNG government's conduct from scrutiny. The agreement provided amnesty to all sides for activities related to the crisis, in addition to a constitutionally-guaranteed referendum on Bougainville independence and a plan for disarmament.⁴⁸

Facing these obstacles to effective local redress, PNG residents brought their claims to the Central District in California. Although they brought their suit under the ATCA, a federal statutory provision specifically granting jurisdiction for such claims, the victims faced the opposition of the U.S. executive to the adjudication of their claims. In 2002, both the U.S. Legal Advisor to the Secretary of State and the then-current PNG government formally conveyed to the federal district court judge presiding over the case their concern that future judicial resolution of this controversy could affect national reconciliation in PNG under the peace agreement and, consequently, could adversely impact U.S. foreign relations.⁴⁹ Based on these assertions, the U.S. district court dismissed in part the complaint under the ASD.⁵⁰

PNG residents appealed the dismissal and presented the U.S. appellate court with statements indicating that the new PNG government opposed the litigation because it concerned an action brought against only Rio Tinto as a defendant.⁵¹ The Ninth Circuit panel concluded that the trial court placed too much emphasis on the executive's statement of interest and remanded

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Bougainville Peace Agreement, signed at Arawa (2001) (Papua N.G.).

⁴⁹ The executive's statement of interest made the following points: "In our judgment, continued adjudication of the claims . . . would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations"; "The Government of Papua New Guinea . . . has stated its objection to these proceedings in the strongest terms"; and the PNG government "perceives the potential impact of this litigation on U.S.-PNG relations, and wider regional interests, to be 'very grave.'" *Sarei v. Rio Tinto*, 456 F.3d 1069, 1081-82 (9th Cir. 2006).

⁵⁰ *Sarei*, 221 F. Supp.2d at 1193.

⁵¹ A letter from Joshua Kalinoe, Chief Secretary to the PNG Government, dated March 30, 2005, stating, "The government is not a party to this case. Accordingly, it does not see the case presently before the courts affecting diplomatic and bilateral relations between our two countries nor does it see it affecting the peace process on the island of Bougainville"; and a letter to the State Department dated January 8, 2005, from John Momis, the Interim Bougainville Provincial Governor, "urg[ing] the Government of the United States to support the Prime Minister's position to permit the case to proceed in the courts of America." *Sarei*, 456 F.3d at 1076.

the case for a re-balancing of the ASD factors in light of statements by PNG government officials to the effect that the government no longer opposes this litigation.⁵² Despite changing circumstances, the course of this litigation squarely presents the problem of whether a U.S. court may invoke the ASD to refuse to apply crystallized CIL when the U.S. executive states that continued litigation may impact adversely its conduct of foreign relations.

III. PNG RESIDENTS HAVE A FEDERAL RIGHT OF ACTION FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

PNG residents sought redress for violations of their human rights in federal court in the U.S. by bringing suit against Rio Tinto. Using U.S. courts to vindicate rights conferred by international human rights conventions and customary norms fits squarely within the courts' constitutional responsibilities. Congress authorized U.S. courts to apply CIL under the ATCA, provided that alien plaintiffs claim actual violations of international law. PNG residents sufficiently alleged violations under CIL for war crimes and murder, crimes against humanity, racial discrimination, and environmental harms.

A. *Congress Opened U.S. Courts to Claims Brought by Foreign Citizens Under the ATCA*

The First Congress opened U.S. courts to alien plaintiffs asserting violations of international law when it enacted the ATCA. Under the statute, "the district courts shall have original jurisdiction of any civil action [brought] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁵³ The Supreme Court has recognized that Congress reaffirmed the courts' authority to apply CIL and treaty provisions when it passed the Torture Victims Protection Act ("TVPA") in 1992.⁵⁴

⁵² *Sarei*, 456 F.3d at 1086.

⁵³ 28 U.S.C.A. § 1350 (2006).

⁵⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (the Torture Victims Protection Act of 1992's legislative history states that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law").

B. *Sosa Requires Plaintiffs Bringing Suit Under the ATCA to Allege Violation of a Crystallized CIL Rule*

The Supreme Court in *Sosa v. Alvarez-Machain*⁵⁵ approved the application of a customary norm as binding law if the norm is specifically defined by the law of nations, universally recognized, and considered obligatory among states.⁵⁶ Claims brought under the ATCA must allege violations of norms with no “less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted,”⁵⁷ because the ATCA requires courts to “interpret international law . . . as it has evolved and exists among the nations of the world today.”⁵⁸ To apply *Sosa*’s standard, a court must examine both current state practice⁵⁹ and the international legal instruments upon which litigants rely. This

⁵⁵ 542 U.S. 692.

⁵⁶ *Id.* at 732 (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.” (quoting with approval *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994))).

CIL represents customary practices, which states have come to recognize as part of the duties they owe to each other and follow out of a sense of legal obligation. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT (THIRD)]. However, not all CIL norms are sufficiently definite to constitute one of the “laws of nations” invoked by the ATCA, because, by definition, customary rules evolve from an embryonic stage, in which states begin to acknowledge a particular pattern of conduct as desirable but not legally binding, to a state of crystallization, in which states widely agree that the norm has become an obligatory rule and defines a duty owed by states to one another and to individuals. See *The Paquete Habana*, 175 U.S. 677, 686 (1900); INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON THE FORMATION OF RULES OF CUSTOMARY (GENERAL) INTERNATIONAL LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 11, 21 (2000), available at <http://www.ila-hq.org/pdf/customarylaw.pdf> (2000) [hereinafter ILA STATEMENT OF PRINCIPLES] (A pattern of behavior may be commonly followed, but it may not rise to the status of a binding norm if states do not consistently and uniformly adhere to it).

⁵⁷ *Sosa*, 542 U.S. at 732 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), as an illustration of the specificity required). Under *Sosa* courts must adopt a historical frame of reference to compare, and ultimately ascertain whether the proposed violation is denounced with the same exactitude as the pirate or slave trade in the 18th century.

⁵⁸ *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

⁵⁹ There is controversy over how to interpret state practices that contravene states’ obligations under international law. On one hand, the International Court of Justice has held that how a state justifies its breach of a rule may strengthen the rule: “[i]f a state acts in a way prima facie incompatible within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.” *Military and Paramilitary Activities (Nicar. V. U.S.)* 1986 I.C.J. 14, 98 (June 27). On the other hand, Professor Weisburd take a strictly behavioral perspective: “if a state’s behavior does not conform to its treaty obligations, it would be unreasonable to rely on the fact of treaty adherence in forming expectations as to future actions . . . the weight to be given treaty adherence . . . would depend on a state’s actual performance under the treaty.” A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT’L L. 1475, 1482 (2003).

inquiry establishes whether states consistently behave as they do because they believe that a CIL norm is legally obligatory.⁶⁰

The specific, universal, and obligatory standard embraces two categories of widely-accepted norms: the narrow class constituting *jus cogens*⁶¹ and the broader class of crystallized norms that meet *Sosa*'s three-dimensional standard but that have not obtained *jus cogens* status. The level of state consent explains the difference between these two classes of norms. *Jus cogens* norms are non-derogable because their existence is no longer tied to states' continuing consent.⁶²

Jus cogens and crystallized norms meet *Sosa*'s standard because they both enjoy widespread acceptance. The Ninth Circuit acknowledged the practical equivalency of both kinds of norms: "restrict[ing] actionable violations of international law to only those claims that fall within the categorical universe known as *jus cogens* would deviate from both the history and text of the ATCA," because "[t]he notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the ATCA in

⁶⁰ *United States v. Yousef*, 327 F.3d 56, 99-103 (2nd Cir. 2003) (explaining why the usage and practice of states constitute primary sources of CIL, and relegating the works of scholars to secondary sources). Courts ascertain crystallized norms by parsing state practice and evaluating the scope of international legal instruments' binding force. Treaties may indicate when a norm attains the status of CIL, because states may obligate themselves to treating individuals according to defined standards; but such treaty obligations only carry evidentiary force to the extent that the provisions are actually legally binding. The evidentiary weight of a treaty increases the greater the number of states parties to the treaty (i.e., the more multilateral it is), whether more powerful states have signed on, and if states have taken measures to implement it domestically or to enforce its obligations internationally. *Flores v. Southern Peru Copper Corporation*, 414 F.3d 233, 257 (2nd Cir. 2003). States reduce evidentiary weight by attaching reservations (signaling that a state has opted not to assume a certain obligation) or understandings and declarations (explaining how a state interprets its obligations under the treaty).

⁶¹ *Jus cogens* norms permit no exceptions: no state can object to the binding character of peremptory norms and refuse to abide by them, nor can any group of states agree to contravene them. The Vienna Convention on the Law of Treaties offers the following definition: "a norm accepted and recognized by the international community of States 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." Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 23 U.S.T. 3227, 1155 U.N.T.S. 331. *Jus cogens* norms include those prohibiting genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination. RESTATEMENT (THIRD), *supra* note 56, § 702 cmt. n.

⁶² "[*Jus cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or selfinterested [sic] choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent Because *jus cogens* norms do not depend solely on the consent of states for their binding force, they enjoy the highest status within international law." *Alvarez-Machain v. U.S.*, 331 F.3d 604, 613 (9th Cir. 2003) (ellipsis in original) (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir.1992)).

1789.”⁶³ The panel’s reasoning fits within the logic of the Supreme Court’s ultimate decision in *Sosa*. The *Sosa* majority held that “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms”⁶⁴ Nowhere in its opinion did the majority mention that only a norm having peremptory status would meet the Court’s standard.

C. *The ASD Allows U.S. Courts to Avoid Sitting in Judgment of a Foreign Sovereign’s Official Act, Absent a Controlling, Unambiguous Rule of International Law*

PNG residents rely on CIL rules meeting *Sosa*’s standard to seek redress in U.S. courts under the ATCA. Despite meeting the jurisdictional threshold, the district court employed the judicially-crafted ASD and thereby refused to vindicate the victims’ properly-pled violations of their rights.⁶⁵

The ASD enables U.S. courts to avoid pronouncing a foreign sovereign’s official act legally invalid if the sovereign performs the act within its own territory. U.S. courts applying the doctrine presume that a foreign state’s acts are consistent with its domestic laws and adopt the official act as a principle or rule of decision without fully evaluating the litigant’s allegations that bring the act into question.⁶⁶ It allows courts to sidestep questioning the validity of sovereign acts taken by foreign states when judicial resolution would interfere with the executive’s conduct of foreign relations.⁶⁷ The Supreme Court, however, did not leave the rule unqualified: separation of powers principles pull in the other direction when a widely-accepted international rule of law provides a standard for assessing a foreign sovereign’s act, and justify judicial resolution.⁶⁸

⁶³ *Id.* at 614. The panel also stated specifically “the fact that a violation of [*jus cogens*] is *sufficient* to warrant an actionable claim under the ATCA does not render it *necessary*.” *Id.* at 613.

⁶⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

⁶⁵ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

⁶⁶ *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int’l.*, 493 U.S. 400, 406 (1990). Whenever the matter in controversy depends upon the fact that “a foreign government has acted in a given way . . . the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.” *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918).

⁶⁷ *Kirkpatrick*, 493 U.S. at 404; *Sarei v. Rio Tinto*, 456 F.3d 1069, 1084 (9th Cir. 2006).

⁶⁸ Although originally the doctrine derived from the sovereign equality of states, the *Sabbatino* Court transplanted it into separation of power principles. *Sabbatino*, 376 U.S. at 421 (international law does not require the ASD), 427-28 (the ASD depends upon “the proper distribution of functions between the judicial and political branches”). The Court’s classic nineteenth-century statement of the doctrine rested on the idea that sovereign immunity insulated states from being judged by another state’s courts: “[e]very sovereign is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” Underhill

The Supreme Court in *Sabbatino* recognized (and affirmed in *Kirkpatrick*⁶⁹) that courts may not apply the doctrine where judicial resolution does not present a separation of powers problem. In *Sabbatino*, the Court granted certiorari to elucidate “the proper role of the Judicial Branch” in the “conduct of foreign relations”⁷⁰ and held:

[R]ather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.⁷¹

The Court further stated that it is more appropriate for the judiciary to evaluate another state’s official act “the greater the degree of codification or consensus concerning a particular area of international law,” “the less important the implications of an issue are for our foreign relations,” and “if the government which perpetrated the challenged act of state is no longer in existence.”⁷² Where there is ascertainable agreement on an international legal rule, it is appropriate for the judiciary to resolve claims based on it, because “the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.”⁷³ The judicial application of a definite legal rule to which states have consented to be bound does not impermissibly interfere with the foreign policy set by the political branches.

v. Hernandez, 168 U.S. 250, 252 (1897). Congress’ enactment of statutory rules for determining when a foreign state may claim sovereign immunity, Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. § 1330 (2000), Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), confirms that the doctrine’s application is no longer rationalized by the principle of sovereign immunity. That either plaintiff or defendant can invoke the ASD also exemplifies this departure from sovereign immunity.

⁶⁹ *Kirkpatrick*, 493 U.S. at 409. Justice Scalia explained that since *Sabbatino* the doctrine does not presume the validity of foreign states’ actions merely because resolution of cases and controversies by U.S. courts may embarrass foreign governments. *Id.*

⁷⁰ *Sabbatino*, 376 U.S. at 407.

⁷¹ *Id.* at 428.

⁷² *Id.* at 428. It may be noted that the third factor analytically folds into the second, because it merely highlights that judicial resolution is far less likely to affect the conduct of foreign policy where the government committing the act in controversy is no longer in power. *See, e.g.* *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977).

⁷³ *Sabbatino*, 376 U.S. at 428.

Absent a widely accepted international legal rule, courts should avoid assessing a foreign sovereign's official act for two reasons. First, applying an international rule that does not yet receive the full consent of the international community constitutes impermissible interference because it amounts to a policy determination—properly made by the political branches rather than the Judicial Branch—about what the rule of law internationally should be. Creating rules that structure international relationships is within the domain of the political branches; a court would give impermissible legal force to an international norm, which states have declined to make legally binding, if the court chose to apply that norm. This usurps the power of the political branches to make the necessary policy judgments assigned to them under the Constitution in making treaties or creating customary international rules through consistent state practices.⁷⁴ It also renders the judiciary vulnerable to having its pronouncements on international law completely disregarded because U.S. courts would be giving binding force to rules not consented to.⁷⁵

Second, the courts are institutionally incompetent to resolve an issue that touches sharply on national nerves, relative to the political branches, which have the capacity to secure the national interest by reaching an agreement diplomatically.⁷⁶ The executive has the superior ability to manage international relations through the special competence it exercises in international negotiations.⁷⁷ Furthermore, a condescending judicial pronouncement not predicated on widely-accepted legal principles may offend the foreign sovereign and complicate political resolution of the issue.

The separation of powers problem is not present where a clear international rule is on point. The *Sabbatino* majority recognized this, gesturing toward an “international law” exception to the ASD. While the balancing test reflects the proper balance of the political branches’ and the

⁷⁴ “When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.” *Id.* at 432-33.

⁷⁵ “[G]iven the fluidity of present world conditions, the effectiveness of such a patchwork approach toward the formulation of an acceptable body of law concerning state responsibility for expropriations . . . [This] rests upon the sanguine presupposition that the decisions of the courts . . . would be accepted as disinterested expressions of sound legal principles by those adhering to widely different ideologies.” *Id.* at 434-35.

⁷⁶ *Id.* at 431-32.

⁷⁷ Theoretically the executive can represent all those injured when bargaining with another sovereign and more effectively achieve some measure of redress. *Id.* at 431-32.

judiciary's respective constitutional roles,⁷⁸ the *Sabbatino* Court emphasized that not "every case or controversy which touches foreign relations lies beyond judicial cognizance."⁷⁹ Even when judicial resolution will likely resonate throughout international relationships, the application of an unambiguous international rule constitutionally outweighs the political branches' desire for a more delicate handling of the controversy (unless the political branches decide to preempt litigation by concluding an international agreement). In *Sabbatino*, the Court predicated its holding on the international community's widely divergent views on public takings/expropriations.⁸⁰ In spite of the Cold War tensions arising from the divergence between capitalist states and those with state-controlled economies, the Court stated that absent "a treaty or other unambiguous agreement regarding controlling legal principles"⁸¹ adjudication would not be inconsistent with separation of powers principles, notwithstanding the tenor of the issue's implications for foreign relations.⁸² Properly understood, *Sabbatino's* holding and rationale contradicts the gloss placed on the ASD by some lower federal courts and affirms other lower court decisions that concluded that the doctrine "was never meant to apply" where a sufficiently concrete and accepted rule governs an act's validity.⁸³ ASD applies only when compelled by its underlying policies.

Where international obligations are crystallized in treaty obligations or in widely-accepted CIL, separation of powers principles compel the judiciary to decide cases and controversies that significantly affect the tenor of international relations. Courts impermissibly interfere in the conduct of foreign relations when adjudication, in effect, imposes international rules on sovereigns who have not consented to those obligations.

⁷⁸ The doctrine's "continuing vitality" and specific application in any given case "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches . . . on matters bearing upon foreign relations." *Id.* at 427.

⁷⁹ *Id.* at 423 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

⁸⁰ The Court confesses that "there are few if any issues in international law . . . on which opinion seems to be so divided" as expropriations. *Id.* at 428. It is "difficult to imagine . . . adjudication in an area which touches more sensitively the practical and ideological goals of . . . the community of nations." *Id.* at 430.

⁸¹ *Id.* at 428.

⁸² The holding cannot be confined to the factual context of expropriations; the Court repeatedly declares that separation of powers principles animate the doctrine whenever a court is asked to decide the validity of a foreign state's act.

⁸³ *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1540 (D.C. Cir. 1984); *see Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984); *American Int'l. Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980).

IV. APPLYING EITHER UNAMBIGUOUS, WIDELY-ACCEPTED CIL RULES OR TREATY PROVISIONS DOES NOT RAISE THE SEPARATION OF POWERS CONCERNS THAT UNDERLIE THE ASD

The “international law” exception to the ASD permits courts to examine foreign states’ official acts when their legal validity turns on a treaty obligation or crystallized CIL rule. Even though adjudication may have strong implications for foreign affairs, a separation of powers problem does not arise when international law supplies a rule of decision—one established by the political branches either in a treaty or by the executive’s contributions to the development and maintenance of a CIL rule.⁸⁴ The judiciary does not overstep its constitutional role because it is resolving cases and controversies according to the international rules and mutual obligations the executive has seen fit to make. Whether applied via the Supremacy Clause as Article II treaties or as CIL pursuant to the ATCA, the judiciary gives force to international human rights instruments, including treaties, conventions, and other agreements formed by states’ political leaders. Furthermore, the judiciary properly applies international law through its regular practice of considering the executive’s views of the meaning of treaty provisions and the content of CIL when interpreting international law.

A. *The Constitution Does Not Grant the Political Branches Plenary Power over Matters Touching on Foreign Relations*

The Constitution’s text allocates authority over matters touching on foreign relations across all three branches. While the executive may have primary responsibility for the conduct of foreign relations under Article II, this cannot mean that the judiciary must check its Article III judicial power at the door whenever litigants’ claims entreat the courts to step into controversies touching on foreign relations. Separation of powers principles stake out a protected sphere of foreign affairs authority (and consequently, a sphere of responsibility) belonging exclusively to the branch to which it is assigned. They, therefore, constrict the expansion of one branch’s exercise of its foreign affairs powers to the derogation of the others’.

The Take Care Clause is often cited as establishing the President’s dominance in the conduct of foreign relations by implication: it grants the executive broad residual powers not specified in Article II from the

⁸⁴ *Weinberger*, 745 F.2d at 1540.

penumbral authority emanating from several explicit grants.⁸⁵ This interpretation may require Article II's Take Care Clause to carry more weight than it is reasonable to believe the clause was ever intended to bear in light of the text and structure of the Constitution. Professors Curtis Bradley and Martin Flaherty explain that a virtually unlimited grant of foreign relations power sits uneasily in light of the Constitution's enumerated powers structure. Therefore, a narrower interpretation is much more consistent with the Framers' conception of executive power.⁸⁶ The notion that every governmental decision touching on foreign affairs is exclusively entrusted to the executive has never been the law.⁸⁷

The Constitution enumerates specific powers to each branch that bring aspects of foreign affairs under their authority, in effect spreading out responsibility for elements of foreign affairs among the three branches.⁸⁸ Article III, § 2 extends the judicial power to "all cases" arising under the Constitution, federal laws, and "Treaties," as well as to "Controversies . . . between a State, or the Citizens thereof, and *foreign* States, Citizens or Subjects."⁸⁹ The Constitution's text makes no exception for cases bearing weightily on foreign relations, if they otherwise meet the Article III, § 2 grant extending the judicial power to all cases and controversies.

In *Kirkpatrick*, the most recent case involving the ASD before the Supreme Court, Justice Scalia reminded us that the courts "have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."⁹⁰ Interpreting and applying the law—both domestic and

⁸⁵ See generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). The Constitution explicitly names the President as the commander in chief of the military, U.S. CONST. art. 2, § 2, cl. 1, and gives the President the power to make treaties with the advice and consent of the Senate, U.S. CONST. art. 2, § 2, cl. 2, and to appoint, U.S. CONST. art. 2, § 2, cl. 2, and receive Ambassadors, U.S. CONST. art. 2, § 3.

⁸⁶ Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 602-4 (2004). They identify interpretations of Article II contrary to the notion of executive dominance that are equally defensible and well-grounded in the Constitution's text. *Id.* at 553-59.

⁸⁷ In *United States v. Curtiss-Wright Export Co.*, the Supreme Court carefully qualified its broad characterization of the executive's foreign affairs power by emphasizing that it is "a power which . . . like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. 304, 320 (1936). *Reid v. Covert* recognized constitutionally imposed limits to the political branches' range of permissible foreign policies and empowers the courts to uphold those limitations. 354 U.S. 1 (1957). The Court clarified what this means for the judiciary's involvement in foreign affairs in *Baker v. Carr*: the Court starkly declared it cannot be thought that "every case or controversy which touches on foreign relations lies beyond judicial cognizance." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (quoting *Baker v. Carr*, 369 U.S. at 211).

⁸⁸ For example, the Constitution assigns to the Legislature the familiar enumerated powers implicating foreign affairs under Article I, § 8. U.S. CONST. art. I, § 8.

⁸⁹ U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

⁹⁰ *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp., Int'l.*, 493 U.S. 400, 409 (1990).

international—are inherently judicial functions, and the judiciary “cannot shirk this responsibility merely because our decision may have significant political overtones.”⁹¹ The *Sabbatino* Court originally stated that the Constitution “does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.”⁹² Rather, the doctrine provides a rule of decision to prevent judicial resolution of litigants’ rights from bleeding into foreign policymaking which is not the responsibility of the judiciary.

B. The Judiciary Fulfills its Responsibilities Under Article III and the Supremacy Clause by Applying Treaties and CIL Rules Meeting Sosa’s Standard

By adjudicating the cases and controversies that are properly before it, the judiciary gives force to separation of powers principles. As a counterpoise to the political branches’ law-making and law-enforcing powers, Article III, joined by Article VI’s Supremacy Clause, assigns to courts the power to interpret the law. *The Paquete Habana*⁹³ dispelled any doubt that international law is “part of our law.”⁹⁴ Articles III and VI textually commit to the judiciary the responsibility of applying treaties. The federal courts have the authority to apply CIL via the Supremacy Clause at least with political branch authorization and, potentially, more broadly as federal common law.

1. Self-Executing Treaties Are Judicially Enforceable Under the Supremacy Clause

Self-executing Article II treaties and congressional-executive agreements provide rules of decision for U.S. courts. They grant private individuals rights, which may be vindicated in domestic courts and are “[t]reaties, made . . . under the Authority of the United States” which qualify as “the supreme law of the land.”⁹⁵ Non-self-executing treaties, on the other hand, are not judicially-enforceable unless Congress enacts implementing legislation and creates a private right of action.⁹⁶ One of the very few

⁹¹ *Japan Whaling Ass’n v. Amer. Cetacean Society*, 478 U.S. 221, 230 (1986).

⁹² *Sabbatino*, 376 U.S. at 423.

⁹³ *The Paquete Habana*, 175 U.S. 677 (1900).

⁹⁴ *Id.* at 700.

⁹⁵ U.S. CONST. art. VI, § 2, cl. 2. The President makes Article II treaties “by and with the Advice and Consent of the Senate. . . .” U.S. CONST. art. II, § 2, cl. 2.

⁹⁶ *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) “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

treaties purporting to establish fundamental human rights obligations for states that the United States has ratified is the International Covenant on Civil and Political Rights (“ICCPR”). When ratifying the treaty, however, Congress stipulated that its substantive provisions were not self-executing and exempted the United States from certain obligations.⁹⁷ Many human rights treaties are neither self-executing nor implemented through congressional legislation.⁹⁸

2. *CIL Is Judicially Enforceable Under the Supremacy Clause, Either as Federal Common Law, or when the Judiciary Applies It Pursuant to Political Branch Authorization*

Under international law, states may enter into multilateral treaties to codify customary law.⁹⁹ The status of CIL under the U.S. Constitution is presently uncertain because the Constitution does not recognize CIL as a source of positive domestic law.¹⁰⁰ Chief Justice Marshall made clear that “the Court is bound by the *law of nations* which is a part of the law 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 engages 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.*

⁹⁷ When Congress ratifies or implements a treaty, however, it may opt not to assume specific treaty obligations through stating reservations, declarations or understandings that denote the United States’ interpretation of the duties and extent to which it has consented to be bound. *See Domingues v. Nevada*, 961 P.2d 1279 (1998).

⁹⁸ *See, e.g.* International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁹⁹ A rule established by treaty may supersede obligations placed on the parties by a prior customary rule, unless the parties intend otherwise. RESTATEMENT (THIRD), *supra* note 56, § 102 cmt. j. (1987). Multilateral treaty provisions usually are non-self-executing, but their terms can evidence CIL norms among states. The Vienna Convention on the Law of Treaties is a case in point. RESTATEMENT (THIRD), *supra* note 56, § 102 cmt. f.

¹⁰⁰ The Constitution is mostly silent about the domestic status of customary international law. Customary law only appears as the object of one of Congress’ enumerated powers: Article I, § 8 vests Congress with the power “[t]o define and punish . . . [o]ffenses against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. The “law of nations” is conspicuously missing where one might expect to find it mentioned again—either within Article III’s definition of the scope of the judicial power or in the Supremacy Clause. The text of the Constitution itself is not likely to lead one to conclude that customary legal rules should have equal weight or authority as treaties or domestic laws. *The Paquete Habana* dispels any doubt—subordinating CIL to a controlling legislative or executive act. On the other hand, if one seriously scrutinizes the difference in the Supremacy Clause and Article III’s texts, the Constitution may suggest that the “law of nations” constitutes a category of laws that are not “made in Pursuance” of the Constitution, U.S. CONST. art VI, § 2, cl. 2, and yet are “Laws of the United States” under Article III, U.S. CONST. art. III, § 2, cl. 1. *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 705 (2002). The history of the Constitutional Convention provides material suggesting this difference in text evidences some of the Framers’ belief that the “law of nations” was within Article III’s grant of jurisdiction. *Id.* at 707.

land.”¹⁰¹ *The Paquete Habana*, however, held that U.S. courts can “resort” to and apply CIL only “where there is no treaty and no controlling executive or legislative act or judicial decision” on point.¹⁰² Until the Supreme Court clarifies the Constitutional status of CIL, we do not know precisely *to what extent* CIL is a part of our law—whether U.S. courts can freely construe CIL’s content in any case or controversy over which the court has general federal question jurisdiction, or only when the political branches have statutorily authorized the application of CIL to resolve certain cases and controversies.¹⁰³

While the Supreme Court has yet to resolve this controversy, *Sosa v. Alvarez-Machain* may suggest that the Court will side with the dominant position, allowing the courts free construction of CIL.¹⁰⁴ If the dominant view prevails, then CIL will be an international source of domestic law that shares the same status as treaties under the Supremacy Clause. On the other

¹⁰¹ *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (emphasis added). The Framers’ and early Courts’ usage of the term “law of nations” equates to our contemporary understanding of CIL.

¹⁰² 175 U.S. 677, 700 (1900).

¹⁰³ The first position posits that the political branches must authorize the courts to invoke CIL in either of two ways: 1) Congress can enable U.S. courts to apply CIL by enacting a statute like the ATCA, pursuant to its constitutional power to invoke the law of nations, *see generally* Note, *An Objection to Sosa – And to the New Federal Common Law*, 119 HARV. L. REV. 2077 (2006) (Pursuant to Congress’ enumerated power in U.S. CONST. art. I, § 8, cl. 10, Congress enacted in 1789 the Alien Tort Statute, 28 U.S.C.A. § 1350 (2006), and in 1992 the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992)), or 2) the political branches can incorporate customary law into domestic law by signing and ratifying treaties that codify customary law, pursuant to the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2. Either way CIL indirectly acquires a binding character under the Supremacy Clause via the enabling statute or the Article II treaty—but only under circumstances identified by the controlling statute or treaty.

The second position equates CIL’s constitutional status to that of federal common law. Even though Congress has not mandated the courts to invoke CIL, most scholars and courts agree that CIL should be treated as part of federal common law and apply it to resolve cases. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (labeling the consensus among courts and scholars that customary law has the status of federal common law as the “modern position”, but proceeding to reveal the dubious assumptions required by this view); Ernest A. Young, *Sorting out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365 (2002) (discussing the debate between those who subscribe to the modern position and the revisionist view held by Bradley and Goldsmith). This approach fits with *The Paquete Habana*’s instruction that CIL “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.” *The Paquete Habana*, 175 U.S. at 700.

¹⁰⁴ The Court stated the loss of “some metaphysical cachet on the road to modern realism” did not deprive the federal courts of “all capacity to recognize enforceable international norms. . . .” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703 (2004). And elsewhere, the Court expressed the view that *Sabbatino* did not question the application of international law “in appropriate cases, and it further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts.” *Id.* at 730 n.18 (citing Phillip C. Jessop, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740 (1939)). Indeed, *Erie* opened the door “to the emergence of a federal decisional law in areas of national concern” and resituated CIL on this basis. *See* Henry J. Friendly, *In Praise of Erie—and the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

hand, if the Court adopts the revisionist view, then U.S. courts could apply CIL only when plaintiffs rely on a federal statute that authorizes the courts to apply CIL, such as the ATCA. Under both views, the judiciary has a mandate either directly from the Supremacy Clause or from Congress via the Supremacy Clause to apply CIL to resolve cases and controversies properly before the courts. The difference rests in how expansive the category of cases is in which U.S. courts may apply CIL—whether the courts are limited to the cases specifically recognized by the political branches’ authorization or whether courts can apply CIL to any case over which it has general federal question jurisdiction.

C. *U.S. Courts Articulate the Executive’s Foreign Policies by Applying Crystallized CIL Rules to Which the United States and Other Sovereigns Have Mutually Consented*

When Congress enacted the ATCA and ratified certain treaty provisions negotiated by the executive, the representative political branches deliberately defined and conferred rights derived from international law on private entities. The Supreme Court has stated that it is not the proper role of the Judicial Branch to construe causes of action that the political branches have seen fit to provide in ways that contravene their intent.¹⁰⁵ The courts undercut the separated-powers structure of the U.S. Constitution if they apply the doctrine under the misconception that preserving the executive’s lead role in foreign relations is a greater separation of powers concern than upholding the judiciary’s own responsibilities (and private parties’ rights) under the Constitution. Circuit Judge Edwards has asserted that “[t]o ignore the Supreme Court’s cautious delineation of the doctrine in . . . *Sabbatino* and its progeny, and to cite the doctrine’s rationale as broad justification for effectively nullifying a statutory grant of jurisdiction, is, in my view, an inappropriate exercise of lower federal court power.”¹⁰⁶ In effect, a court “[v]igorously waving in one hand a separation of powers banner, ironically, with the other . . . renounces the task that Congress has placed before” the courts.¹⁰⁷

¹⁰⁵ *Sosa*, 542 U.S. at 716. The ATCA must be construed to have the practical effect the First Congress intended—to “cause infractions of treaties, or the law of nations to be punished. . . .” See *Id.*; *Johnson v. Collins Entm’t Co.*, 199 F.3d 710, 729 (4th Cir. 1999) (Luttig, concurring) (“If the Congress sees fit to provide citizens with a particular cause of action, then we as federal courts should entertain that action—and unbegrudgingly.”).

¹⁰⁶ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 790 (D.C. Cir. 1984) (J. Edwards, concurring).

¹⁰⁷ *Id.*

1. *Crystallized CIL Rules, which Meet Sosa's Standard, Represent the Executive and Foreign Sovereigns' Unambiguous Assent to Controlling Legal Principles*

The *Sabbatino* majority's primary anxiety was that courts would interfere in the conduct of foreign relations by declaring legal relations among states and between states and private entities that were not widely accepted by states.¹⁰⁸ This would raise a separation of powers problem because courts would be making policy determinations about U.S. foreign policy interests and which legal rules are appropriate to pursue them.¹⁰⁹ Applying crystallized CIL, like self-executing treaty provisions, does not raise separation of powers concerns, however, because the political branches demonstrate their consent to be bound through entering into mutual obligations with other states.¹¹⁰

Derived from state consent, treaties and CIL represent equally binding legal obligations under international law. When political leaders enter into international agreements, reflected in crystallized CIL or in treaties, they effectively relinquish some measure of state sovereignty for perceived advantages.¹¹¹ Because the political branches have expressly provided the courts with rules of decision through judicially-enforceable self-executing treaties and treaties implemented by congressional enactments, a judicial determination that an act of state runs contrary to these obligations cannot be said to interfere with the expressed objectives of the political branches.¹¹² Like treaty obligations, a crystallized CIL rule is one to which the executive

¹⁰⁸ In *Sabbatino* the Court refused to recognize CIL defining acceptable expropriations and duties states owe to dispossessed foreign owners because there were no signs that states widely agreed on such principles. *Sabbatino*, 376 U.S. at 428-29. Ascertaining an unsettled norm and declaring it a rule of law amounts to active participation in the creation or codification of international law. This is a function reserved to the executive branch, which acts "as an advocate of standards it believes desirable for the community of nations and protective of national concerns." *Id.* at 433. The judicial branch wanders into the executive's constitutional territory when it defines international rules that have not been enshrined in treaties nor have attained the highest degree of consensus.

¹⁰⁹ Policy choices and value determinations are constitutionally committed to the political branches. *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

¹¹⁰ The political branches, in the conduct of foreign policy, decide to make commitments with leaders of other nation-states to secure foreign affairs objectives deemed to be in the national interest. *See* Jack Goldsmith & Eric Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

¹¹¹ *See generally* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539] (1992). All international agreements "create law for the states parties thereto . . ." RESTATEMENT (THIRD), *supra* note 56, § 102(3), and in the case of a dispute "establish[] rules expressly recognized by the contesting states." Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

¹¹² For example, modern FCN treaties between the U.S. and other states exemplify *Sabbatino*: where such a treaty right has been violated, the executive does not express concern that adjudication would pose a problem. *See Kalamazoo*, 729 F.2d 422; *Am. Int'l Group*, 493 F.Supp. 522.

has consented by participating in its creation and maintenance. Also like treaty obligations, courts can read the indicia of CIL to make an objective determination of what course of action the political branches have decided is within the national interests.¹¹³ U.S. courts applying CIL uphold the international legal relationships defined through the political branches' conduct of foreign relations.¹¹⁴

CIL meeting *Sosa's* standard thus fits *Sabbatino's* requirement of some "other unambiguous agreement regarding controlling legal principles".¹¹⁵ The policies underlying *Sosa's* specific, universal and obligatory standard match those that preoccupied the *Sabbatino* majority, despite the fact that the *Sosa* majority was primarily concerned with defining the "law of nations" in a way that would be congruent with the understanding of the First Congress, which passed the ATCA. *Sabbatino's* inquiry into the status of customary law against expropriations aligns with *Sosa's* inquiry into whether alleged CIL norms are specific, universal and obligatory—the main point of both is to avoid holding states to binding rules to which they did not consent. Referring to the standard it adopted, the *Sosa* majority remarked that the potential implications for foreign relations justify a high bar to recognizing new private causes of action under CIL.¹¹⁶

Crystallized CIL reflects deeply-ingrained, reciprocal expectations which the political branches have determined are in the national interest to make and abide by. Its wide acceptance establishes its legitimacy and well-settled character. The extent to which such a crystallized norm enjoys the broad consent of states means that neither the political branches nor other states could genuinely contest the existence of the rule in international law or that it was transgressed by an act of state. Federal courts remedying embryonic CIL rules essentially intrude upon the political branches' competence and constitutional roles as international lawmakers.¹¹⁷ When a new rule surpasses *Sosa's* high bar, however, it alleviates the disruption

¹¹³ Goldsmith and Posner, *supra* note 110, at 1169-70.

¹¹⁴ U.S. courts confirm whether the political branches have supported or acquiesced in the putative norm's crystallization, i.e. by enacting the norm into domestic statutory law (*See, e.g.*, Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992)), or opposed it.

¹¹⁵ *Sabbatino*, 376 U.S. 428.

¹¹⁶ *Sosa*, 542 U.S. at 727 ("[M]odern international law is very much concerned with . . . rules that would go so far as to claim a limit on the power of foreign governments over their citizens . . .").

¹¹⁷ When courts apply customary law that has not yet crystallized, they move beyond their institutional competence and constitutional role because they are essentially making political judgments about the value of emerging norms. *Sosa*, 542 U.S. at 695 (courts "imping[e] on the discretion of the Legislative and Executive branches in managing foreign affairs."). The *Sabbatino* majority decided the ASD barred a claim challenging a Cuban expropriation decree, because there was no treaty provision on point and expropriations in the 1960s was an area of international law evidencing no consensus as to legal standards. *Sabbatino*, 376 U.S. at 428-30.

created by courts imposing new legal rules upon other states in the name of applying existing international law.

2. *Courts Properly Defer to the Executive Branch's Foreign Policy Powers when They Interpret of International Rules According to Political Branches' Understanding of Them*

Courts appropriately consider the political branches' understanding of international rules because the political branches, as the lawmakers, can explain the intent behind treaty provisions and whether certain state practices are adhered to out of a sense of legal obligation. Similar to the weight accorded legislative history when construing a statute, courts give great weight to the meaning of treaties as expressed by the departments of the government charged with their negotiation and enforcement.¹¹⁸ The executive also has special competence in ascertaining the nature of international rules because the executive's statements and behavior in the international arena are a source of CIL.¹¹⁹ From experience participating in international politics, the executive can attest to whether a norm is generally and consistently followed. Professor Curtis Bradley suggests this deference also can be understood as a form of Chevron deference: courts may presume that Congress has delegated interpretive power to the executive because of his special expertise in foreign matters, arising from both the President's role as the negotiator who speaks on behalf of the nation and from the executive agencies' superior access to relevant facts.¹²⁰ This kind of deference expresses the ordinary respect due to the coordinate, law-making branches.¹²¹

Conventional judicial practices for treaty interpretation and judicial application of *Sosa's* standard for CIL results in substantive agreement between those making international law and those definitively interpreting it. Thus, deference to the executive in interpretive issues effectively alleviates *Sabbatino's* anxieties. It avoids hampering the executive's negotiations or creating uncertainty in international relationships caused by multifarious

¹¹⁸ Considering the executive's understandings of international rules allows courts to read treaties, like other contracts, in light of the conditions and circumstances existing when they were negotiated and to give effect to the parties' intents. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984).

¹¹⁹ Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 707-09 (2000).

¹²⁰ *Id.* at 701-07.

¹²¹ David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999).

pronouncements on the legal validity of a foreign sovereign's act.¹²² The fact that the CIL rule is universally accepted weakens the foreign state's bargaining position and buttresses the U.S. executive's position. Therefore, adjudication according to a crystallized CIL rule is more properly understood as a continuation of states' expectations regarding the duties they owe to each other and to private entities.

This kind of deference also mitigates the foreign policy implications of insulting foreign states.¹²³ States that violate crystallized human rights laws cannot expect to avoid the disapprobation of the international community or judicial review of their acts by U.S. courts.¹²⁴ Courts cannot presume that a government which transgresses such a widely accepted rule of law could be any more offended by a condescending U.S. court opinion than by the international disapprobation that it will inevitably confront.

Furthermore, it is not at all clear that the Judicial Branch should be viewed as constraining or embarrassing the executive when it adjudicates cases bearing on foreign affairs. It is widely known by those negotiating with the U.S. that the executive is constrained not just by the courts but by the American constitutional structure, including Congress. The executive may employ these constraints in negotiations by articulating its limited ability to meet foreign sovereigns' expectations because of the institutional constraints presented by the separation of powers.¹²⁵ Moreover, foreign leaders negotiate with the President, not the courts, to achieve their objectives. One would expect that the executive's condescending or ambivalent statements would more significantly affect the tenor and course of negotiations than judicial pronouncements.

A universally recognized rule of law alleviates potential embarrassment to the executive because ordinary judicial practice in

¹²² The fear concerns situations in which courts might hold that an international law standard either has or has not been met when the executive has stated the contrary belief. *Cf. Sabbatino*, 376 U.S. at 433. This is accomplished when courts examine sources of international law for the extent to which the executive and members of the international community have agreed to be bound. *See, e.g.* *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) (finding the "rights to life and health" insufficiently definite to constitute CIL rules).

¹²³ *Sabbatino*, 376 U.S. at 432.

¹²⁴ The Restatement states that the ASD would not bar a claim alleging violation of fundamental human rights, such as torture or genocide, because "the accepted international law of human rights . . . contemplates external scrutiny of such acts." RESTATEMENT (THIRD), *supra* note 56, §443 comment c. In *Doe v. UNOCAL*, the court decided judicial resolution would not substantially exacerbate foreign relations with Burma by connecting the strong international consensus against *jus cogens* violations of human rights to the U.S. criticism of the Burmese government's acts. *Doe I v. Unocal Corp.*, 395 F.3d 932, 959 (9th Cir. 2002).

¹²⁵ Robert Putnam has elaborated on how the executive makes use of domestic institutional constraints to strengthen its bargaining power. *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

discerning the meaning of international law obviates disagreement between the executive and the judiciary on the substantive content of definite international rules. The executive's stated interest in *Sarei v. Rio Tinto* confirms this expectation. The executive did not deny that the PNG government's actions provided a basis for the claims. Instead, it merely stated that continued adjudication could adversely impact U.S. foreign relations with PNG.¹²⁶ The executive appears to have taken the stance that alleged human rights violations are better resolved politically rather than judicially.

V. COURTS SHOULD NOT ABIDE BY EXECUTIVE STATEMENTS THAT JUDICIAL RESOLUTION WILL HAVE AN ADVERSE IMPACT ON FOREIGN RELATIONSHIPS WHERE CLEAR INTERNATIONAL LAW APPLIES

The executive's expressed preference for political resolution as "[a] statement of national interest alone . . . does not take the present litigation outside of the competence of the judiciary."¹²⁷ This preference does not warrant upsetting the usual constitutional order, which implies for *Sarei v. Rio Tinto* that the victims' claims brought under the ATCA are constitutionally committed to the judiciary for resolution.¹²⁸ Therefore, the judiciary should proceed to resolve the victims' claims, recognizing that the political branches may take the necessary steps to enter into an international agreement with PNG that would politically address the claims.

A. *U.S. Courts Are Constitutionally Prohibited from Categorically Deferring to the Executive*

Assertions by the executive that the courts should apply the ASD doctrine cannot be given more weight than the policies underlying the doctrine can bear. Courts have the constitutional authority to determine when their Article III responsibilities and the Supremacy Clause compel them to redress rights violations.¹²⁹ In another case concerning the ASD not

¹²⁶ *Sarei*, 456 F.3d at 1075-76, 1082

¹²⁷ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 (11th Cir. 2004).

¹²⁸ *See Kadic v. Karadzic*, 70 F.3d 232, 249 (1995) ("Not every case 'touching foreign relations' is nonjusticiable, *see Baker v. Carr*, 369 U.S. 186 . . . (1962) . . . and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.").

¹²⁹ The Ninth Circuit recently expounded on this idea in discussing whether claims against the Vatican Bank were associated with crimes committed against European Jews under the Nazi regime. Even though extensive negotiations by the executive have resulted in international agreements with Germany

long after *Sabbatino*, a plurality of the Court rejected the notion that courts must defer categorically to the executive's views.¹³⁰ Separation of powers principles require judicial independence here: unquestioning judicial acceptance would turn the Court into "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'."¹³¹ More recently, the *Sosa* Court recognized "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy,"¹³² but judicial consideration of executive views must not become unquestioning deference.¹³³

Rather than giving dispositive weight to the executive's assertions of interference, courts should carefully parse the executive's statement of interest in conjunction with the record in order to assess the strength of the executive's interest in avoiding judicial resolution compared to the judiciary's responsibilities under the Constitution.¹³⁴ The Ninth Circuit rejected the district court's application of the doctrine and instructed the lower court to re-weigh the *Sabbatino* factors for the claimed violations of CIL norms not amounting to *jus cogens* rules because the district court relied too heavily on the executive's statement of interest.¹³⁵ The panel

regarding claims related to the Nazi era, the court noted that the "Constitution does not relegate [the courts] to the sidelines. We are a player in adjudicating claims, and a crucial one at that." *Alperin v. Vatican Bank*, 410 F.3d 532, 558 (9th Cir. 2005) (citing *W.S. Kirkpatrick & Co.*, 493 U.S. at 409). Unquestioning acceptance and "reflexively tossing the ball into the political branches' court . . ." amounts to abdicating that role. *Id.*

¹³⁰ *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972); *Id.* at 772-73

(Douglas, J., concurring); *Id.* at 773 (Powell, J., concurring); *Id.* at 778 (Brennan, J. dissenting).

¹³¹ *Id.* at 773 (1972) (Douglas, J., concurring).

¹³² *Sosa*, 542 U.S. at 733 n.21. The Supreme Court recently instructed that should the executive branch "choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

¹³³ *Sarei*, 456 F.3d at 1081 ("Ultimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding.").

¹³⁴ Compare "[the court] may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning." *Sarei*, 221 F. Supp. 2d at 1182, with "[the court] may take notice of the government's official policy position and opinion . . . for the limited purpose of assessing the strength of the government's interest" *Sarei*, 221 F. Supp. 2d at 1183 (citing *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995)). A noted scholar has disagreed with the courts' ability to assess the executive's statement of the foreign policy interests at stake, but similarly has concluded that courts should not accord them dispositive weight. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1415-16 (1999) (Courts are not institutionally competent to "divine" the foreign policy interests at stake in a particular context and how to pursue them—these are political decisions constitutionally assigned to the branches with the expertise and institutional structure to make them.).

¹³⁵ *Sarei*, 456 F.3d at 1085-86.

determined, even if continued adjudication would present “some risk to the Bougainville peace process” and the executive may “prefer that the suit disappear,” the Statement of Interest’s “nonspecific invocations of risk to the peace process” did not establish that adjudication would touch sharply on foreign relations.¹³⁶ The record also demonstrated that the U.S. “had little involvement” in the foreign conflict that gave rise to the claims.¹³⁷

B. Judicial Resolution Does Not Prevent the Political Branches from Taking Action to Secure a Desired Outcome

Courts should not, by deferring to the executive’s stated interests, permit the executive to avoid taking action. Instead, courts should push the political branches to manage these claims through political channels, a judicial action that is consistent with the separated powers system.

Any consequences of judicial resolution viewed as adverse to foreign policy interests cannot be considered “so significant as to warrant a reversal of the usual assumptions of our constitutional order.”¹³⁸ When courts perform their usual responsibilities to decide cases, the political branches can step in to correct any “underprotection error”—a judicial decision that does not adequately protect the nation’s foreign policy interests.¹³⁹ Professor Jack Goldsmith argues that it is reasonable to expect the political branches to redress such errors if the political branches perceive them as such.¹⁴⁰ These “decision costs” are precisely the kind that the political branches, which are institutionally competent and accountable to the people, should absorb under the Constitution.¹⁴¹ On the other hand, when courts apply the ASD, in spite of clear international law, due to the stated interests of the executive, they exhibit an unyielding deference to the political branches and over-protect the conduct of foreign policy under the Constitution. The political branches cannot be expected to correct this extreme, judicially-created deference because the practical effect is to widen the political branches’ foreign affairs powers.

The formalist approach to the ASD advocated here preserves the doctrine as formulated in *Sabbatino*—as a prudential choice-of-laws

¹³⁶ *Id.* at 1082.

¹³⁷ *Id.*

¹³⁸ Goldsmith, *supra* note 134, at 1412.

¹³⁹ *Id.* at 1419-20.

¹⁴⁰ *Id.* at 1420. This is because the executive has the power to preempt claims in U.S. courts or shape their outcome. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370 (D.N.J. 2001); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

¹⁴¹ Goldsmith, *supra* note 134, at 1437.

doctrine for situations in which states have not agreed to restrict their sovereign conduct through clear international obligations. The usual assumptions of the separated powers system, along with a pragmatic view of the practice of international relations, argues against allowing courts to employ the doctrine as a functional, sliding-door to refuse judicial application of clear international law in U.S. courts.

C. *Using the ASD to Presume the Validity of a Foreign State's Act Which Is Invalid Under International Law Detracts from the Rule of Law Internationally and Derogates Litigants' Rights*

The international law exception to the ASD doctrine entrenches the role of U.S. courts in the application of international law when appropriate. In certain circumstances, treaty obligations and customary law are directly applicable in the resolution of claims between private parties. U.S. courts have always had the task of vindicating violations of rights conferred by international law. This is reflected in the Framers' explicit incorporation of treaty law into the Constitution, the First Congress' invocation of the law of nations in the ATCA, and Congress' recent instantiation of CIL in the federal statute books by enacting the TVPA. It is starkly anomalous that a judicially-created prudential doctrine should be used to presume the validity of acts clearly invalid under international law. That judicial resolution may embarrass foreign governments does not, in itself, establish an exception to the constitutional assumption that courts have "the power, and ordinarily the obligation, to decide cases and controversies . . ."¹⁴² The judiciary cannot "allow the fate of a litigant to turn on the possible political embarrassment of the Department of State and it is not this Court's role to encourage or require nonexamination by limiting a rule of law with the domestic public relations of the Department of State."¹⁴³ It compromises the integrity of those rights as well as that of the law that confers them.

Refusing to apply crystallized CIL under the ASD is tantamount to denying the "existence or purport" of the customary rules themselves.¹⁴⁴ The development of international human rights law has been a political struggle to embed certain fundamental and basic rights for individuals vis-à-vis states into the legal fabric of the international community. Allowing the doctrine to override a crystallized rule or treaty obligation not only contravenes the *Sabbatino* majority's concern for rendering decisions

¹⁴² *Kirkpatrick*, 493 U.S. at 409.

¹⁴³ *Sabbatino*, 376 U.S. at 467 (White, J., dissenting).

¹⁴⁴ *Id.* at 457.

consistent with the national interest and international justice (which coincide in firmly established principles of international law), but also unwinds the “stability of relationships and preservation of reasonable expectations”¹⁴⁵ secured by the international rule of law.

VI. THE ASD IS NOT A DEFENSE TO PNG RESIDENTS’ CLAIMS ALLEGING VIOLATIONS OF CRYSTALLIZED CIL RULES

Both the federal district court and a Ninth Circuit panel agreed that PNG residents’ alleged violations of CIL implicate specific, universal, and obligatory CIL norms. Before both courts, Rio Tinto argued that the PNG residents’ racial discrimination and environmental tort claims trigger the ASD because their resolution requires a court to evaluate the legal validity of the Rio Tinto’s joint conduct with the PNG government in the operation of the mine and during the civil war. On appeal, the Ninth Circuit properly reversed the district court’s decision to apply the ASD because of the character of the CIL rules forming the basis of the PNG residents’ claims.

The claims that derive from international human rights law “assert jus cogens violations that form the least controversial core of modern day ATCA jurisdiction.”¹⁴⁶ Specifically, PNG residents assert that the PNG government and the PNG military (PNGDF), acting as Rio Tinto’s agents during the civil war, violated the laws of war by torturing and murdering innocent civilians through the medical blockade, bombing of civilian targets, wanton killing and acts of cruelty, burning homes and villages, raping women, and pillaging the island.¹⁴⁷ They also contend that the defendants’ support for and involvement in the medical blockade constituted genocide and crimes against humanity.¹⁴⁸ Moreover, Rio Tinto’s policy of treating the indigenous

¹⁴⁵ *Id.* at 453.

¹⁴⁶ *Sarei*, 456 F.3d at 1078 (citing *Sosa*, 542 U.S. at 729-30).

¹⁴⁷ *Sarei*, 221 F. Supp. 2d at 1139-49 (citing *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995), for the conclusion that the Geneva Conventions codify the laws of war, along with various federal court decisions explicating the requirements for liability under the Conventions. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3516, 75 U.N.T.S. 287.).

¹⁴⁸ *Sarei*, 221 F. Supp. 2d at 1149-51. (citing a federal court decision that quotes The Nuremberg (Nuremberg) Trial, 6 F.R.D. 69, 130 (Int’l Military Tribunal 1946), for the statement “[w]hile some of the same offenses that violate the laws and customs of war are also crimes against humanity, crimes of the latter sort most notably include murder, extermination, enslavement . . . or persecutions on political, racial

people as inferior, destroying their villages, the environment, sacred sites and local culture, and supporting the blockade constituted racial discrimination.¹⁴⁹ The Ninth Circuit found the ASD could not shield these official acts by the PNG government from judicial scrutiny. Such acts would constitute *jus cogens* violations, and states are not permitted under international law to act contrary to *jus cogens* norms. “Because ‘[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act,’ . . . the alleged acts of racial discrimination cannot constitute official sovereign acts”¹⁵⁰ A condition precedent of the doctrine—an official act of state—did not occur because sovereigns cannot officially violate non-derogable obligations.

Similarly, the ASD should not bar the environmental tort claims. The residents allege that Rio Tinto unlawfully harmed the environment by failing to fulfill its duty to avoid serious and irreversible environmental or human health effects.¹⁵¹ “[A]lthough the alleged UNCLOS [United Nations Convention on the Law of the Sea] violations represent violations of international law, the UNCLOS provisions at issue do not yet have a status that would prevent PNG’s acts from simultaneously constituting official sovereign acts.”¹⁵² Alleged violations of norms which have not yet attained the status of *jus cogens* are subject to ASD balancing: the federal courts must determine whether these CIL rules meet *Sosa*’s standard and therefore survive Rio Tinto’s invocation of the ASD. The Ninth Circuit remanded

or religious grounds . . . of entire racial, ethnic, national or religious groups,” *Id.* at 1149; and another federal court decision quoting the Convention on the Prevention and Punishment of the Crime of Genocide, which has been ratified by more than 120 nations, including the United States, to define the term ‘genocide’ as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births with the group; (e) Forcibly transferring children of the group to another group,” *Id.* at 1151.).

¹⁴⁹ *Sarei*, 221 F. Supp. 2d at 1151-55. (citing *Siderman de Blake*, 965 F.2d at 717, which notes that the Restatement “identif[ies] *jus cogens* norms prohibiting genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination”). The district court also rooted the norm prohibiting racial discrimination in numerous international agreements.

¹⁵⁰ *Sarei*, 456 F.3d at 1085 (citing *Siderman de Blake*, 965 F.2d at 718). *See also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289, 345 (S.D. N.Y. 2003) (“[J]us cogens violations are considered violations of peremptory norms, from which no derogation is permitted. Acts of state to the contrary are invalid.”).

¹⁵¹ *Sarei*, 221 F. Supp. 2d at 1160-63 (citing two provisions in the United Nations Convention on the Law of the Sea: (1) one requiring that “states take ‘all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment’ that involves ‘hazards to human health, living resources and marine life through the introduction of substances into the marine environment;” and (2) another mandating that states “adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources.”).

¹⁵² *Sarei*, 456 F.3d at 1086.

resolution of this issue to the district court with the reminder that foreign policy concerns are merely one of the factors to consider.¹⁵³ It was improper for the district court to rely heavily on the executive's expressed concern over the potential consequences of adjudication in its resolution of these allegations; the real issue is whether these international rules have become sufficiently crystallized to fall within the categories of laws that the judiciary is constitutionally committed to interpret and apply. Should a federal court find that the UNCLOS claims constitute violations of a CIL norm meeting *Sosa's* standard, the court cannot apply the ASD to bar a full consideration on the merits.

Refusing to apply the ASD in this situation would not only comply with the judiciary's constitutional responsibilities under the American constitutional system of separated powers, but it also would appropriately push the political branches to respond to the PNG residents' claims in a manner that is consistent with their own constitutional powers. If litigation is not the desired method of resolving these claims, the political branches may enter into an international agreement with the PNG government that resolves the claims on more acceptable terms. If they were expressly barred by a treaty,¹⁵⁴ an executive agreement,¹⁵⁵ or the subject of ongoing negotiations or formal steps by the political branches to reach a settlement,¹⁵⁶ the claims derived from non-*jus cogens* norms would be removed from the judiciary and placed within the power of the political branches. Recent litigation against foreign private entities arising from their alleged complicity in the atrocities committed during the Holocaust demonstrates that international agreements made by the political branches may render adjudication of certain claims off limits under the Political Question Doctrine.¹⁵⁷ Both the district court and the appellate panel that considered *Sarei v. Rio Tinto* recognized that the political branches had not taken any action with respect to the PNG residents' claims; the executive

¹⁵³ *Id.*

¹⁵⁴ See *Alperin*, 410 F.3d at 550 (citing U.S. CONST. art. II, § 2, cl. 1).

¹⁵⁵ *Id.* at 550 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981), and *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415-16 (2003)).

¹⁵⁶ *Id.* at 550 (explaining that the United States and Germany entered into the Foundation Agreement to establish a foundation to oversee compensation of the victims' claims); *Id.* at 558 (attesting to the judiciary's role in resolving claims where "[n]o ongoing government negotiations, agreements, or settlements are on the horizon."); See also *Ungaro-Benages*, 379 F.3d at 1234 (finding judicial consideration of certain claims appropriate where "by its own terms, [the Foundation Agreement] does not provide a basis to dismiss or suspend litigation against German companies stemming their actions during the National Socialist era.").

¹⁵⁷ See *Alperin*, 410 F.3d 532; *Ungaro-Benages*, 379 F.3d 1227; *Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370; *Iwanowa*, 67 F. Supp. 2d 424; *Burger-Fischer*, 65 F. Supp. 2d 248.

merely had expressed the desire that the case be resolved in Rio Tinto's favor to maintain the stability of the domestic peace agreement.¹⁵⁸ For the courts to allow mere statements by the executive, without more, to guide the outcome of litigation is a more functionalist approach to the Constitution than our system of separated powers can justify.

VII. CONCLUSION

Treaty obligations and any crystallized CIL norm which meets *Sosa's* specific, universal, and obligatory standard will preclude application of the ASD. The separation of powers policies underlying the ASD are appropriately respected when courts apply codified or crystallized international rules of law. Congress, by enacting the ATCA, has availed victims of human rights abuses access to U.S. courts to redress violations of their fundamental human rights under international law. The U.S. executive, along with Congress, has taken great steps to define those rights by participating in the creation and maintenance of treaty regimes and customary norms. Therefore, U.S. courts properly fulfill their Article III responsibilities and the Supremacy Clause's mandate by providing litigants, who rely on treaty obligations and widely-accepted CIL rules, with a full resolution of their claims on the merits.

The ATCA entitles the PNG residents in *Sarei* to the jurisdiction of U.S. courts. Because they have based many of their claims on international law of the highest order—law which squarely fits *Sabbatino's* description of “unambiguous agreement regarding controlling legal principles”¹⁵⁹—U.S. courts may submit to judicial review the unlawful acts perpetrated against the residents. Only judicial consideration of those claims that do not depend on crystallized legal principles amounts to impermissible interference with the political branches' conduct of foreign policy. Vindicating litigants' rights and the constitutional role of the judiciary cannot be conditioned on how politically sensitive the case at bar may be for domestic or international politics.

¹⁵⁸ *Sarei*, 221 F. Supp. 2d at 1178-79 (noting general comments made by the Secretary of State Madeline Albright that the United States' official policy to support PNG's territorial integrity and the peace process for resolving the Bougainville crisis); *Id.* at 1181 (noting Attorney General William Howard Taft IV's comments that the official policy of the U.S. is to support the peace process); *Sarei*, 456 F.3d at 1082 (noting that the executive's Statement of Interest, alone, presents “no independent reason why the claims presented to us raise any warning flags as infringing on the prerogatives of our Executive Branch.”).

¹⁵⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).