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REVISITING *VAN GEND EN LOOS*

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Vivian Grosswald Curran**

**The Use, Abuse, and Non-Use of International Law
in the United States and France**

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Prologue:
Revisiting *Van Gend En Loos*

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to ‘celebrate’ *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor H el ene Ruiz Fabri, Director of the UMR de droit compar e de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

**THE USE, ABUSE, AND NON-USE OF INTERNATIONAL LAW
IN THE UNITED STATES AND FRANCE**

By William M. Carter, Jr. * and Vivian Grosswald Curran⁺

I. Introduction

The United States Constitution makes international law part of “the Supreme Law of the Land.”¹ Despite this clear text, the functional place of international law in domestic law remains a source of significant dispute in the United States. Indeed, the contemporary trend in the United States, particularly in the judicial and legislative branches of government, has been toward increasing skepticism regarding the role of international law in domestic law, most strongly with regard to international human rights protections of individual and group rights.

This Article focuses largely on the “non-use” of international law in U.S. domestic law, particularly in judicial decisions. It first reviews the constitutional provisions relevant to the status of international law in the U.S. legal order and discusses the evolution of the legal doctrine regarding “self-executing versus non-self-executing” treaties, with an eye toward comparative lessons to be drawn from the European Union’s experience with the “direct effects” doctrine of *Van Gend en Loos*. This Article next discusses the use and non-use of customary international law in the domestic law of the United States, particularly via the Alien Tort Statute. Finally, this Article describes and critiques the explicit and implicit reasons for judicial reluctance to incorporate international law into domestic law in the United States in a manner consistent with the text and history of the Constitution and the Alien Tort Statute (“ATS”). The Article argues that the constitutional order of the United States supports

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¹ U.S. CONST. art. VI, cl. 2.

broader and deeper incorporation of international law into domestic law. After analyzing United States decisions, the Article turns to pending proposals to amend French legislation in order to improve French incorporation of the Statute of Rome, as well as to three recent French court decisions, all of which deal with international law in the French domestic legal order. In so doing, this Article seeks to depict both internal domestic diversification of perspectives as well as to draw cautious comparative conclusions concerning current legal approaches in the two countries.

II. Constitutional and Statutory Provisions Relevant to the Status of International Law in U.S. Law

The Constitution's Treaty Clause provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."² The Constitution's Supremacy Clause provides that the Constitution, federal statutes, and "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³ Read together, the text of the Treaty and Supremacy Clauses provide that a treaty becomes fully incorporated into U.S. domestic law at the moment of ratification. The text of those Clauses does not require any further legislative or executive action beyond a treaty's ratification in order to create domestic law. Therefore, the United States is nominally a "monist" legal system.⁴

Longstanding statutory provisions also incorporate international law into domestic law in the United States, including the Alien Tort Claims Act ("ATS") (incorporating the "law of nations"),⁵ the federal habeas corpus statute (incorporating treaties),⁶ and the Uniform Code of Military Justice (incorporating the laws of war,

² U.S. CONST. art. II, § 2, cl. 2.

³ U.S. CONST. art. VI, cl. 2.

⁴ See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987) Various constitutional provisions other than the Supremacy Clause and Treaty Clause also speak to the status of international law in the U.S. legal system. See, e.g., Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 12-33 (discussing, inter alia, the Offenses Clause, the Compact Clause, the war powers clauses, and the Admiralty Clause).

⁵ 28 U.S.C. §1350. See *infra*, Part V, B.

⁶ 28 U.S.C. §2241(c)(3) 2254(a) (writs of habeas corpus may be granted in cases where custody is "in violation of the Constitution or laws or treaties of the United States").

including the Geneva Conventions).⁷ As federal statutes, these provisions do not speak directly to the question of the self-executing status or direct effect of international law in U.S. domestic law, since they represent an intervening legislative step incorporating international law into domestic law. They do, however, serve as further evidence of the longstanding commitment of the U.S. legal order to the incorporation of public international law standards regarding human rights into domestic law, at least nominally.

The bare text of the constitutional and statutory provisions discussed above does not, of course, fully resolve the issue of the status of international law in the domestic law of the United States.⁸ The history and context of these provisions, however, also support a monist stance regarding international law in U.S. domestic law. With regard to constitutional provisions, historical evidence indicates that the Constitution's Framers intended that the United States' approach to treaties would be different from the practice in Great Britain which, at the time, followed a strictly "dualist" approach to international law.⁹ Under the U.S. Constitution, by contrast, the Framers purposefully departed from Great Britain's practices, providing that the President's ratification of a treaty with the Senate's consent would suffice to render a treaty domestic law without further legislative action.¹⁰ Additionally, at the time of the Constitution's ratification, the new country's political leaders repeatedly stated their desire to be seen as a legitimate independent nation in the eyes of the world. The Framers accordingly and repeatedly expressed commitments to join the international legal order. The history and context of the relevant statutory provisions, particularly the ATS, also support this view.

⁷ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the Uniform Code of Military Justice incorporates and makes applicable Common Article 3 of the Geneva Conventions).

⁸ Cf. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37 (1997) ("In textual interpretation, context is everything, and the context of the Constitution tells us . . . to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear").

⁹ See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 865 (1987) (noting that in the United Kingdom, "[t]reaties are . . . international acts rather than laws of the realm, and treaty obligations are enforced in court only as they are enacted or implemented by Parliament"). See also *Medellin v. Texas*, 128 S. Ct. 1346, 1378 (2008) (Breyer, J., dissenting) ("[A]fter the Constitution's adoption, while further parliamentary action remained necessary in Britain [for a treaty to become domestic law], further legislative action in respect to the treaty's . . . provision was no longer necessary in the United States [by virtue of the Supremacy Clause]" (emphasis omitted) (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 275–77 (1796))).

¹⁰ See generally Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (discussing in detail the Framers' views on this subject).

The ATS was adopted concurrently with the nation's founding and reflects similar sentiments that the new nation would be, and be seen as, a legitimate part of the community of nations by providing a cause of action under the "law of nations" and providing the federal courts as a forum for non-citizens to invoke it.

III. Judicial Decisions Regarding the Status of Treaties in Domestic Law

Judicial decisions early in the history of the United States adhered to the monist view. *Foster v. Neilson*¹¹ was the first Supreme Court case explicitly addressing the "non-self-executing treaty" doctrine. *Foster* involved a lawsuit between two individuals regarding ownership of land.¹² The plaintiffs sought to eject the defendant from the land, claiming title to it solely by virtue of a treaty between the United States and Spain.¹³ The Supreme Court therefore had to decide under what circumstances a treaty has direct effect as domestic law.

The *Foster* Court distinguished between a treaty that "operates of itself" (self-executing) versus one that "the legislature must execute" (non-self-executing).¹⁴ The Court began from the presumption that, under the Supremacy Clause, properly ratified treaties have direct effect as domestic law, stating that "[o]ur constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself"¹⁵

The *Foster* Court recognized an exception to the principle that ratified treaties are incorporated into domestic law: where treaty obligations by their specific terms constitute promises of future action by the Legislative or Executive Branches, the act of ratification does render such provisions domestic law for purposes of direct judicial enforcement.¹⁶ In other words, such treaty provisions are promises of future action rather than statements of present legal obligations and therefore would not yet be ripe for judicial enforcement.¹⁷ An example of such a treaty provision can be found in the

¹¹ 27 U.S. (2 Pet.) 253 (1829).

¹² *Id.* at 254-55.

¹³ *Id.* at 255-56.

¹⁴ *Id.* at 314.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The presumption in favor of the direct effect of ratified treaties was seen as so uncontroversial that shortly after *Foster*, Justice Baldwin wrote that "it would be a bold proposition, that an act of Congress must be first passed in order to give [treaties] effect . . . and equally bold to assert . . . that [their]

Torture Convention, which provides that “[e]ach State Party shall ensure that all acts of torture are offences under its criminal law.”¹⁸ Because only Congress and the President have the power to enact criminal laws, such a provision amounts to a promise by the federal government to execute this provision by later domestic action. In other words, this provision of the Torture Convention did not itself make torture a federal crime: rather, it imposes a legal obligation upon the United States, subsequent to ratification, to make torture a crime under federal law.¹⁹

The Supreme Court’s recent decision in *Medellín v. Texas*²⁰ departed substantially from the doctrine of *Foster* and is evidence of the contemporary disfavor of international law in American courts. *Medellín* involved Mexican nationals sentenced to the death penalty in Texas.²¹ Mr. Medellín argued that Texas officials’ failure to inform him of his right to contact the Mexican consulate upon his arrest violated his rights under the Vienna Convention on Consular Relations (“VCCR”).²² While the domestic litigation was ongoing, the International Court of Justice (“ICJ”) issued its decision in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*.²³ *Avena* held that due to the VCCR violations, the affected group of Mexican nationals were entitled to review and reconsideration of their sentences.²⁴ President George W. Bush then issued a legal memorandum stating that the United States would comply with its international

stipulations may be performed or not, at the discretion of Congress.” *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 388 (1840) (Baldwin, J., concurring). There are other situations in which a treaty cannot become effective as domestic law upon ratification despite the Supremacy Clause, however. For example, a treaty cannot become domestic law if it conflicts with the Constitution, either because it infringes upon a constitutionally protected right or because it violates a structural provision of the Constitution. Similarly, a treaty cannot become domestic law where it seeks to accomplish domestic goals that under the Constitution can be accomplished only by statute. Moreover, a treaty’s terms may be sufficiently vague or precatory as to lack the status of law altogether. *See, e.g.*, Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 699–700 (1995).

¹⁸ United Nations Convention Against Torture and Other Cruel, Inhuman

or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 4(1).

¹⁹ To be clear, the promise to make torture a crime is itself legally enforceable in and against the United States. *See generally* William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Treaty Implementation*, 69 MARYLAND L. REV. 344 (2010).

²⁰ 128 S. Ct. 1346 (2008).

²¹ *Id.* at 1353.

²² *Id.* at 1354–55; *see* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

²³ 2004 I.C.J. 12 (Mar. 31).

²⁴ *Id.* at 71–72.

obligations under the *Avena* decision “by having State courts give effect to the decision.”²⁵

When the case reached the Supreme Court, Medellín argued that he was entitled to a review of his sentence based on the *Avena* judgment and the President’s Memorandum implementing *Avena*.²⁶ Medellín argued that, under the Supremacy Clause, the treaties requiring compliance with ICJ judgments had direct effect in U.S. domestic law upon their ratification.²⁷ The Supreme Court disagreed, holding that “neither *Avena* nor the President’s Memorandum constitutes directly enforceable federal law.”²⁸ The Court adopted a strict dualist interpretation of the relationship between international and domestic law, stating that “[n]o one disputes that the *Avena* decision . . . constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts.”²⁹ The Court presumed that most treaties are to be interpreted as non-self-executing unless extraordinarily clear language to the contrary appears in the treaty’s text.³⁰ Because it did not find such language in the treaties at issue in *Medellín*, the Court concluded that those treaties were non-self-executing.³¹ As noted above, however, the non-self-executing treaty doctrine as originally articulated in *Foster* presumes just the opposite. *Foster* held that under the Supremacy Clause, most treaties are presumed self-executing unless clear evidence to the contrary appears in the treaty or in its drafting history.³² Contemporary judicial opinion has shown similar skepticism toward the use of international law via statutory provisions in U.S. law, such as the Alien Tort Statute.

²⁵ Memorandum from President George W. Bush to the U.S. Attorney General, Feb. 28, 2005, 44 I.L.M. 964.

²⁶ *Medellín*, 128 S. Ct. at 1353.

²⁷ *Id.* at 1356.

²⁸ *Id.* at 1353.

²⁹ *Id.* at 1356 (emphasis in original).

³⁰ *Id.* at 1369 (explaining that a treaty should be seen as non-self-executing whenever it was “ratified without provisions clearly according it domestic effect”).

³¹ See *id.* at 1369 (majority opinion) (if the President wants a treaty to “have domestic effect of its own force, that determination may be implemented in mak[ing] the treaty, by ensuring that it contains language plainly providing for domestic enforceability.” (internal quotation marks omitted)).

³² See *supra* notes 12-20 and accompanying text.

IV. The Normative Case Concerning the Use or Non-Use of International law in U.S. Domestic Law

Scholars and judges who are skeptical of the direct effect of international law in U.S. domestic law offer several arguments. The two most substantial arguments are grounded in separation of powers principles and concerns about democratic accountability.

As to separation of powers, opposition to the incorporation of international law into domestic law rests upon the fact that the Constitution reserves the foreign affairs power to the Executive and Legislative branches rather than the judiciary.³³ When the political branches have chosen not to take additional steps beyond ratification to enact a treaty into domestic law, or have not been sufficiently explicit regarding the incorporation of customary international law into domestic law, the argument goes, the judiciary should stand aside.³⁴

The separation of powers argument against the use of international law in U.S. domestic law largely misses the mark. As the Supreme Court has explained, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”³⁵ When a treaty truly involves relations between or obligations among different nations, it may be proper to classify it as dealing with foreign affairs and thereby presume that the decision of whether to abide by the treaty is left to the political branches of government. However, where a treaty’s function is to provide rules of law for each State Party with regard to the treatment of individuals within its own

³³ See, e.g., *Medellin v. Texas*, 128 S. Ct. 1346, 1363 (2008) (“The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided[.]” (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829))); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1962 (1999) (arguing that the Framers intended that “the political branches, rather than the courts, would maintain the discretion to decide how the nation should meet its international obligations”); cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749–50 (2004) (Scalia, J., concurring in part and concurring in the judgment) (arguing that, by applying “the Law of Nations” via the Alien Tort Statute, 28 U.S.C. § 1350 (2006), “unelected federal judges have been usurping [the political branches’] lawmaking power by converting what they regard as norms of international law into American law”).

³⁴ Perhaps in recognition that taking this argument literally with regard to treaties would render the Supremacy Clause a nullity, some scholars have suggested that while treaties are indeed incorporated into U.S. domestic law upon ratification, their resulting status as “supreme law” is limited to binding state court judges to give such treaties precedence only when they conflict with a specific provision of state law. See, e.g., Yoo, *supra* last note, at 1979 (“Including treaties in [the Supremacy Clause] serves the purpose of making clear that treaties are entitled to the same supremacy as constitutional and statutory provisions, when they are enforced by the national government in conflict with state laws.”).

³⁵ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

territory, the treaty no longer is primarily concerned with foreign relations matters delegated solely to the political branches. As discussed in this Article, the Constitution's Framers presumed a judicial role in the enforcement of international legal obligations by drafting the Supremacy Clause and the Treaty Clause to render treaties "supreme law" upon ratification and by drafting the ATS to provide a cause of action to enforce the law of nations.

A separate but related argument concerns skepticism about the putative "democracy gap" that exists when international legal standards have direct effect domestically. On a structural level, because treaty ratification does not involve the House of Representatives, some scholars have argued that treaty obligations should not become domestic law unless the full Congress participates by subsequently passing implementing legislation.³⁶ These formalist concerns about the treaty-making process are easily addressed with a formalist response: to the extent that the Treaty and Supremacy Clause in fact create such a democracy gap, it is a gap countenanced by the Constitution and intended by the Framers.³⁷

Moreover, it is worth noting that the full Congress, if urged by the citizenry, has a variety of tools to ensure that treaties do not have domestic effect even after ratification, such as jurisdiction-stripping legislation or subsequently enacted legislation superseding the treaty's domestic effect. Any of these steps might very well place the United States in violation of its international legal obligation if the treaty at issue requires domestic implementation. Moreover, none of these steps would vitiate the treaty's force as a matter of international law. The point is that at least as to treaties, the people are not left without recourse should they wish to deny the treaty legal force domestically.

Putting aside the formalist argument, the concern about the democracy gap created by giving international law direct domestic effect also has a normative dimension, and one that is admittedly more acute with regard to the ATS. Even if such

³⁶ See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1962 (1999) (stating that "vesting the [treaty] power partially in the Senate and excluding the House threatened to remove the people's most direct representatives from an important lawmaking function").

³⁷ Carter, *supra* note 20 at 359-60 ("The Constitution [itself] provides two different processes for creating supreme domestic law. Federal statutes require bicameralism and presentment; treaties, under the text of the Supremacy Clause and the Treaty Clause, do not.").

direct effect is permitted (and indeed, required) as a constitutional matter, is it wise to allow lawmaking conducted on the international plane to have direct domestic effect without intervening legislative steps that give all of the people's representatives a direct voice in the laws that govern them? This concern is more acute in the context of the ATS, since that statute incorporates the "law of nations" which, as arguably a species of federal common law, takes shape and evolves without any deliberative legislative processes (domestic or international).

V. Two Winding Roads: Direct Effect and Humanitarian Law in the United States and France

A. Backwards Before Forwards

This may be a good starting point for considering the legacy of *van Gend*³⁸ because of how many strands are intertwined in the relevant considerations upon us. Much fraying of once distinct threads is involved, reminding us of Mireille Delmas-Marty's idea that the driving force behind both studying law's internationalization and formulating fruitful paths forward not only is, but should be, to mix everything up, "*tout mélanger*."³⁹

Van Gend's is a two-fold story of both individual and judicial empowerment, but also of many other aspects of law. The remaining Parts of this Article will look at the 2013 U.S. Supreme Court Alien Tort Statute case, *Kiobel v. Royal Dutch Petroleum Co.*,⁴⁰ and three recent French cases,⁴¹ as well as pending, proposed amendments to French domestic criminal procedure law which project to incorporate the Statute of Rome more fully than has yet been done in France's Code of Criminal Procedure,⁴² and indeed would go beyond the Rome Statute as the amendments enter French law.⁴³ In

³⁸ *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 [1963] ECR 1.

³⁹ "*Je mélange tout*." Acceptance speech of WILIG award, American Society International Law, 2012.

⁴⁰ 133 S.Ct. 1659, 569 U.S. – (2013).

⁴¹ No. 11/05331, OLP c/ Société Alstom et Veolia, CA Versailles, 3^e Ch., 22 mars 2013 (« *Alstom* »); CE, Sect., 4 octobre 2012, M. Gilbert B. N° 328502 (« *l'arrêt Baumet* »); Cass. crim., 25 sept. 2012, no. 10-82.938 (« *l'affaire Erika* »).

⁴² *Proposition de loi tendant à modifier l'article 689-11 du code de procédure pénale*. The French Senate voted to approve the measure on February 26, 2013. The National Assembly has not voted to date. French criminal law incorporated the Statute of Rome into its Criminal Code in 2010. See *Loi no 2010-930 du 9 août portant adaptation du droit pénal à l'institution de la Cour pénale internationale*.

⁴³ Beyond it, in the sense that the incorporation of the amendments would allow corporations to be prosecuted by virtue of other provisions of internal French law that render corporations in all respects the

these, we can observe admixtures of public and private, criminal and civil, national and international legal considerations, sometimes re-nationalization as the body national reacts against absorption of foreign substances, and, finally, the need for comparative legal considerations.

B. Categorizing the Alien Tort Statute

Enacted in 1789, the ATS consists of few words: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴⁴ It was a measure intended to grant jurisdiction to the federal courts where the first Congress feared that state courts might thwart the fledgling country’s foreign policy if foreign plaintiffs, particularly diplomatic personnel, brought tort actions in state courts, where juries might be more biased in favor of local defendants.⁴⁵ Essentially unused for its first two hundred years, it found new life in 1980 in *Filaritga v. Pena-Irala*,⁴⁶ in which the Second Circuit held that foreign plaintiffs had pleaded a cause of action under the ATS when they sued a Paraguayan police official who had tortured their son and nephew to death in Paraguay on behalf of the Paraguayan regime. The Second Circuit reanimated the ATS in that case on the view that the “law of nations,” or customary international law, as it is called today, must be understood in its contemporary, not 1789, significance.⁴⁷ For the next thirty years, such foreign-cubed cases proceeded at various appellate levels, with the Supreme Court referring with approval to *Filartiga* in 2004 in *Sosa v. Alvarez-Machain*.⁴⁸

same as individuals under criminal law, while the Rome Statute excludes corporations from its purview. See Alain Anziani, *Proposition de loi tendant à modifier l'article 689-11 du code de procédure pénale relatif à la compétence territoriale du juge français concernant les infractions visées par le statut de la Cour pénale internationale*, 13 fév. 2013, available at <http://www.senat.fr>., see also *infra* notes 78 to 82, and surrounding text. I thank Professor Hervé Ascensio for confirming to me his understanding that the version finally approved by the Senate would not entail any necessary elimination of corporate liability.

⁴⁴ 28 U.S.C. §1350.

⁴⁵ See William S. Dodge, *The Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L. & COMP. L. REV. 221, 226-30 (1996).

⁴⁶ 630 F.2d 876 (2d Cir. 1980).

⁴⁷ *Id.* at 881.

⁴⁸ 542 U.S.692, 725,731 (“the position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga* ...”) (2004).

In 2010, the Second Circuit held in *Kiobel* that corporations were immune from liability under the ATS,⁴⁹ while several other circuits held to the contrary,⁵⁰ and the Supreme Court accepted this issue for review.⁵¹ After an initial oral argument, however,⁵² at which the justices focused intensively on whether the United States was the only state to recognize civil, as opposed to criminal, liability for grave violations of human rights, the Court ordered further briefing and argument on the issue of extraterritoriality. In the end, the majority did not address the issue of corporate liability in its decision. Rather, it categorized *Kiobel* in the *Morrison v. Australian Bank, Ltd.*⁵³ line of jurisprudence that has been rejecting extraterritorial reach for United States statutes, and which explains the presumption against extraterritoriality as follows: "When a statute gives no clear indication of an extraterritorial application, it has none." ⁵⁴ *Morrison*, where the Supreme Court rejected extraterritoriality in a foreign-cubed situation, was a Securities and Exchange Act Section case, entirely based on the implied private right of action that the courts have attributed to Section 10 (b) ⁵⁵ since the 1960s.⁵⁶ In applying *Morrison*, the *Kiobel* majority emphasized the negative impact extraterritoriality might wreak on foreign policy and raised the specter of U.S. legal hegemony, upholding the "presumption that United States law governs domestically but does not rule the world..."⁵⁷

The cases it cited as precedents dealt with United States substantive law.⁵⁸ The Court found that, despite the ATS' creation of a cause of action to enforce certain norms of international customary law, the principles applied in the precedents it cited dealing with United States substantive law statutes also applied to the ATS, and *a fortiori*,

⁴⁹ 621 F.3d 111 (2d Cir. 2010).

⁵⁰ The D.C. Circuit (*Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011)); the Seventh (*Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011)); and the Eleventh (*Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008)).

⁵¹ 132 S. Ct. 472 (2011).

⁵² Feb. 28, 2012, transcript available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf.

⁵³ 561 U.S. – (2010).

⁵⁴ 133 S. Ct. at 1664, citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. - (2010) (slip op. at 6).

⁵⁵ Securities Exchange Act of 1934 §10(b), 15 U.S.C. §78(j) (2000).

⁵⁶ See *Tcherepnin v. Knight*, 389 U.S. 332 (1967); see also *Superintendent of Ins. of N. Y. v. Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9 (1971)

⁵⁷ *Id.*, citing *Microsoft Corp. v. AT&T Corp.* 550 U.S. 437, 454 (2007).

⁵⁸ E.g., *Morrison*, *supra* note 54 (dealing with extraterritorial application of SEC § 10(b), *supra* note [4]; *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (dealing with extraterritorial application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. s. 2000(e) et seq.)

because “in the context of the ATS ... the question is not what Congress has done but instead what the courts may do.”⁵⁹ The majority did not explore the analytical differences that international customary law might suggest as relevant between ATS cases and those it cited as precedents, which involved the extraterritorial application of statutes such as the SEC (*Morrison*) or Title VII of the United States Civil Rights Act (*Aramco*)⁶⁰. By textual definition, however, the ATS substantively does not involve American law, but principles so widely accepted under international customary law and currently interpreted as consisting of such gross violations of human rights as to have become crimes arising from *jus cogens*, that they are subject to universal jurisdiction.⁶¹

Morrison and its ascendancy (*Nicastro*,⁶² et al.) all involved multinational corporations but did not deal with universal human rights. The second generation of ATS cases, starting in the 1990s, while all dealing in universal human rights, had shifted its focus from individual perpetrators of those violations to corporate violators. Thus, by the time of *Kiobel*, the ATS had become primarily, if not almost exclusively, focused on multinational conduct. The *Morrison* line did not involve universal jurisdiction, but the ATS, like the *Morrison* jurisprudence, did implicate multinationals.

⁵⁹ *Kiobel*, 133 S.Ct. at 1664.

⁶⁰ *EEOC v. Arabian American Oil Company* 499 U.S. 244 (1991).

⁶¹ At oral argument, much was made of the issue of the difference between universal jurisdiction accorded under criminal law in other countries versus civil (tort) law under the ATS, see Transcript, *supra* note 52. As I have noted elsewhere, including in an amicus brief to the Court, in my view universal criminal law jurisdiction in civilian legal orders is analogous to universal civil jurisdiction in the United States. For a fuller discussion of this issue, see Vivian Grosswald Curran, *Globalization, Legal transnationalization and Crimes against Humanity: The Lipietz Case*, 56 AMER. J. COMP. LAW 363 (2008); *Brief of Amici Curiae Comparative Law Scholars and French Supreme Court Justice in Support of Petitioners on the Issue of Extraterritorial Jurisdiction*, available at <http://www.chamberlitigation.com/sites/default/files/scotus/files/2012/Comparative%20Law%20Scholars%20&%20French%20Supreme%20Court%20Justice%20Supplemental%20Amicus%20Brief%20in%20Support%20of%20Petitioners%20--%20Kiobel,%20et%20al.%20v.%20Royal%20Dutch%20Petroleum%20REARGUMENT%20%28U.S.%20Supreme%20Court%29.pdf>

On the Court’s insistence that the statutory language be express, it is interesting to contrast with the European Court of justice’s focus on “the subject matter of the treaty and not its wording or institutional functioning” in the context of denying direct effect to WTO obligations. Hélène Ruiz-Fabri, *Is There a Case -- Legally and Politically -- for Direct effect of WTO Obligations?*, *supra/infra* THIS VOLUME, at - -. Similarly, with respect to concluding that a treaty has direct effect, neither the ECJ nor France’s Conseil d’État require that its benefit to individuals be express. See Paul Cassia & Sophie Olivier-Robin, *L’invocabilité limitée des conventions internationales dans la jurisprudence administrative*, 27 SEMAINE JURIDIQUE 1331, 1333 (2012).

⁶² *J. McIntyre Mach, Ltd. v. Nicastro*, 131 S. Ct. 2788 (2011) (plurality opinion).

As the Court defined it, the ATS raises the issue of “*a cause of action under U.S. law ...*,”⁶³ that law being U.S. federal common law,⁶⁴ a law which must not be imposed willy-nilly on states and actions having no nexus with the U.S. According to the Restatement (Third) of Foreign Relations, however, and to the common interpretation of the *Sabbatino* case,⁶⁵ in addition to the constitutional text noted earlier, “customary international law in the United States *is* federal law...”⁶⁶

The United States Supreme Court is not alone in voicing the seemingly inherent paradox of concern that the extraterritorial enforcement even of crimes entitled to universal jurisdiction would endanger foreign affairs or amount to a hegemonic exercise of power. In February of 2013, as France’s Senate voted to adopt a fuller incorporation of the Statute of Rome of the International Criminal Court (“ICC”), the Senate debates made explicit that France’s objective in doing so was to reject any semblance of hegemony, and indeed to act in a spirit of international cooperation as it sought to expand the extraterritorial reach of its law in furtherance of its obligations of complementarity under the Statute of Rome.⁶⁷ To alleviate potential foreign relations difficulties, it also altered the original proposal which would have honored the French legal tradition of victim-triggered criminal pursuits through the *partie civile* mechanism, and, instead, retained prosecutorial control,⁶⁸ albeit with a limited victim right of appeal to the prosecutor.⁶⁹

⁶³ *Id.* at 1666 (emphasis added).

⁶⁴ *See id.* at 1663 (quoting *Sosa*, *supra* note 48, at 732).

⁶⁵ *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962).

⁶⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 Reporter’s Notes 3 (1987) (emphasis added).

⁶⁷ *See Séance du 26 février 2013 (compte rendu intégral des débats)*, available at <http://www.senat.fr>. Another, quite different argument, was put forth forcefully by the President of the (French) National Advisory Commission on Human Rights: namely, to be better in cooperating with the objectives of the ICC and to gain more influence on it, so as to better preserve disappearing civil law influence on the court, such as the tradition of written argumentation, which was succumbing increasingly to encroaching common law influence. *See* Christine Lazerges, *La Cour pénale internationale doit redevenir une priorité pour la France*, 52 SEMAINE JURIDIQUE 17, 19 (2012).

⁶⁸ Retained, because the 2010 incorporation of the Rome Statute was itself a departure from French tradition by placing those crimes under prosecutorial control and eliminating the *partie civile* mechanism. *See* Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l’institution de la Cour pénale internationale.

⁶⁹ Where the prosecutor decides not to pursue an action, the prosecution must at the victim’s request grant the victim a hearing and, if the victim loses on appeal, the prosecution must set forth its reasons in writing. *See id.*

VI. Back and Forth (*Va-et-Vient*): One Case and A Proposed Criminal Code Revision

The original *Kiobel* issue of corporate liability for *jus cogens* crimes as a matter of international customary law arose in a recent French case where the court reached the same conclusion as the Second Circuit.⁷⁰ The Court of Appeals of Versailles held that two French corporations were not liable to the Palestine Liberation Organization and France-Palestine Solidarité for constructing a light rail system in Israel that passed through East Jerusalem. The plaintiffs charged (among others) that the companies had in so doing facilitated Israel's occupation, declared illegal by the United Nations, and that, by virtue of the tramway's having some stops in "occupied territory,"⁷¹ the defendants' actions also constituted violations of *jus cogens* law.⁷² The court found, among others, that customary international law does not recognize corporations as subjects of international law, and specifically rejected as insufficient evidence of widespread understanding or practice of international law the plaintiffs' argument that in the United States the ATS accords civil damages against corporations for such violations.⁷³ Indeed, beyond the Second Circuit, the United States Supreme Court was determined to reject prior ATS practice without proof of widespread evidence of similar practices. At the first oral argument in *Kiobel*, Justice Kennedy had said that, for him, the case turned on whether the United States was the sole country to grant civil damages against corporations for violations of universal human rights.⁷⁴

As of the present writing, however, the French Parliament is seeking to extend the extraterritorial jurisdiction of French courts by amending its 2010 Criminal Procedure Code sections that incorporate the Rome Statute into French law, thereby allowing for the statute's fuller integration into national law.⁷⁵ The proposed amendments eliminate the 2010 habitual domicile requirement for defendants and allow prosecutions against defendants from states which are not signatory to the Rome

⁷⁰ *Affaire Alstom*, *supra* note 41.

⁷¹ The plaintiffs also claimed, *inter alia*, that the French companies were guilty of war crimes under the Geneva Convention by these acts. *See Affaire Alstom*, *supra* note 41.

⁷² *Id.*

⁷³ *See id.* The arguments were made before the U.S. Supreme Court had decided *Kiobel* and the court made no reference to that case.

⁷⁴ *See supra*, note 52.

⁷⁵ *See supra*, note 42. As noted earlier, the Senate has approved these amendments. The National Assembly has not yet voted.

Statute or defendants who committed the violations in non-signatory states. This change would allow, among others, crimes against humanity and war crimes committed during the present conflict in Syria to be prosecuted in France.⁷⁶ They also eliminate the “*double incrimination*” condition that currently requires the act committed to be punishable *both* in France and in the state where it was committed, and they eliminate the requirement that, before proceeding, French courts obtain an ICC decision not to prosecute.

The three above changes reflect three requirements in the 2010 law that were deemed to have been thwarting France in its traditional role as a prime supporter of international human rights, and were known as three of the four “*verrous*” or “locks” preventing its courts from fully implementing the Rome Statute.⁷⁷ It was decided to leave the opening of the fourth “lock” for a future day, after a probation period to test the effectiveness of the first three reforms. The original proposal would, in addition, have allowed victims to resume their traditional role in French criminal law by constituting themselves as civil parties (*parties civiles*) to criminal actions if a prosecutor otherwise would have decided not to pursue the action. The Minister of Justice and others were, however, reluctant to engage France in a situation akin to that in Belgium and Germany during their periods of complainant-controlled universal jurisdiction.⁷⁸ Both of those countries had been overwhelmed by what they experienced as politically embarrassing lawsuits under that mechanism. Each has dealt in its own manner to resolve the situation while maintaining universal criminal jurisdiction outside of its originally envisaged *partie civile* model.⁷⁹

Interestingly, the current proposed French amendments, already approved by the Senate, go beyond the Rome Statute inasmuch as the latter excludes corporations from its purview. This is because under French internal law since 2004, corporations are criminally responsible for all violations of the Criminal Code.⁸⁰ Thus, by extension, corporations can be prosecuted in France for *jus cogens* violations to the extent that

⁷⁶ See Senate debates, *supra* note 43.

⁷⁷ See *id.*

⁷⁸ See *id.* Both countries reformed their laws to modify that aspect of their respective laws. See, e.g., Vivian Grosswald Curran & David Sloss, *Reviving Human Rights Litigation after Kiobel*, AMER J. INT’L. L. (forthcoming, Oct., 2013).

⁷⁹ See, e.g., *id.*, and sources cited therein.

⁸⁰ La loi n° 2004-204 du 9 mars 2004 (JO du 10 mars 2004) (known as the « *Loi Perben II* »).

individuals can. On the other hand, the failure of the *partie civile* amendment will no doubt greatly diminish this effect in practical terms. The *partie civile* mechanism would have allowed civil damages in what the U.S. Supreme Court would call foreign-cubed cases in much like post-*Filartiga*, pre-*Kiobel* plaintiff-triggered ATS cases.⁸¹

VII. *L'Arrêt Baumet* or Struggles in Equilibrium

In his 2011 book on the culture of human rights, Lawrence Friedman maintains that international law for the most part is “powerless rhetoric in the face of national interests.”⁸² Numerous examples can be given of the difficulties international human rights face as those claims are staked through national courts. The interface between national EU member state and European courts (as well as other manners of EU legal imperatives) is of particular interest as the interactions form intricate patterns in the legal and political evolution of European and internal law, or what Joseph Weiler has called Europe’s transformation.⁸³ Recurrent issues arise where direct effect clashes with the reintegration of European norms into national legal systems.⁸⁴

The second French case, *l'arrêt Baumet*,⁸⁵ involves the *Conseil d'État's* decision that a new trial did not have to be given to a French defendant, despite the European Court of Human Rights’ (“ECtHR”) condemnation of France for having denied the defendant a fair trial in a civil case.⁸⁶ The defendant had not had notice of some of the evidence used against him at trial, leading the ECtHR to conclude that France had violated Article 6-1 of the European Convention.⁸⁷ The *Conseil d'État* decided that by forward-looking measures to ensure the problem did not reproduce itself in future

⁸¹ See *Anziani Report*, *supra* note 43, citing the opinion of Mireille Delmas-Marty on the civil liability of corporations that would have ensued from the fourth amendment.

⁸² LAWRENCE M. FRIEDMAN, *THE HUMAN RIGHTS CULTURE: A STUDY IN HISTORY AND CONTEXT* 4 (2011), quoting HELEN M. STACY, *HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY, CULTURE* 29 (2009).

⁸³ J.H.H. Weiler, *The Transformation of Europe*, 100 *Yale L.J.* 2403 (1991).

⁸⁴ André Noellkaemper describes “post-reception domestication.” See André Noellkaemper, *The Rest of the World: Direct Effect and Associated Concepts in Domestic Courts Outside Europe and the U.S.*, *supra*/infra THIS VOLUME; Vivian Grosswald Curran, *Re-Membering Law in the Internationalizing World*, 34 *Hofstra Law Rev.* 93, esp.98-102, 115-123 (2005).

⁸⁵ See *supra* note 41. For an analysis of the case critical of the *Conseil d'État*, see Frédéric Sudre, *À propos de l'obligation d'exécution d'un arrêt de condamnation de la Cour européenne des droits de l'homme*, 2013 *RFDA* 103

⁸⁶ CEDH 24 juill. 2007, no. 56802/00 *Baumet c. France*.

⁸⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

cases, France was in sufficient compliance with its Article 46 duty to apply the ECtHR's decision. The obligation to make restitution in the individual case is porous and fluid in ECtHR jurisprudence, if not occasionally self-contradictory,⁸⁸ and the French court's refusal to grant a new trial to Gilbert Baومت was approved as acceptable by the Committee of Ministers of the Council of Europe.⁸⁹ The *Conseil d'État* reasoned, in contrast to the German Federal Constitutional Court, that even a European court decision cannot undo a French decision that is *res judicata* ("chose jugée").⁹⁰ Sophie Robin-Olivier has raised the issue of a normative standard so porous that compliance may slip into non-compliance.⁹¹

Some are of the view that current French judicial procedures simply are not suited for an era in which the French legal system is no longer self-contained.⁹² Of note in *l'arrêt Baومت* was the *Conseil d'État's* reluctance to be the source creating a new internal method for reviewing a matter *res judicata*, however much such a procedure might be needed in view of its European obligations. Adaptation pains also affect United States courts, but rather in the sense that the common law heritage has produced an underdeveloped art of statutory interpretation, and yet a profusion of statutory law now afflicts judges lacking interpretive methodology. They find themselves devoting increasing time to debating proper hermeneutics with neither confidence nor guidance, in no small part due to the equally significant legislature's lack of statutory interpretation concern in drafting legislation.⁹³

⁸⁸ For an analysis of the Member States' obligations and discretion in this matter, see Serge Slama, *Droit à un procès équitable et exécution des décisions (Art. 6-1 et 46 CEDH): Absence de droit au réexamen de jugements définitifs suite à une condamnation de la France par la Cour de Strasbourg pour violation du droit au procès équitable*, in *Lettre « Actualités Droits-Libertés » du CREDOF*, 16 oct. 2012.

⁸⁹ M. Gilbert B., cons 9, Resolution of 6 June 2012 (closing the investigation of the decision of 24 July 2007).

⁹⁰ For a deeper analysis of the challenges to normative understandings within the EU, and in particular "normative combinations," see Sophie Robin-Olivier, *The Evolution of Direct Effect in the EU: Stockholding, Problems, Projections* [supra/infra THIS VOLUME].

⁹¹ See *id.*

⁹² Pierre-Yves Gautier, *De l'obligation pour le juge civil de réexaminer le procès après une condamnation par la Cour européenne des droits de l'homme*, LE DALLOZ, 2005, no. 40, *chronique*, 2773.

⁹³ See *Remarks at Opening Session (May 20, 2013) by the Honorable Brett M. Kavanaugh*, in THE AMERICAN LAW INSTITUTE REMARKS AND ADDRESSES AT THE 90TH ANNUAL MEETING 1, 11-14 (May 20-22, 2013). The primitive stage of statutory interpretive methodology in the United States is in contrast to the highly developed sophistication of its case law analysis and methodology. The reverse is the situation in France.

VIII. A Study in Contrast: *L’Affaire Erika*

I have left the best case for last. It is the best because it may be said to be the most confusing, or the most emblematic of transnationalizing law. It threads together strands of (1) French statutory law, perhaps shaded with hues of EU law (an ECJ case on the Erika had been decided in the many years between start and finish of the French case), (2) two international treaties, (3) humanitarian imperatives concerning far-reaching environmental catastrophes, (4) the issues of France’s extra-territorial jurisdiction and (5) what at least one scholar has termed a “global approach” to environmental law.⁹⁴ To this must be added a veritable judicial *coup de théâtre* when France’s supreme court of private and criminal law, the *Cour de cassation*, most unusually reached its conclusions in a completely unexpected rejection of its own Advocate General’s opinion, a rare event in French judicial history. Moreover, while *l’affaire Alstom* provides an approach that is reminiscent of the United States Supreme Court’s recent jurisprudence, and *l’arrêt Baumet* suggests ongoing resistance to integrating treaty principles into French domestic law, in *l’affaire Erika*, by contrast, the *Cour de cassation* had an expansive view of its extraterritorial jurisdiction.

The Erika was a Maltese oil tanker carrying fuel oil when it sank in 1999. It caused an environmental disaster on the shores around Brittany. The case involved both civil damages and criminal convictions against, among others, the ship’s charterer, Total International, Ltd. (“Total”), the Panamanian branch of the French company Total. The Paris Court of Appeals had found Total guilty, but the Advocate General of the *Cour de cassation* had concluded that French courts lacked jurisdiction because the oil spill had occurred in an exclusive economic zone. The Advocate General further concluded that Malta would have been the proper forum to hear the case.⁹⁵

⁹⁴ See Karine Le Couviour, *Erika: l’arrêt salvateur de la Cour de cassation*, 47 SEMAINE JURIDIQUE 2095, 2097 (2012).

⁹⁵ The Advocate General’s opinion was highly technical. In a moment of historical irony of which he may not be aware, he is reputed to have said in defense of his opinion, “*le droit reste le droit*” (“the law remains the law” – i.e., no matter how unpleasant its results). *Erika : le droit aura-t-il raison de l’équité?*, in JURIDIQUE, ACTU ENVIRONNEMENT (24 May 2012), available at <http://www.actu-environnement.com/ae/news/Erika-proces-cassation-requisitions-avocat-general-annulation-15742.php4> **A version of that phrase in German** (“*Gestez ist Gestez*” – but admittedly not “*Recht ist Recht*”) became the hallmark of Radbruch and others’ post-war explanation of what had gone wrong during the era of Nazi judicial terror. See generally, Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 CORNELL INT’L L. J. 101(2002), and sources cited therein.

The *Cour de cassation*, in marked contrast to its United States counterpart in *Kiobel*, relied on the spirit of the laws it dealt with, rather than, as a French commentator put it, on an “exegetical interpretation of texts.”⁹⁶ The sources the French high court accepted as compelling, such as the U.N. Treaty on the Law of the Sea, have been rejected by United States federal appellate courts in environmental ATS cases as failing to provide evidence of customary law.⁹⁷ In *l’Erika*, however, the French court was a signatory to the treaty and therefore interpreted its treaty obligations or, more accurately, its treaty limitations and possibilities, not customary international law, as the Court had been doing in *Kiobel*.

One may consider that it is unfair or meaningless to compare the substantive results of these two high courts with respect to their legal conclusions on extraterritorial jurisdiction since their tasks were different, and, as we have seen, since the appellate French court of Versailles treated a customary international law question *grosso modo* similarly to the United States Supreme Court approach in *Kiobel*. On the other hand, the French public, including legal public, considered the *Cour de cassation’s* task in *l’Erika* to be a substantive one of international legal justice, and of the “environmentalisation of law” in a globalized era.⁹⁸ Similarly, in the United States, *Kiobel* was widely viewed as the end of an era in international human rights vindication in the United States. On a methodological level, the interpretive strategies of the high courts of the two countries reflect a turning on the head of the idea that the American judge does not hesitate to create law, while the civilian one adheres to the letter of the text. The *Cour de cassation* in *l’Erika* purposefully went beyond not just the language of the treaty, but the treaty itself, once the Court had determined that it does not bar states from maintaining higher standards than those the treaty embodies. According to de Couviour, this represents a globalistic approach inasmuch as the Court seeks to interpret French law so as to make it a more effective instrument against widespread catastrophic environmental

⁹⁶ *See id.*

⁹⁷ For an account of the continual, failed attempts to use the ATS as an instrument for environmental protection claims, see Vivian Grosswald Curran, *Les mécanismes de compétence universelle au service de la protection de l’environnement*, in Mireille Delmas-Marty & Stephen Breyer, ed.s, REGARDS CROISES SUR L’INTERNATIONALISATION DU DROIT: FRANCE- ÉTATS-UNIS 223-230 (Société de législation comparée, 2009).

⁹⁸ These words are those of a law professor: Valérie Lasserre, *L’affaire du naufrage de l’Erika ou le procès d’une mauvaise gouvernance mondiale*, Le Monde online , 1 June 2012, at Le Monde.fr.

pollutions.⁹⁹ Of course this global approach involves the exercise of extraterritorial jurisdiction to ensure the latter benefits. In *Kiobel*, as Part V, B discussed, the United States Court also evolved a global approach, but insisted that this consists of refraining from treading on the state sovereignty of others, rather than in furthering mutually or globally common human rights concerns.

IX. Conclusion

What does the material presented in this paper signify in terms of underlying contemporary legal trends? *Kiobel*, as well as the *Morrison-Nicastro* line of cases to which the Court linked it analytically, may be interpreted as a rejection of extraterritoriality,¹⁰⁰ or as part of a much larger rejection of judicial empowerment that can be observed over the last decade or so. Ironically, in France, where judicial empowerment has been anathema, at least officially, since the Revolution of 1789, and the epithet of a “*gouvernement des juges*” was given a concrete form of expression through Edouard Lambert’s eponymous book,¹⁰¹ there has been a steady empowerment of the judiciary, albeit also with some inner conflicts and opposition.¹⁰²

Certainly the proposed legislative amendments discussed in this article would empower the French courts to have extraterritorial powers they have hitherto lacked. In the *Alstom* case, we saw a French appellate court restrict its territorial reach in favor of French corporate defendants under the universal human rights claim plaintiffs brought concerning customary international law.¹⁰³ *L’arrêt Baumet* indicates the highest French court’s concern with maintaining national judicial integrity, as it saw it, arguably at the

⁹⁹ *Id.* at 2097.

¹⁰⁰ For this interpretation, see Jodie A. Kirschner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritorialism, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT’L LAW 259 (2012)

¹⁰¹ Édouard Lambert, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LEGISLATION SOCIALE AUX ÉTATS-UNIS. L’EXPERIENCE AMERICAINE DU CONTROLE JUDICIAIRE DE LA CONSTITUTIONNALITE DES LOIS* (1921).

¹⁰² There has in particular been struggle over the last few years concerning the correct application of the *Conseil constitutionnel*’s newly acquired power to review statutes *a posteriori* and concretely, instead of abstractly for preventive purposes before final legislative enactment. While the legislative reforms overtly favor concrete *a posteriori* constitutional review for the *Conseil constitutionnel*, the *Conseil constitutionnel* itself has been, controversially, restricting its own statutory control to decontextualized, abstract review, adhering to longstanding French judicial tradition. For an interesting commentary on the issue of the evolving roles of the legislature and *Conseil d’État*, see Pauline Türk, *Quel rôle pour le Parlement dans le mécanisme dela prioritaire de constitutionnalité?*, 239 PETITES AFFICHES 5 (nov. 2012).

¹⁰³ The plaintiffs in that case also had set forth numerous other claims not discussed in this article. See *Société Alstom*, *supra* note 42.

expense of international harmony.¹⁰⁴ *L'affaire Erika* provides a counterpoint where a French supreme court found a corporation criminally and civilly responsible, upholding its own extraterritorial jurisdiction in order to do so, and interpreting French law so as to maximize environmental goals. It may be necessary for future legislative and judicial events to unfold before we are able to conclude whether, when courts are loathe to embrace extraterritoriality, it is to further international harmony, to protect commercial interests, or, rather, if the judicial reluctance towards self-empowerment may have other causes, whether in the area of international human rights or any other. The answer is likely to be more complex than these binary choices suggest, and may include several of the elements suggested. The two French supreme courts, in expressing different approaches, also were reflecting the particular character of each, revealing contemporary disunity at the national level in French judicial approaches to international law. This disunity corresponds to important ongoing debates within French society. Most importantly, it should be remembered when comparing the cases discussed above, that even the French supreme courts (particularly the *Cour de cassation*) exist in a legal order in which cases are understood as requiring confirmation by multiple similar progeny at the same supreme court level before carrying anything like the precedential weight of a United States Supreme Court case under the imperative sway of *stare decisis*.

As to the incorporation of treaties into domestic law, the trend in the United States is a presumption against such incorporation, at least in cases where a private party seeks to invoke international standards protecting individual rights in judicial proceedings. The reasons for such judicial reluctance are many, but they are all at least formally premised upon the notion that a treaty's force as "real" law is dependent upon a subsequent secondary act of affirmative legislative consent to a treaty having domestic effect. Whatever the normative or prudential arguments in favor of such a dualist legal structure, they are inconsistent with the constitutional order established by the text, history, and structure of the constitution, under which the act of ratification itself

¹⁰⁴ On the French judicial impulse to control domestic law's opening to international law, and the countervailing deference to EU law and judges, see Paul Cassia & Sophie Robin-Olivier, *L'invocabilité limitée des conventions internationales dans la jurisprudence administrative*, 27 SEMAINE JURIDIQUE 1333-1335 (2012).

renders a treaty law, with the concomitant obligation to give the treaty domestic effect where its terms so require.

Looking back to *Van Gend*, we may say that it enshrined a core aspect central to international human rights inasmuch as every empowerment of the individual vis-à-vis law does so. Not every step will be forward and recalibrations are needed to reflect the ongoing equilibrium reached in the juggling of roles among the national, supra- and international, as internal, external and foreign influences increase in prevalence. Perhaps these oscillations, which may seem merely back and forth and back again, are not, as Vladimir Jankélévitch said of those between thought and doubt, mere stirrings in place, but, we may hope, movements of deepening, as time and the law lumber forward.¹⁰⁵

¹⁰⁵ VLADIMIR JANKELEVITCH, LE PARADOXE DE LA MORALE 15 (« *ce mouvement de va-et-vient, qui n'est pas une simple oscillation sur place, mais un approfondissement* »).