law has direct effect under domestic law in terms of being enforceable before national judges (see RTC Art. 240(1), (2)). But, crucially, this lacuna bears no legal significance, as the CCJ has already established that private parties may claim their CARICOM rights directly at the Community level without the exhaustion of local remedies. A unique regime of Community law thus results, with the following key components: direct applicability at the domestic and supranational levels, combined with direct effect and direct access to the Court at the supranational level.

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Sovereign immunity—state-sponsored terrorism—enforcement of judgments—jurisdiction to adjudicate—violation of jus cogens

FLATOW v. IRAN. No. 21946. 99 Rivista di diritto internazionale 293 (2016).
Corte Suprema di cassazione della Repubblica Italiana, October 20, 2015.

On October 20, 2015, the Italian Court of Cassation (Court) refused to enforce[1] a judgment rendered in the United States against the government of Iran and several of its entities under the state-sponsored terrorism exception to the U.S. Foreign Sovereign Immunities Act (FSIA).[2] The Court held that sovereign (or state) immunity does not apply to violations of *jus cogens* norms—such as acts of terrorism in this case—but that, to be enforceable in Italian courts, a foreign judgment must have been based on jurisdictional principles common to Italian law. Because, in the given case, U.S. courts would not have had jurisdiction over the acts in question under Italian law, the U.S. judgment could not be enforced in Italy. The decision marks another round in the ongoing dialogue between the Italian judiciary and the International Court of Justice (ICJ) over the scope of sovereign immunity vis-à-vis *jus cogens*. It also adopts an unduly restrictive approach to the enforcement of foreign judgments.

Alisa Michelle Flatow, an American student from Brandeis University who was studying in Israel, was among eight people killed in a suicide attack on a bus en route to a resort on the Mediterranean Sea on April 9, 1995. A faction of the group Palestine Islamic Jihad (Hamas) claimed responsibility for the attack. The U.S. Department of State had determined by July 1996 that the Islamic Republic of Iran—a designated state sponsor of terrorism since January 19, 1984—had provided approximately $US2 million annually in support of the group's terrorist activities.

In 1997, the Flatow estate (Estate) brought a wrongful death claim in federal court against the State of Iran; the Iranian Ministry of Information and Security; Ayatollah Ali Hoseini Khamenei, the supreme leader; Ali Akbar Hashemi-Rafsanjani, the former president; and Ali Fallahian-Khuzestani, the former minister of information and security (the defendants). The

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[1] Flatow v. Islamic Republic of Iran, Cass., sez. un. civ., 20 ottobre 2015, n. 21946, 99 RIVISTA DI DIRITTO INTERNAZIONALE 293 (2016), *available at* http://www.cortedicassazione.it (follow "SentenzeWeb" hyperlink; then search by case number/year). The references below to the factual portion of the judgment, *Ritenuto in fatto*, are labeled "Facts"; those to the legal considerations, *Considerato in diritto*, simply use the Court's numbering.

[2] Foreign Sovereign Immunities Act, 28 U.S.C. §§1602–11 (2014) [hereinafter FSIA].

claim proceeded under retroactive legislation amending the FSIA that was enacted shortly after the attack, the "terrorism exception" and the "Flatow Amendment."[3] The terrorism exception gave U.S. courts jurisdiction over certain designated foreign states and removed their immunity in connection with specified acts of state-sponsored terrorism. The FSIA defines "foreign State" as including agents and instrumentalities of the state, and thereby reaches all parties named as defendants in the Estate's complaint. The Flatow Amendment made punitive damages available in actions brought under the terrorism exception.

The district court found the application of this provision to extraterritorial conduct proper and held that a foreign state that causes the death of a U.S. citizen through an act of state-sponsored terrorism has sufficient "minimum contacts" with the United States to satisfy due process. The court entered a default judgment on March 11, 1998, of $247,513,220 in favor of the Estate against the defendants jointly and severally for their provision of material support and resources to a terrorist group responsible for the extrajudicial killing of Flatow.[4]

In 2004, the Estate sought to enforce the district court judgment against Iranian assets in Italy and initially obtained an order of recognition and enforcement from the Court of Appeal of Rome. But that order was quashed without prejudice by the Court of Cassation in 2007 for lack of notice to the defendants of the institution of recognition proceedings in Italy (Facts, para. 1.2).[5] The Estate returned to the Rome Court of Appeal for an order of recognition and enforcement, this time presumably having satisfied the process requirements specified by the Court of Cassation (*id.*, para. 1.3). The defendants resisted that effort on the ground that, in the original action, the U.S. district court had lacked jurisdiction by virtue of the defendants' sovereign immunity. The Italian government intervened and also asserted the jurisdictional immunity of the defendants (*id.*).

Meanwhile, since the first decision by the Rome Court of Appeal, the ICJ had rendered its decision of February 3, 2012, in *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, which affirmed the applicability of the jurisdictional immunity of the state in foreign courts regardless of the gravity of the alleged conduct at issue (that is, violations of *jus cogens* norms).[6] The Court of Appeal recalled the 2012 ICJ judgment, which had been formally incorporated into the Italian legal system by Law No. 5/2013.[7] The court determined that, with regard to a procedure for recognition of a foreign judgment, the requested court must examine whether or not it would have granted immunity in adjudging a similar matter, noting that there is no exception to the jurisdictional immunity of the state for claims concerning violations of *jus cogens* norms (Facts, para. 2.2).

Accordingly, the Court of Appeal dismissed the Estate's second application for recognition and enforcement on July 18, 2013, on the basis of the defendants' sovereign immunity (Facts, paras. 2, 2.2). The Estate then appealed that decision to the Court of Cassation, claiming that the Court of Appeal had misapplied Italy's operative jurisdictional statute, as well as Articles

[3] The provisions in question, 28 U.S.C. §§1605(a)(7) & 1605 note (West Supp. 1997), respectively, are currently codified at 28 U.S.C. §1605A (2014).

[4] Flatow v. Islamic Republic of Iran, 999 F.Supp. 1 (D.D.C. 1998).

[5] Cass., sez. un. civ., 22 giugno 2007, n. 14570, *at* http://www.ilcaso.it; *see also* Cass., sez. un. civ., 22 giugno 2007, n. 14571 (applying the same reasoning in parallel proceedings to recognize and enforce the related judgment *Eisenfeld v. Islamic Republic of Iran*, 177 F.Supp.2d 1 (D.D.C. 2000)).

[6] Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), 2012 ICJ REP. 99 (Feb. 3).

[7] Legge 14 gennaio 2013, n. 5, Gazzetta Ufficiale [G.U.] (ser. gen.) Jan. 29, 2013 [hereinafter Law No. 5/2013].

5 and 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property,[8] Articles 7 and 27 of the Rome Statute of the International Criminal Court,[9] Articles 10 and 11 of the Italian Constitution (which provide respectively for conformity with recognized principles of international law and limitations on sovereignty necessary to ensure peace and justice among nations), and the principles of universal jurisdiction as applied under the Italian Code of Civil Procedure (para. 1).

In its appeal, the Estate argued that the issue of jurisdictional immunity should have been raised before the district court to preserve it as a basis for challenging the subsequent recognition and enforcement of that court's judgment (para. 1.1). The Estate further argued that jurisdiction was proper by virtue not only of the FSIA, but also of Italian law embracing principles of universal civil jurisdiction over international crimes, to which the jurisdictional immunity of the state was not applicable (para. 1.2).

The Court of Cassation rejected the Estate's argument that the defendants had effectively waived the jurisdictional issue and were foreclosed from raising it for the first time before Italian courts in a proceeding for recognition and enforcement (para. 3). Even so, the Court found that the jurisdictional immunity of the state did not apply to the defendants in this case, rejecting the *ratio decidendi* of the Rome Court of Appeal (para. 4). The Court of Cassation cited Judgment No. 238/2014 of the Italian Constitutional Court—which held that the jurisdictional immunity of foreign states from civil jurisdiction does not apply in proceedings for *jus cogens* violations (paras. 4–4.1).[10] Lower courts, the Court of Cassation concluded, cannot apply a norm deemed inconsistent with Italian constitutional principles by the Constitutional Court and, moreover, successive rulings by the Court of Cassation had contributed to the emergence of a different principle of customary international law (*id.*).

Thus, according to the Court of Cassation, the jurisdictional immunity of the state is inapplicable where, as in the underlying district court judgment, damages had been sought and awarded as a result of a terrorist attack, which constituted an international crime contravening inviolable human rights (para. 5). The Court went further, noting that the jurisdictional immunity of the state is not a right but a privilege, one that cannot be asserted in the face of *delicta imperii*—crimes committed in violation of international norms of *jus cogens*—as such acts violate universal values that transcend the interests of individual states (*id.*).

Nonetheless, the Court of Cassation considered that the rejection of the application for recognition and enforcement by the Rome Court of Appeal was consistent with Italian law (para. 6). In Italy the recognition and enforcement of foreign judgments requires that the jurisdiction of the foreign court that rendered the underlying judgment be assessed according to principles of jurisdiction under Italian law (para. 6.1). Specifically, because the issue at bar fell outside the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial

[8] UN Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38, Arts. 5, 12 (Dec. 2, 2004) (not yet in force) (definition of immunity and exception for damages, respectively).

[9] Rome Statute of the International Criminal Court, Arts. 7, 27, July 17, 1998, 2187 UNTS 3 (on crimes against humanity and nonimmunity of officials, respectively).

[10] Simoncioni v. Repubblica Federale di Germania, Corte cost., 22 ottobre 2014, n. 238, G.U. (ser. spec.) n. 45, Oct. 29, 2014, I, 1 [hereinafter Judgment No. 238/2014], *translated at* http://www.cortecostituzionale.it/documenti/download/doc/recent-judgments/S238_2013_en.pdf (reported by Riccardo Pavoni at 109 AJIL 400 (2015)).

Matters,[11] jurisdiction under Italian law was to be assessed according to the criteria for determining territorial jurisdiction under the Italian Code of Civil Procedure (paras. 6.2–6.3).

The Court of Cassation found that none of the bases for territorial jurisdiction under Italian law would have entitled the U.S. district court to render the underlying judgment (paras. 6.4–6.5).[12] Territorial jurisdiction would be available over the conduct at issue only where unlawful acts or omissions had occurred, in whole or in part, in the territory of the forum state and the author was present in that territory at the time of the act or omission. Because the default judgment rendered in the United States had been premised on an assertion of extraterritorial jurisdiction that could not have been applied by an Italian court, the Court of Appeal had properly rejected the application for recognition and enforcement even though the defendants were not entitled to immunity.

The Court of Cassation concluded its reasoning by noting that the requirement of a basis for jurisdiction under Italian law was unaffected by Judgment No. 238/2014 (para. 6.6). In the Court's view, the Constitutional Court had based that judgment not on the principle of universal civil jurisdiction for acts *delicta imperii* but, rather, on the inapplicability of the customary international law principle of the jurisdictional immunity of the state in cases concerning compensation for damage by the commission in the forum state of war crimes and crimes against humanity (*id.*). Therefore, where valid jurisdiction exists under Italian law, an Italian court cannot deny its jurisdiction, on the basis of immunity, regarding the acts of a foreign state that constitute war crimes and crimes against humanity (*id.*).

The Court of Cassation corrected the grounds of the judgment of the Rome Court of Appeal as described, compensated both parties for cassation court fees, and further compensated the defendants for the unified contribution due to that appeal (paras. 8–9).

* * * *

Judgment No. 21946/2015 touches on some of the most sensitive issues facing contemporary international law: immunity, jurisdiction, and *jus cogens*. In presenting its decision, the Court of Cassation was right to approach immunity and jurisdiction as distinct issues for, as the ICJ has noted, "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."[13] It was also correct in characterizing the prohibition of terrorism as a norm belonging to *jus cogens*.[14] Nevertheless, the Court of Cassation's treatment of immunity and jurisdiction presents significant doctrinal concerns in the areas of both public and private international law.

The judgment marks the latest volley in the feud between the Italian judiciary and the ICJ over the relationship between *jus cogens* and the jurisdictional immunity of the state. For some time prior to 2012, Italian courts had declined to recognize the jurisdictional immunity of the state in civil

[11] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Consolidated Version), Sept. 27, 1968, *as amended*, 1998 O.J. (C 27) 1.

[12] The Court of Cassation then observed that (a) the FSIA was inconsistent with the jurisdictional criteria of the Italian legal system, (b) the defendants were not represented in the United States, and (c) the conduct at issue occurred entirely outside the United States and was never subject to criminal proceedings before a U.S. court. Para. 6.5.

[13] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3, 24, para. 59 (Feb. 14).

[14] See similarly Réunion Aérienne v. Jamahiriya Arabe populaire et socialiste, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 9, 2011, Bull. civ. II, No. 247 (Fr.), *translated in* 150 ILR 630.

claims arising from violations of *jus cogens* norms, particularly in the context of Nazi atrocities committed on Italian soil during the Second World War. Germany challenged this Italian practice before the ICJ, which, in 2012, affirmed the jurisdictional immunity of the state irrespective of the gravity of the conduct at issue.[15] The Italian parliament responded to this ruling by enacting Law No. 5/2013, which gave effect to the 2012 ICJ judgment and implemented the 2004 UN Convention on Jurisdictional Immunities of States and Their Property.[16] Italian courts subsequently declined jurisdiction in civil proceedings against the state arising from *jus cogens* violations on the basis of the 2012 ICJ judgment and the jurisdictional immunity of the state.

The Italian Constitutional Court put an end to this practice with Judgment No. 238/2014, which held, inter alia, that the constitutional principle of judicial protection of fundamental rights prevents the jurisdictional immunity of the state from barring Italian courts from exercising jurisdiction in civil proceedings for *jus cogens* violations—namely, war crimes and crimes against humanity—which themselves cannot constitute a legitimate exercise of governmental authority.[17] Accordingly, the Constitutional Court found Article 3 of Law No. 5/2013 unconstitutional for barring the jurisdiction of Italian courts in such instances and, for the same reason, declared 1957 legislation executing the UN Charter in Italy unconstitutional with respect to Article 94 of the Charter (requiring compliance with ICJ judgments). The Constitutional Court affirmed these holdings in 2015.[18]

Judgment No. 21946/2015 therefore affirms the Italian judiciary's rejection of the 2012 ICJ judgment and denial of state immunity in civil claims arising from *jus cogens* violations. The Court of Cassation justified this approach here by configuring immunity as a privilege, not a right, under customary international law, and as one that is inapplicable to violations of *jus cogens* because the value of human dignity from which such norms derive transcends sovereignty and the interests of the individual state.

The use of this reasoning to lift the state's jurisdictional immunity, however, is both conceptually problematic and legally unsupported.[19] If the jurisdictional immunity of the state operates at least in part like immunity *ratione personae* to shield the state from the personal jurisdiction of foreign courts as a threshold matter, then conditioning the applicability of immunity upon a subject-matter-based determination of the gravity of the underlying conduct is inconsistent with such immunity.

Nevertheless, the highest courts of Italy have now taken on both the ICJ, by repeatedly rejecting the 2012 ICJ judgment as incompatible with the Italian legal order, and the UN Charter, which under Article 94(1) requires member states to comply with decisions of the ICJ in any case to which they are party. This is not a desirable state of affairs for international law however laudable the motivations. Although the Court of Cassation considered the Italian judiciary to be contributing to the formation of a new principle of customary international law that limits the jurisdictional immunity of the state, the 2012 ICJ judgment makes crystallization of such a contrary norm unlikely in the foreseeable future.

[15] Jurisdictional Immunities of the State, *supra* note 6, at 140–42, paras. 92–97.

[16] Law No. 5/2013, *supra* note 7, Art. 3; UN Convention on Jurisdictional Immunities of States and Their Property, *supra* note 8.

[17] Judgment No. 238/2014, *supra* note 10.

[18] Corte cost., 11 febbraio 2015, ordinanza n. 30, *at* http://www.cortecostituzionale.it.

[19] Thomas Weatherall, Jus Cogens *and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT'L L. 1151, 1207–10 (2015).

The second part of the Court of Cassation's holding in Judgment No. 21946/2015 is no less problematic; namely, that, in a proceeding of recognition and enforcement of a foreign judgment, the foreign court that rendered that judgment must have jurisdiction over the matter by reference to the rules for *Italian* jurisdiction.

Strangely, in this respect the Court of Cassation failed to consider the concept of comity.[20] Though not a legal requirement, comity may be understood as a principle or doctrine of private international law consisting essentially of two elements: (1) maintaining confidence in, and noninterference with, foreign judicial institutions; and (2) granting full faith and credit to the acts of such institutions.[21] Comity can be traced to the origins of the contemporary international legal order, as reflected in Vattel's *The Law of Nations* (1797),[22] and further back to Huber's *Of the Conflict of Diverse Laws in Diverse Governments* (1689).[23] The "comity of nations," as Justice Story famously describes it in his *Commentaries on the Conflict of Laws* (1834), is

> the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and is inadmissible, when it is contrary to its known policy, or prejudicial to its interests.[24]

Importantly, the foundation of comity is respect for the sovereignty of foreign judicial institutions and the jurisdiction exercised thereby.[25]

Rather than consult the doctrine of comity, the Court of Cassation rejected the U.S. district court's jurisdiction in the underlying judgment under the territorial jurisdiction provision of the Italian Code of Civil Procedure, which was made applicable by a default provision of Italian legislation governing the recognition and enforcement of foreign judgments. This approach did not attempt to acknowledge the sovereignty underlying the exercise of jurisdiction by a foreign court, much less respect for its acts, as comity counsels. While the Court of Cassation listed certain aspects of the district court's jurisdiction that it considered to be problematic, it did so in passing, only after applying the Italian Code of Civil Procedure to deny recognition of the judgment. To be sure, international law contemplates universal jurisdiction only over individuals for violations of *jus cogens* norms (international crimes); universal jurisdiction is not analogously recognized over states in proceedings concerning the state's international responsibility for violations of *jus cogens* norms. But the U.S. district court's jurisdiction was not based on such a theory and, even if it were, this rationale would not have sufficed to excuse the Court

[20] *See* Hilton v. Guyot, 159 U.S. 113 (1895).

[21] *See* Adrian Briggs, *The Principle of Comity in Private International Law*, 354 RECUEIL DES COURS 65, 91 (2011).

[22] EMER DE VATTEL, THE LAW OF NATIONS, bk. II, ch. VII, §85 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., 2008) (1797) ("In consequence of these rights of jurisdiction, the decisions made by the judge of the place within the extent of his power, ought to be respected, and to take effect even in foreign countries.").

[23] Ernest G. Lorenzen, *Huber's* De Conflictu Legum, 13 ILL. L. REV. 375, 403 (1919) (translating and quoting Huber: "Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.").

[24] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §38 (Boston, Little, Brown & Co., 5th ed. 1857) (footnote omitted).

[25] Briggs, *supra* note 21, at 149.

of Cassation's treatment of U.S. jurisdiction. Remarkably, as applied to the facts of the underlying case, only a judgment rendered for the Estate by a court with valid jurisdiction over the Gaza Strip could have been recognized and enforced in Italy.

On the one hand, the Court of Cassation's rejection of principles arising from sovereignty is consistent across the Court's treatment of immunity and jurisdiction. The jurisdictional immunity of the state before foreign courts is an outgrowth of sovereignty and the principle *par in parem non habet imperium*: between equals, no power.[26] The Court explained nonrecognition of the jurisdictional immunity of the state in civil claims arising from violations of *jus cogens* norms in relation to the value of human dignity from which such norms derive; on balance, vindication of such norms transcends state sovereignty. Similarly, jurisdiction is a basic exercise of the state's sovereignty, and it is out of respect for sovereignty that foreign judgments are recognized as a matter of comity. Yet when the Court of Cassation reached the question of recognizing and enforcing a foreign judgment, it unceremoniously rejected the exercise of jurisdiction by a U.S. court. As with immunity, the Court of Cassation showed little regard for the sovereignty of another state.

On the other hand, the Court's rationales for disregarding sovereignty vis-à-vis immunity and jurisdiction could not be more different. The nonrecognition of sovereignty in the jurisdiction context was not based upon the same lofty values of human dignity and access to justice that the Court considered in relation to immunity. Instead, it rejected the U.S. district court's jurisdiction by virtue of a default rule of Italian law applicable to foreign judgments that admits only territorially based jurisdiction in such cases.

In *Flatow*, the U.S. district court based its extraterritorial jurisdiction on the terrorism exception to the FSIA, a provision designed to ensure access to justice for U.S. citizens-victims of state-sponsored terrorism—in the first instance, Alisa Flatow. Terrorism, according to Judge Lamberth in *Flatow*, had "achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's *hosti humani generis*—an enemy of all mankind."[27] Thus, the U.S. jurisdictional provision on which the *Flatow* judgment was rendered was based on the very same foundational principles that led the Italian judiciary to reject the application of immunity to such conduct.[28] But when confronted with a judgment arising from that provision, the Italian judiciary rejected the jurisdiction conferred thereby and, in so doing, rigidly exercised its own sovereignty in effect to deny the Estate access to justice for the violation of a norm of *jus cogens*.

Such rejection flies in the face of the very balancing that prompted Italian courts to disregard both an ICJ judgment and Article 94(1) of the UN Charter, as well as to render unconstitutional provisions of Italian legislation implementing them. Curiously, however, the importance of access to justice for *jus cogens* violations evidently did not count for enough in this case for the Court of Cassation to question an exceptionally narrow procedural rule on the recognition and enforcement of foreign judgments at odds with well-established international norms.

[26] Jurisdictional Immunities of the State, *supra* note 6, at 123, para. 57.

[27] *Flatow*, *supra* note 4, at 23.

[28] Indeed, when defending its treatment of Germany before the ICJ, Italy invoked the terrorism exception prompted by the Flatow affair as support for its refusal to grant immunity to Germany. *See* Jurisdictional Immunities of the State, *supra* note 6, at 138, para. 88.

Perhaps the most remarkable aspect of Judgment No. 21946/2015 is the isolation of the Court of Cassation. The Court departed from long-standing principles of customary international law and comity and effectively undermined the very premises—access to justice and vindication of *jus cogens* norms—that the decision purports to champion. And, in so doing, the Court of Cassation simultaneously set itself against lower Italian courts, a U.S. district court, the ICJ, and the Charter of the United Nations. Although Judgment No. 21946/2015 embodies the highest imprimatur of the Italian legal system, it is unlikely to be the final word in the Italian judiciary's efforts to circumscribe the jurisdictional immunity of the state for violations of *jus cogens* norms.

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Australia—migrants—refugees—international refugee law—immigration—offshore detention—human rights—executive power

PLAINTIFF M68/2015 v. MINISTER FOR IMMIGRATION AND BORDER PROTECTION. [2016] HCA 1. *At* http://www.hcourt.gov.au/cases/case_m68-2015.
High Court of Australia, February 3, 2016.

On February 3, 2016, the High Court of Australia upheld Australia's controversial practice of interdicting and transferring asylum seekers to third countries for the processing of their claims.[1] The Court rejected the challenge to the third-country detention scheme primarily on the ground that the government of Australia could not be held liable for the detention policies and programs of the relevant third countries. Although the decision does not expressly address Australia's obligations under the 1951 United Nations Convention and Protocol Relating to the Status of Refugees (Refugee Convention),[2] it is likely to influence other courts confronting similar challenges to offshore detention and processing arrangements and could have far-reaching consequences for the state practice and interpretation of the international law involving refugees and migrants.

Because of the proximity of its outlying islands to Southeast Asia, Australia has long been a popular destination for migrants and human smugglers. In the early 2000s, faced with rising numbers of migrants and asylum seekers, the government adopted the so-called Pacific Solution to regulate migration to Australia. The legislation implementing the Pacific Solution created a category of territory called the "excise offshore place," which includes outlying territories like Christmas Island (only 360 kilometers south of Java). Any alien who unlawfully enters the country through an excise offshore place is deemed an "offshore entry person" and cannot submit a valid visa application absent express authorization from the minister for immigration. The legislation also allows Australia to identify regional processing countries to which offshore entry persons may be redirected.

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[1] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (Austl.) (Feb. 3, 2016), *at* http://www.hcourt.gov.au/cases/case_m68-2015.

[2] Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137, *as amended by* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 UNTS 267.