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Unprotected Ground: The Plight of Vanishing Island Nations

Shaina Stahl*

I. Introduction

Children shriek joyfully as the warm waters of the Pacific Ocean crash over the barrier walls onto the roads and into their neighborhoods. Tidal forces take credit for this recurring ritual, which has been fun and games for the children on the island nation of Tuvalu. However, many of them may not notice that each time the Pacific waters breach the walls, the waves' impact becomes greater—more roads flood, the airport stays closed for longer periods of time, and more homes suffer irreversible damage. Tuvalu is one of the smallest nations in the world[1] and likely produces fewer carbon emissions as a country than most American communities.[2] Despite its small carbon imprint, it may become the first nation to become submerged because of rising global sea levels.[3]

That which is owned by everyone is generally protected by no one.[4] Extinction of many species, increased quantity and intensity of hurricanes, and global sea-level rise are a few of the

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1. *See* Table 3: Population by Sex, Rate of Population Increase, Surface Area and Density, 2008 UN Demographic Y.B. 54, U.N. Doc. ST/ESA/STAT/SER.R./37 (identifying Tuvalu as one of the world's smallest nations).

2. *See* Cinnamon Carlarne, *Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared*, 14 PENN ST. ENVTL. L. REV. 435, 456 (2006) (noting that the U.S. population is only one-twentieth of the world population but accounts for one-fourth of global carbon emissions); *see also* Alister Doyle, *At Risk From Rising Seas, Tuvalu Seeks Clean Power*, REUTERS, Aug. 14, 2009, http://www.reuters.com/article/environmentNews/idUSTRE57D4AC20090814 (stating that a Tuvaluan's individual annual emission is 0.4 tons compared to 20 tons per American).

3. *See* Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 104 (2005) (noting that Tuvalu may become the first populated island to be submersed in the ocean); *see also* Dennis Culley, *Global Warming, Sea Level Rise and Tort*, 8 OCEAN & COASTAL L.J. 91, 94 (2002) (stating scientists' predictions that ocean levels will submerge Tuvalu within 50 years).

4. *See* JAMES Q. WILSON, THE MORAL SENSE 37 (1997) (noting a dispersed sense of personal responsibility toward a victim when responsibility belongs to an entire group); *see also* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE MAG. 1243, 1243– 48 (1968) (positing a proportional correlation between an individual's share of finite resources and his tendency to strive for personal gain without limit).

* **Shaina Stahl graduated with honors in May 2009 from Emory University School of Law with a J.D. and an M.B.A. from the Goizueta Business School. She served on the Executive Board of the EMORY INTERNATIONAL LAW REVIEW as the Business Manager and Web Editor. She is a member of the New York Bar and a member of the Patent Bar. Originally from Hawaii, Shaina received her B.S. in Civil and Environmental Engineering from Carnegie Mellon University in Pittsburgh, Pennsylvania.**

staggering effects global climate change may have on the earth and its inhabitants.[5] This degradation of the environment is a classic example of the "tragedy of the commons."[6] Because this issue touches all nations, the international community must address harmful new aspects of climate change.[7] The United States has attempted through legislation to limit harm from climate change, but overall efforts to combat climate change have been slow to develop because little precedent exists for massive environmental changes.[8] While the media and the scientific community are highly focused on the issue of climate change, the legal realm apparently lacks the attention and resolve to address the problem.[9] The Supreme Court attempted to address, and ultimately was divided over, the issue of whether citizens have standing to sue on issues of climate change.[10] Many meetings, treaties, and lawsuits have highlighted issues of climate change, but the international community must look at these issues comprehensively and prioritize solutions based on urgency and the extent of potential damage to humans and the environment.[11]

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5. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 693, 695–97 (Martin Parry et al., eds. 2007) [hereinafter IPCC CLIMATE CHANGE] (highlighting the dire results of climate change including regional biodiversity loss and extinction of species); *see also* Patrick E. Tolan, Jr., *Homeland Security Challenges of Global Climate Change*, 54 LOY. L. REV. 800, 801 (2008) (underscoring the formidable direct and primary consequences of global warming that now affect the Earth including severe hurricanes, increased sea levels, droughts and flooding).

6. *See* Hardin, *supra* note 4, at 1243 (describing the idea that a shared resource will be exploited by all and protected by none).

7. *See* William D. Nordhaus, *Assessing the Economics of Climate Change: An Introduction in* ECONOMICS AND POLICY ISSUES IN CLIMATE CHANGE 1, 1–11 (William D. Nordhaus ed., 1998) (identifying the need for greater cooperation among nations to "join together" to reduce emissions and combat global climate); *see also* JOINT IMPLEMENTATION TO CURB CLIMATE CHANGE, LEGAL AND ECONOMIC ASPECTS 16–18 (Onno Kuik et al. eds., 1994) (legitimizing climate change as a common concern for all humankind because it not only adversely affects the present generation but also poses an immediate danger to future generations).

8. *See* 7 U.S.C. § 6702 (2009) (codifying the efforts of the United States in addressing and ameliorating the negative impact on agriculture and forestry); *see also* 42 U.S.C. § 7521 (2009) (detailing the United States' Clean Air Act and its efforts to reduce motor vehicle emissions and carbon dioxide levels, which contribute to climate change).

9. *See* CHRISTOPHER FLAVIN & ODIL TUNALI, WORLDWIDE WATCH PAPER 130, CLIMATE OF HOPE: NEW STRATEGIES FOR STABILIZING THE WORLD'S ATMOSPHERE 7–8 (Jane A. Peterson, ed., 1996) (claiming that the reason for the lethargic pace of climate policy change within various nations is caused by hardball politics that affect the legislative processes, specifically highlighting Germany's unsuccessful struggle in changing their climate policy); *see also* Sumudu Atapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive This Onslaught?* 20 COLO. J. INT'L ENVTL. L. & POL'Y 35, 60 (2008) (admonishing the failures in previous governmental polices that attempted to regulate climate change and putting forth the argument that success in this endeavor demands greater changes in each nation's legal policy).

10. *See* Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (holding, by a 5 to 4 margin, that the state and similarly affected individuals had standing to sue the EPA in its capacity as regulator of greenhouse gas emissions).

11. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3. Dec. 11, 1997, 2303 U.N.T.S. 148 (outlining the agreement among the signatories to reduce greenhouse gas emissions by specified amounts); *see also* Randall S. Abate, *Kyoto or Not, Here We Come: The Promises and Perils of the Piecemeal Approach to Climate Change Regulation in the United States,* 15 CORNELL J.L. & PUB. POL'Y 369, 400 (2006) (concluding that despite existing international efforts, the international community agrees that more vigorous steps must be taken to address the potential debilitating effects of climate change); *see also* Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making*, 86 TEX. L. REV. 1837, 1867–69 (2008) (utilizing recent climate change litigation to analyze the effectiveness of tort lawsuits as a means of influencing government policy).

While many of the anticipated consequences of climate change may be devastating, global sea-level rise may potentially affect more people sooner than the international community anticipates.[12] In the short term, 50 million people worldwide may be displaced by climate change effects by sometime in 2010.[13] The long-term outlook is even worse. In Florida alone, 4,315 square miles of land could be underwater with just a 27-inch sea-level rise, which is predicted to occur by the year 2060.[14] More than 1.5 million people live in this area.[15] Applying the Florida scenario to coastal states and islands all over the world, the potential amount of destroyed land is staggering.[16] These areas are home to millions of people who rely on the land for shelter, safety, and their livelihoods.[17] While loss of land will be devastating to all coastal

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12. *See* Kelley M. Jancaitis, *Florida on the Coast of Climate Change: Responding to Rising Seas,* 31 ENVIRONS ENVTL. L. & POL'Y J. 157, 160–61 (2008) (noting that sea levels will continue to rise at an alarming rate, even if immediate steps to significantly curb greenhouse gas emissions are taken); *see also* Michael A. Hiatt, Note, *Come Hell or High Water: Reexamining the Takings Clause in a Climate Changed Future,* 18 DUKE ENVTL. L. & POL'Y F. 371, 376–77 (2008) (postulating that sea levels will rise more quickly than anticipated since the IPCC's projections don't accurately account for current Greenland ice sheet melting rates); *see also* Marguerite E. Middaugh, Comment, *Linking Global Warming to Inuit Human Rights,* 8 SAN DIEGO INT'L L. J. 179, 183 (2006) (acknowledging predictions that sea levels in the 21st century will increase at a rate six times faster than witnessed in the previous century).

13. *See* ELIZABETH A. STANTON & FRANK ACKERMAN, FLORIDA AND CLIMATE CHANGE: THE COST OF INACTION 16, (2007), http://www.ase.tufts.edu/gdae/Pubs/rp/Florida_hr.pdf (acknowledging a report by the International Red Cross stating that climate change may displace 50 million people worldwide by 2010); *see also* Norman Myers, Response, *Environmental Refugees: An Emergent Security Issue,* OSCE Doc. EF.NGO/4/05, ¶ 2 (May 22, 2005) (declaring that the 1995 total of 25 million environmental refugees is likely to double by 2010).

14. *See* STANTON & ACKERMAN, *supra* note 13, at 14–15 (detailing the projected impact a 27-inch rise in sea levels will have on Florida's coastal areas by 2060).

15. *See* STANTON & ACKERMAN, *supra* note 13, at 14; *see also* FRANK ACKERMAN & ELIZABETH A. STANTON, THE COST OF CLIMATE CHANGE: WHAT WE'LL PAY IF GLOBAL WARMING CONTINUES UNCHECKED 8 (2008), http://www.nrdc.org/globalwarming/cost/cost.pdf (illustrating the economic effects of rising sea levels in Florida).

16. *See* STANTON & ACKERMAN, *supra* note 13, at 16 (describing the effect that a three-foot increase in sea level, together with higher temperatures and increased storms, will have on island nations in the Caribbean); *see also* James Painter, *Americas on the Alert for Sea Level Rise*, BBC NEWS, April 8, 2009, http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7977263.stm (asserting that 50 percent of the population of most Caribbean islands could be directly affected by rising sea levels).

17. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 689 (Martin Parry et al., eds. 2007) [hereinafter IPCC CLIMATE CHANGE] (reporting how rising sea levels will ultimately impact the economies of island communities); *see also* Justin T. Locke, *Climate Change-Induced Migration in the Pacific Region: Sudden Crisis and Long-Term Developments*, 175 GEOGRAPHICAL J. 171, 171 (2009) (explaining how rising sea levels may adversely affect health conditions and the availability of food and water in some islands, leaving millions of people displaced); *see also* Charles W. Schmidt, *Keeping Afloat: A Strategy for Small Island Nations*, 113 ENVTL. HEALTH PERSP. A606, A608 (2005) (discussing how millions of people could be potentially displaced and adversely affected by various rising seas).

countries, many small island nations stand to lose even more: their entire territories and their national identities.[18]

Forty-three small island countries are extremely vulnerable to a relatively small rise in sea level and some may effectively end up entirely underwater.[19] Up to 25 million islanders might become refugees as global climate changes cause the sea levels to rise.[20] The future of these people and countries is grim, and the international community's response is far from certain. Despite this looming crisis, no comprehensive international law has emerged to deal with the consequences of submerged island nations.[21]

This article discusses many unique legal issues that will arise from the loss of a nation due to global climate change. It addresses two main questions: First, what will be the status under international law of a sovereign nation once it is submerged? And second, what will be the legal status of the citizens of the submerged nation? Section II provides background on global climate change issues, including scientific scenarios, the formation of international groups and treaties that address this issue, and a discussion of the disproportionate focus of international attention on climate change prevention rather than postdisaster mitigation. Section III discusses international law concepts with respect to state sovereignty and displaced persons. Section IV applies the international law concepts discussed in Section III to the problem of sea-level rise. Finally, this article will recommend methods for handling these issues and states' international obligations to the threatened small island nations.[22]

II. Background of Global Climate Change

This section addresses the current state of scientific knowledge regarding climate change, the effect of climate change on low-lying island nations, and the international organizations formed around climate change. It will also discuss what physical problems will most likely occur due to sea-level rise and which countries are most likely to be affected.

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18. *See* Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, 50 ENV'T 6, 10 (2008) (explaining how small island nations may potentially disappear or become uninhabitable due to rising sea levels); *see also* Wei-Shiuen Ng & Robert Mendelsohn, *The Impact of Sea Level Rise on Singapore*, 10 ENVTL. & DEV. ECON. 201, 201 (2005) (indicating that land loss is one of the most serious effects of rising sea levels on low-lying and small island).

19. *See* IPCC CLIMATE CHANGE 2007, *supra* note 17, at 687 (describing how small islands are vulnerable to rising sea-levels); *see also* Laura Thomas, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design,* 41 COLUM. J. TRANSNAT'L L. 795, 859 n.236 (2003) (acknowledging that the Alliance of Small Island States [AOSIS] is comprised of 42 states in the Pacific, Indian, and Atlantic Oceans that are experiencing similar negative effects of climate change although at different geographical locations).

20. *See* Jessica Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition,* 6 N.Y.U. ENVTL. L.J. 480, 510 (1998) (proposing that the Refugee Convention's definition of "refugees" should be redefined in light of the millions of individuals who will be displaced due to a rise in sea level).

21. The term "submerged nation," for purposes of this article, includes island nations that may have some land above water, but cannot sustain a permanent population.

22. The scope of this article cannot specifically address each country's unique situation. This article will focus on the sovereign island nations that will be completely underwater or uninhabitable due to sea-level rise.

A. Likelihood of Sea-Level Rise and Subsequent Problems; Low-Lying Countries Affected by Sea-Level Rise

Scientists worldwide have synthesized data, made available in The Intergovernmental Panel on Climate Change (IPCC) Assessment Reports.[23] In the Fourth Assessment Report, the IPCC unanimously dispelled previous doubts that recent temperature rise might be due to something other than human activity.[24] While scientists are still modeling the extent of climate change due to human activity and the extent of any forthcoming changes, there is a consensus that devastation will occur in the form of sea-level rise.[25] The future actions of countries will determine precisely how much temperatures will rise.[26] The Fourth Assessment Report of the IPCC projected, with "medium confidence,"[27] that deglaciation will occur, and that an increase in temperature from one to four degrees Celsius (relative to 1990–2000), will result in a contribution to sea-level rise of at least four to six meters.[28]

Low-lying atoll countries are in the greatest danger of losing their land.[29] Many other low-lying countries face the same risk of uninhabitability because most infrastructure exists along

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23. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT: AN ASSESSMENT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 40–41 (Nov. 12, 2007) [hereinafter IPCC, FOURTH ASSESSMENT REPORT] (explaining how the Intergovernmental Panel on Climate Change assesses scientific information related to climate change in order to evaluate its consequences and find a solution).

24. *See id.* (detailing how climate change is primarily a result of human activity); *see also* Alexander Adam, *Technology Transfer to Combat Climate Change: Opportunities and Obligations Under Trips and Kyoto*, 9 J. HIGH TECH. L. 1, 3 (2009) (noting that scientists now agree that the increase in temperature and recent climate change are due to human activity); *see also* Stacey R. O'Neill, Comment, *Consuming for the Environment: A Proposal for Carbon Labels in the United States,* 39 CAL. W. INT'L L.J. 393, 399 (2009) (naming human activity as the cause of climate change).

25. *See* IPCC, FOURTH ASSESSMENT REPORT*, supra* note 23 (explaining that sea-level rise will have detrimental global effects); *see also* Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM L. REV. 1531, 1546 (2009) (noting that sea-level rise could displace coastal inhabitants, destroy fresh water systems, and increase extreme weather).

26. *See* IPCC, FOURTH ASSESSMENT REPORT*, supra* note 23 (describing a number of currently available measures to mitigate climate change); *see also* Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Proposal Is "Best"?*, 102 NW. U. L. REV. COLLOQUY 123, 128 (2007) (asserting that reductions in emissions must be made to limit global temperature rise to under two degrees Celsius).

27. *See* IPCC, FOURTH ASSESSMENT REPORT*, supra* note 23 (noting that the IPCC defines "medium confidence" as a 5 out of 10 chance of being correct).

28. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 17 (Martin Parry et al., eds. 2007) (hereinafter IPCC CLIMATE CHANGE) (purporting that increased temperatures of one to four degrees Celsius will contribute to sea-level rise of at least four to six meters); *see also* K.J.E. Walsh et al., *Using Sea Level Rise Projections for Urban Planning in Australia*, 20 J. COASTAL RES. 586, 589 (2004) (acknowledging a disagreement as to the extent of sea-level rise, but a common agreement among experts that a temperature increase of 0.45 degree Celsius could correlate to a sea level rise of 20 centimeters).

29. *See* Peter Roy & John Connell, *Climatic Change and the Future of Atoll States*, 7 J. COASTAL RES. 1057, 1058–61 (1991) (defining atoll states as islands entirely composed of low-relief coral islands, usually not rising more than three meters above mean sea level, located in tropical ocean waters within a 20-degree latitude off the equator); *see also* G. Robin South et al., *The Global International Waters Assessment for the Pacific Islands: Aspects of Transboundary, Water Shortage, and Coastal Fisheries Issues*, 33 AMBIO 98, 99 (2004) (concluding that Pacific Islands that are entirely coastal, such as low-lying atoll countries, are extremely vulnerable to climate change and sea-level rise).

the coast and on low-lying areas and cannot be relocated because of topography.[30] The risk of land loss facing these countries generates an urgency to create effective international agreements that address the issue of global sea-level rise.[31] Thirty-eight small island states belong to the United Nations,[32] while some small island states are not member nations.[33] While all small island nations share great risks, some are in greater danger of being completely uninhabitable after global sea-level rise.[34]

These countries are at the greatest risk because of their low elevation, the location of their infrastructure, and their lack of resources to move infrastructure to higher ground. For example, Tuvalu is a low-lying country made up of nine coral atolls.[35] It is located in the South Pacific Ocean roughly halfway between Australia and Hawaii.[36] The elevation ranges from sea

30. *See* Nobuo Mimura et al., *Small Islands, in* CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT 687, 700–701 (Gillian Cambers & Ulric Trotz eds., 2007) (noting that coastal populations and infrastructure on inhabited atoll islands in the Pacific and Indian Oceans, as well as the Caribbean, are likely to be seriously adversely affected by changes in sea level); *see also* Kristin L. Marburg, Comment, *2001 Yearbook: Air and Atmosphere: Combating the Impacts of Global Warming: A Novel Legal Strategy*, 2001 COLO. J. INT'L ENVTL. L. & POL'Y 171, 175 (2001) (pointing to Jamaica, Maldives, Ireland, and Tuvalu as those countries that are at serious risk of having rising sea levels affect coastal infrastructure).

31. Of the at-risk island nations, some have protectorate or freely associated status with major nations not in danger of sea-level rise. Other island nations may have an economic relationship with another major nation. Individual laws and agreements of these countries with their protectorate nations may already address some of the citizenship and sovereignty issues. These agreements are not comprehensive solutions to the problems addressed in this article and should be viewed as a foundation for the international community.

32. *See* United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States [hereinafter UNOHRLLS], http://www.unohrlls.org/en/sids/44/ (last visited Sept. 2, 2009) (listing the 38 small island states that belong to the United Nations, including Tuvalu).

33. *See* UNOHRLLS, *supra* note 32 (enumerating the nonmember island nations).

34. *See* Edward Cameron, *The Human Dimension of Global Climate Change*, 15 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 6 (2009) (recognizing that small island nations subject to tropical storms and typhoons, such as the Maldives, are more at risk than other small island nations); *see also* Charlotte De Fontaubert et al., *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 GEO. INT'L ENVTL. L. REV. 753, 822 (1998) (stating researchers' belief that rising sea levels, due to climate change, will cause small islands to vanish or become uninhabitable).

35. *See* Alexander Gillespie, *Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL'Y 107, 113 (2003) (stating that Tuvalu consists of several atolls); *see also* U.S. Department of State Background Note: Tuvalu, http://www.state.gov/r/pa/ei/bgn/16479.htm (last visited September 5, 2009) (describing the number and type of atolls in Tuvalu).

36. *See* THE WORLD ALMANAC AND BOOK OF FACTS (2009) (depicting Tuvalu as midway between Hawaii and Australia, and located in the Pacific).

level to the highest point of only five meters above sea level.[37] Many other countries share a similar elevation profile.[38]

There are a few examples of populations who have already been displaced from their homes, such as the inhabitants of the Carterets in Papua New Guinea.[39] These citizens are among the first to be displaced from an island due to climate change.[40] Even in America, citizens such as those in Kivalina, Alaska, are looking for solutions to their climate change problems.[41]

The affected small island nations are diverse in their cultures and origins. They range in geographical location from the Pacific Ocean to the Indian Ocean, and vary in their peoples, traditions, appearance, and ways of life.[42] In addition to people, these nations vary in their flora and fauna, much of which is unique to the islands and will be forever lost with their submersion. Depending on the elevation of the islands, the location of the fresh water aquifers, and the

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37. *See* CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2008 (United State Government Printing Office 2008) (showing that Tuvalu's lowest elevation is zero meters and its highest elevation is five meters).

38. Kiribati, for example, is a low-lying country made up of 33 coral atolls. It is located in the Pacific Ocean between Hawaii and Australia. *See id.* at 313 (detailing Kiribati, a low-lying country located in the Pacific Ocean between Hawaii and Australia, as a landmass made up of 33 coral atolls whose elevation ranges from 0 meters at its lowest point to 81 meters at the highest point); *see also id*. at 367 (describing Maldives as a country made up of a group of low-lying atolls whose net elevation ranges from 0 meters to only 2.4 meters at the highest point); *see also id*. at 379 (detailing Mauritius, an island country off the eastern coast of Madagascar, as a landmass with elevation from 0 meters to 828 meters); *see also id*. at 386 (describing the Federated States of Micronesia, an island group located in the Pacific Ocean between Hawaii and Indonesia whose net elevation ranges from 0 meters to 791 meters).

39. *See* Susan Glazebrook, *Human Rights in the Pacific,* 40 VICT. U. WELLINGTON L.REV. 293, 331–32 (2009) (discussing the effects global warming and natural disasters like significant loss of landmass that will eventually render some islands like Papua New Guinea uninhabitable); *see also* John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL L. REV. 477, 498 n.118 (2009) (using the forced evacuation of the Carteret Island as an example of a population that needs to relocate as the rising sea levels submerge their island home); *see also* Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231, 258 (2007) (calling the forced evacuees of Carteret "environmental refugee[s]" because the decline in their natural resources and landmass has made the people of the island relocate).

40. *See* The Secretary General, *Report of the Secretary General on Climate Change and Its Possible Security Implications*, 20, U.N. DOC. A/64/350 (Sept. 11, 2009) (explaining that rising sea levels are a security threat to small island states including Papua New Guinea's Carteret Islands, which became the first low-lying islands to evacuate due to climate change); *see also* Aminzadeh, *supra* note 39, at 258 (stating that Papua New Guinea's Carteret Islanders are some the world's first climate change refugees); *see also* Brooke Havard, Comment, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILL. ENVTL. LJ. 65, 73 (2007) (discussing the effects of climate change on small island states particularly the Carteret Islands whose residents have become the first to evacuate because of climate change).

41. *See* Complaint at 2, Maniilaq Ass'n v. Salazar, U.S. Dist. Ct. Pleadings 60322 (D.D.C. 2009) (No. 1:09cv01350-RJL) LEXIS 16373 (demonstrating that flooding and erosion due to climate change have forced Kivalina to take steps to secure the community's safety such as mitigation activities); *see also* Katherine M. Baldwin, Note, *NEPA and CEQA: Effective Legal Frameworks for Compelling Consideration of Adaptation to Climate Change*, 82 S. CAL. L. REV. 769, 770 (2009) (explaining the effects of climate change in Kivalina and how some parties are looking to the courts and environmental protection laws as a means of resolving the problem).

42. *See* 2006 U.N. Demographic Y.B. 58, U.N. Sales No. E/F.09.XIII.1 (illustrating the variance in geography and population of the nations found within the Pacific and Indian Oceans). *See generally* U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, POPULATION DIVISION 2007, at 600, 772 U.N. Sales No. E.07.XII.3 (highlighting the changes in the population range in the various states found in the Indian and Pacific Oceans).

elevation and placement of infrastructure, each of these nations will be affected in different ways.[43] Some states, such as Western Samoa and Tahiti, will require money to rebuild on higher ground.[44] However, some states, such as the Maldives and Tuvalu, will likely be fully submerged and require much more than rebuilding.[45]

B. Current Legal Action and Attention

Many states took responsibility for understanding and mitigating climate change by forming groups, signing treaties, and attending conferences.[46] These efforts focused on understanding the climate situation and on protecting the interests of different nations.[47] Several deliverables of climate change groups address the problems facing small island nations but still focus on future behavior of states to prevent climate change rather than remedies for the resulting damage.[48]

1. The Intergovernmental Panel on Climate Change

The World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) created the Intergovernmental Panel on Climate Change (IPCC) in 1988, which was established to assess relevant scientific information for understanding climate

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43. *See* John Crump, *Environmental Change in Polar Regions: Snow, Sand, Ice, and Sun: Climate Change and Equity in the Arctic and Small Island Developing States*, 8 SUSTAINABLE DEV. L. & POL'Y 8, 9 (2008) (demonstrating the destruction of infrastructure of various small islands affected by climate change); *see also* Yvette Livengood, Book Review, *Learning From Red Sky at Morning: America and the Crisis of the Global Environment: How "Jazz" and Other Innovations Can Save Our Sick Planet*, 82 DENV. U.L. REV. 135, 182 n.345 (2004) (illuminating the effects of rising sea levels due to climate change, thus leading to the contamination of aquifers).

44. *See* David Freestone, *International Law and Sea Level Rise*, *in* INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 117 (Robin Churchill & David Freestone eds., 1991) (explaining the options for countries in response to sea-level change); *see also* ALEXANDER GILLESPIE, CLIMATE CHANGE, OZONE DEPLETION AND AIR POLLUTION 286 (Martinus Nijhoff ed., 2006) (discussing the funding needs for small island nations in response to the sea-level issues associated with climate change).

45. *See* Freestone, *supra* note 44, at 109–10 (explaining the effect of climate change on the Maldives and Tuvalu); *see also* Henry W. McGee, Jr., *A New Legal Frontier in the Fight Against Global Warming: Article: Litigating Global Warming: Substantive Law in Search of a Forum*, 16 FORDHAM ENVTL. LAW REV. 371, 382–85 (2005) (evidencing the effects of rising sea levels on the Maldives and Tuvalu).

46. *See* United Nations Framework Convention on Climate Change art. 2, May 9, 1992, 1771 U.N.T.S. 107 (stating the objectives of the United Nations' efforts to address climate change); *see also* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3. Dec. 11, 1997, 2303 U.N.T.S. 148, 37 I.L.M. 22 (describing the Kyoto Protocol as the first legal means to bind international countries to address the effects of global warming).

47. *See* Kyoto Protocol, *supra* note 46.

48. *See* Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 847–49 (2006) (discussing international risk aversion when dealing with global warming); *see also* Christopher D. Stone, *Beyond Rio: "Insuring" Against Global Warming*, 86 AM. J. INT'L L. 445, 474–75 (1992) (using the ambiguities in global warming predictions to explain the desire to insure and prevent future damage).

change.[49] Because it established consensus from a diverse body of scientists worldwide, it quickly became the leading source of information on the subject; consensus by numerous scientists is convincing, and most states choose to presume the validity of information from the IPCC. [50]

The IPCC is open to all members of either the UN or the WMO.[51] The IPCC publishes assessment reports that reflect the most current knowledge of climate change. The Fourth Assessment Report was released on November 17, 2007, and includes an objective scientific review of the risk of anthropomorphic climate change.[52] The assessment is derived from collaborative, peer-reviewed scientific articles; the IPCC does not perform its own scientific research.

The information in the Fourth Assessment paints a dire picture for small island nations. Chapter 16 of the report, dedicated exclusively to risks for small island nations, includes discussions of current vulnerability, future impacts, options and constraints for adaptation, and research gaps.[53]

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49. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT: AN ASSESSMENT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [hereinafter IPCC, FOURTH ASSESSMENT REPORT] (explaining the establishment of the IPCC and its role in scientific research); *see also* Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 261 (1992) (discussing the establishment of the UNEP and the measures adapted for the UNEP, while also questioning the inefficiencies of the current program).

50. *See* Emily Hammond Meazell, *Scientific Avoidance: Toward More Principled Judicial Review of Legislative Science*, 84 IND. L.J. 239, 247 (2009) (asserting that the IPCC's strict and transparent methodology helps to build consensus in the scientific community).

51. *See* IPCC, FOURTH ASSESSMENT REPORT, *supra* note 49 (stating the organizational principles of the IPCC).

52. *See id.* (identifying environmental risks of global climate change).

53. *See id.*

2. Treaties on Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC), created in 1994,[54] included many countries that promised[55] to address issues of global warming through a two-pronged approach: by attempting to avoid problems not yet imminent and by creating mitigation strategies for the inevitable. At the UNFCCC in 2007, representatives from 180 countries gathered together in Bali, Indonesia, to create a road map for future climate change negotiations.[56] Out of the UNFCCC grew the Kyoto Protocol, which many countries involved in the UNFCCC have ratified as an addition to the UNFCCC.[57]

The Kyoto Protocol is a legally binding international treaty to reduce greenhouse gas emissions. The Protocol was adopted on December 11, 1997, at the Conference of the Parties to the UNFCCC.[58] The Kyoto Protocol and the UNFCCC share the same objectives and parties.[59] Although the UNFCCC encouraged countries to limit greenhouse gas emissions, it was not legally binding; the Kyoto Protocol differs in that it obligates the parties to limit their emissions. The Protocol discloses maximum greenhouse gas emissions that each country must meet, and further requires reductions of at least 5 percent below 1990 levels between 2008 and 2012.[60] The United Nations reviews and enforces these commitments of greenhouse gas reduc-

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54. *See* Kyoto Protocol, *supra* note 46 (outlining the measures necessary in slowing down greenhouse gas emissions and sustainable development); *see also* United Nations Conference on Climate Change in Bali, Dec. 3–15, 2007, *Bali Action Plan Addendum,* pp. 3–7, FCCC/CP/2007/6/Add.1 (March 14, 2008) [hereinafter Bali Conference] (describing the resolutions adopted in Bali that identified key areas in continuing with the policies established by the Kyoto Protocol); *see also* Robert P. McKinstry, *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15, 17–19 (2004) (tracing the creation of the UNFCCC and its objectives).

55. The promise was only "soft law" and was not binding on any of the states. *See* Kyoto Protocol, *supra* note 46 at art. 3 (defining the Kyoto Protocol, its mechanisms, monitoring emission targets, and the road ahead); *see also* Sungjoon Cho, *The WTO's Gemeinschaft,* 56 ALA. L. REV. 483, 536 (2004) (defining "soft law" as a "guideline" or "recommendation," but not a formal treaty and thus technically nonbinding).

56. *See* Bali Conference, *supra* note 54 (describing the Bali road map, which charts the course for a new negotiations process designed to tackle climate change); *see also* Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law,* 49 HARV. INT'L L.J. 323, 359 (discussing the different role, impact, and operation of bilateral and multilateral treaties as structures within the architecture of international law).

57. *See* Bali Conference, *supra* note 54 at 28–36 (acknowledging that despite the accomplishments of past conventions, there is still a great need for developed nations to provide financial and technical assistance to developing nations to meet future goals); *see also* Kevin Healy & Jeffrey M. Tapick, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel—It's a Legal Problem*, 29 COLUM. J. ENVTL. L. 89, 90 (2009) (noting that the issues of climate change affect all individuals and that corporations need to provide assistance in finding a solution instead of exacerbating the situation).

58. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3. Dec. 11, 1997, 2303 U.N.T.S. 148.

59. *See id.*

60. *See id.*

tions.[61] Under the Protocol, developed nations bear a heavier burden than developing nations because they have contributed more to the problem and have a greater ability to pay the cost of reducing emissions.[62] The Kyoto Protocol was the first step in a global agreement to prevent human-induced climate change. Unfortunately, the United States, the largest emitter of greenhouse gases, is conspicuously missing as a party to the Protocol.[63] However, in 2007, 187 countries met in Bali, Indonesia, to strengthen international responsibilities dealing with climate change.[64] The United States was a part of these negotiations and a new treaty that includes the United States should have a stronger global effect on emissions.[65]

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61. Because the emissions reductions in the treaty did not officially start until 2008, the UN has not yet enforced the Protocol. The beginning of Kyoto Protocol enforcement signals the first global effort to reduce emissions. No one is sure what problems will arise, whether the Protocol will work as designed or whether the goals will be successful. Therefore, the next few years should be exciting years for international responses to climate change. *See* Clare Breidenich et al., *Current Development: The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 AM. J. INT'L L. 315, 327 (1998) (discussing the reporting requirements of the UNFCCC, which includes annual inventories and estimations of GHG budgets, and periodic communications detailing information on the parties' enforcement of the Kyoto Protocol); *see also* Council Decision (EC) No. 280/2004 of 11 February 2004, art. 7, 2004 O.J. (L 049) (outlining Article 3(2) of the Kyoto Protocol, which requires parties to the Protocol in Annex I of the UNFCCC to have made significant steps toward accomplishing the requirements under the Kyoto Protocol by 2005).

62. *See* Kyoto Protocol, *supra* note 58, at art. 3.

63. Because the Kyoto emissions targets did not apply to developing nations, particularly heavily polluting ones like China and India, the Senate unanimously agreed that the United States should not ratify the Protocol. *See* S. Res. 98, 105th Cong., 1st Sess. (July 25, 1997) (as passed) (describing that by 2015 China will surpass the United States in the amount of greenhouse gas emissions and that because of the adverse effects on the United States' economy, there is no basis for the Unites States Senate to ratify the Kyoto Protocol). Because the United States, with one-twentieth of the world's population, is the largest emitter of greenhouse gas emissions, the international community, as well as many Americans, have been frustrated that the U.S. government has not been more willing to take responsibility and push to reduce emissions by signing the Kyoto Protocol. The U.S. contributes one-fifth of global greenhouse gas emissions. *See* ELIZABETH A. STANTON & FRANK ACKERMAN, FLORIDA AND CLIMATE CHANGE: THE COST OF INACTION 6 (2007), http://www.ase.tufts.edu/gdae/Pubs/rp/Florida_hr.pdf (explaining that in order to meet goals that would stabilize the global temperature the U.S. would have to reduce its emissions of greenhouse gases by 80 percent by 2050); *see also* Kyoto Protocol *supra* note 58 (outlining the requirements for each party to the Kyoto Protocol to reduce greenhouse gas emissions by the year 2012).

64. In December 2007, the United States was booed at the 13th session of the conference of the parties to the UNFCCC. *See* Press Release, *UN Breakthrough on Climate Change Reached in Bali*, December 15, 2007, http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/.

65. *See* Prasad Sharma, *Restoring Participatory Democracy: Why the United States Should Listen to Citizen Voices While Engaging in International Environmental Lawmaking*, 12 EMORY INT'L L. REV. 1215, 1245 (1998) (describing that on December 10, 1997 the U.S. adopted the Kyoto Protocol at a Conference to the Parties of the FCCC and that the U.S. as a result must reduce the level of greenhouse gas emission to 7 percent below 1990 levels); *see also* Timothy E. Wirth, *Ideas for a New Administration: A Way Forward on Climate Change*, 2 HARV. L. & POL'Y REV. 313, 321 (2008) (discussing the upcoming expiration of the Kyoto Protocol and the need for the United States to ratify the agreement that will replace the Kyoto Protocol).

3. Conferences and Organizations Dedicated to Climate Change Prevention

While member nations took some responsibility for preventing climate change when they signed the Kyoto Protocol, many took further action by participating in conferences and groups dedicated to the prevention of climate change.[66] These states recognize the potential effects of climate change and have worked to gain international consensus on threats and possible solutions.[67] Many conferences that address climate change include discussion of the problem for small island nations.[68] The UN is a driving force that gathers together delegates from many nations and creates understandings and agreements.[69] The UN has also had a hand in follow-through and enforcement of agreed-upon measures.

The United Nations Conference on Environment and Development (UNCED) discussed many issues related to the environment and sustainable development.[70] At a 1992 conference in Rio de Janeiro, Brazil, this group set forth international principles to support sustainable development known as the Rio Principles, or Rio Declaration.[71] Although they extend beyond

66. *See* Anita M. Halvorssen, *The Kyoto Protocol and Developing Countries—The Clean Development Mechanism,* 16 COLO. J. INT'L ENVTL. L. & POL'Y 353, 358–59 (describing actions taken by developing nations in order to curb the effect of climate change on vanishing island nations such as the World Summit on Sustainable Development and the Johannesburg Plan of Implementation); *see also* Heather D. Shumaker, *The Economic Effects of the European Union Carbon Dioxide Emission Quota on the New Member States of the European Union: Can They Become Equal Economic Partners of the European Union While Complying with the 2008–2012 Quota?*, 17 PENN ST. ENVTL. L. REV. 99, 105 (2008) (analyzing the creation of the European Commission Climate Change Programme as the European Commission's approach to emissions reduction and the economic impact of this program on member states).

67. *See* L. Mark Berliner, *Uncertainty and Climate Change*, 430 STAT. SCI. 430, 430 (2003) (illuminating the international scientific consensus regarding the dangers of global warming); *see also* David Narum, *International Cooperation on Global Warming and the Rights of Future Generations*, 26 POL'Y SCI. 21, 24 (1993) (describing how there exists a strong consensus in the international community of the need for action regarding global warming).

68. *See* William C. Burns, *Global Warming—The United Nations Framework Convention on Climate Change and the Future of Small Island States*, 6 DICK. J. ENVTL. L. & POL'Y 147, 165–71 (1997) (discussing the threat of global warming on small island nations).

69. *See* U.N. Charter art. 2, para. 4 (declaring that one of the primary purposes of the United Nations is "to achieve co-operation in solving international problems of an economic, social, cultural, or humanitarian character").

70. *See* United Nations Conference on Environment and Development, June 3–14 1992, *Report of the United Nations Conference on Environment and Development*, ¶¶ 1–27, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992) (listing the principles set forth at the United Nations conference held in Rio de Janeiro in 1992); *see also* Elaine Hartwick & Richard Peet, *Rethinking Sustainable Development: Neoliberalism and Nature: The Case of the WTO*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 188, 199–200 (2003) (discussing the Rio Principles and the role they play in bringing about sustainable development).

71. *See* Adil Najam, *Unraveling of the Rio Bargain*, 21 POL. & LIFE SCI. 46, 46–48 (2002) (outlining the key points that evolved from the U.N. Conference on Environment and Development, which evolved into the Rio Principles on sustainable development); *see also* Charles W. Schmidt, *The Down-to-Earth Summit: Lessening Our Ecological Footprint*, 110 ENVTL. HEALTH PERSP. A682, A683–85 (2002) (claiming that a major milestone for sustainable development occurred in 1992 with the UN-sponsored conference on Environment and Development).

climate change, these international principles can be directly applied to strategies for preventing and mitigating climate change and the submersion of small island nations.[72]

The United Nations Department of Economic and Social Affairs (UNDESA) focuses on the socioeconomic consequences of climate change.[73] It also recognizes the special issues facing small island nations, and has thus developed a Small Island Developing States (SIDS) division.[74] This department has assessed vulnerabilities of SIDS, including submersion, and has proposed mitigating tactics.[75] This includes implementing international follow-up to the Barbados Programme of Action and the Mauritius Strategy.[76]

The Alliance of Small Island States (AOSIS) is a non-UN organization that was formed at the Second World Climate Conference in Geneva in November 1990 so that small island nations could uniformly speak on climate change negotiations and lobbying.[77] Forty-three states currently constitute AOSIS, 37 of which are members of the UN.[78]

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72. *See* Tuiloma Neroni Slade, *The Making of International Law: The Role of Small Island States*, 17 TEMP. INT'L & COMP. L.J. 531, 538–39 (2003) (recognizing the precarious position of small states and their fragile nature, the UNCED responded by developing the Rio Principles as a stratagem to prevent the destruction of these small states due to climate change). *See generally* Shae Yatta Harvey, Comment, *The Vitality of the Rio Declaration in Light of Hardin's Theory of the Commons*, 42 HOW. L.J. 347, 347–48 (1999) (describing the creation of the Rio Declaration as an answer to the global recognition of the damage done to the environment).

73. *See* U.N. DEV. PROGRAMME, WORLD ENERGY ASSESSMENT: ENERGY AND THE CHALLENGE OF SUSTAINABILITY, at vii, U.N. Sales No. E.00.III.B.5 (2000) (identifying the purpose of the United Nations Department of Economic and Social Affairs (UNDESA) to facilitate intergovernmental cooperation in creating policies on sustainable development). *See generally* U.N. DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, WORLD ECONOMIC AND SOCIAL SURVEY 2009: PROMOTING DEVELOPMENT, SAVING THE PLANET at 67, U.N. Doc. ST/ESA/319, U.N. Sales No. E.09.II.C.1 (2009) (reporting a recent UNDESA finding that climate change poses one of the greatest threats to the world's small island states).

74. *See* Small Island Developing States Network: The Global Network for Small Island Developing States, http://www.sidsnet.org [hereinafter Small Island Network] (detailing all aspects of small island developing states from the viewpoint of the UNDESA).

75. *See* Small Island Network, *supra* note 74; *see also* The Secretary-General, *Vulnerability and Adaptation to Climate Change in Small Island Developing States,* ¶ 6, Background Paper (Feb. 2007) (exemplifying that SIDS has made efforts to diagnose and treat the challenges to developing island states); *see also* Anita M. Halvorsen, *The UN General Assembly's Special Session on Small Island Developing States—Sustainable Development in a Nutshell*, 2000 COLO. J. INT'L. ENVTL. L. & POL'Y 113, 122 (2000) (describing efforts by the UNDESA to assess the problems facing SIDS, and discussions on how to fund programs to mitigate environmental damage to those states).

76. *See Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, Annex II ¶ 22, U.N. Doc. A./CONF.207/11 (Feb. 14, 2005) (reviewing the progress of the Barbados Programme of Action and following up on the implementation of sustainable development goals); *see also Report of the Global Conference on the Sustainable Development of Small Island Developing States*, Part One ¶ III.2, U.N. Doc. A/CONF.167/9 (July 7, 1994) (setting out the goals and methods of sustainable development for SIDS).

77. *See* Ben Boer et al., *International Environmental Law in the Asia Pacific, in* INTERNATIONAL ENVIRONMENTAL LAW AND POLICY SERIES 47, at 163 (1998) (stating that the Alliance of Small Island Nations was created to provide unity among the small island nations so that their voices and policies can be heard in the issues that impact them). *See generally* G.A. Res. 45/212, ¶¶ 1–10, U.N. Doc. A/RES/45/212 (Dec. 21, 1990) (identifying the need for an intergovernmental agency that would address the impact of climate change and the needs of small island nations).

78. *See* Slade, *supra* note 72, at 540 (revealing that 37 of the member states of AOSIS are members of the UN).

The Global Conference on the Sustainable Development of Small Island Developing States, held in Barbados in 1994, specifically addressed the challenges of small island nations due to climate change.[79] In 2005, an international meeting to review the implementation of the Programme of Action for the Sustainable Development of Small Island Developing States was held in Port Louis, Mauritius.[80] This meeting resulted in the Mauritius Strategy, a document that integrated different approaches to sustainable development in small island developing states.[81]

The international community's growing recognition of the climate change problem has spurred the formation of groups, conferences, and treaties. In addition, the international action further educates the public. Beginning with the formation of the UNFCCC, states started to take responsibility for climate change. This "soft law" became binding[82] under the Kyoto Protocol, and more treaties are currently being negotiated.[83] These treaty obligations impose costs, which capture the public's attention.[84] While the current treaty obligations will not prevent a

79. *See Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, *supra* note 76 (finding that sustainable development was the right option); *see also Report of the Global Conference on the Sustainable Development of Small Island Developing States, supra* note 76 (recognizing the UN's need to address the adverse effects of climate change on small island states); *see also* Daniel Suman, *Integrated Coastal Zone Management in the Caribbean Region*, 30 U. MIAMI INTER-AM. L. REV. 31, 38 (1998) (examining the initial goals set out by the Global Conference on the Sustainable Development of Small Island Developing States and the results of the conference).

80. *See Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, January 10–14, 2005, Annex I ¶ 1-3, U.N. Doc A/CONF/.207/11 (noting that the purpose of the meeting was to review and reaffirm the participants' commitment to sustainable small island nation development); *see also* Henry W. McGee, Jr., *Litigating Global Warming: Substantive Law in Search of a Forum*, 16 FORDHAM ENVTL L. REV. 371, 383–84 (2005) (acknowledging that the meeting addressed the vulnerabilities of small island nations to negative environmental impact).

81. *See Review of the Programme for Development of Small Island Developing States*, *supra* note 80 (recognizing that climate change and sea-level rise are of vital significance to small island nations); *see also* Susan Glazebrook, *Human Rights and the Environment*, 40 VICT. U. WELLINGTON L. REV. 293, 307 n.80 (2009) (indicating that climate change and associated rises in sea levels were among the issues addressed in the Mauritius Strategy).

82. *See* Christopher C. Joyner & George E. Little, *It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 B.U. INT'L L.J. 223, 246 (1996) (comparing "hard" and "soft" law and noting that "soft" law consists of nonbinding legal norms); *see also* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97 AM. J. INT'L L. 901, 914 (2003) (asserting that nonbinding "soft law" may become incorporated into "hard law").

83. *See* David R. Downes et al., *International Environmental Law*, 43 INT'L LAW. 837, 837 (2009) (reporting that the U.N. Framework Convention on Climate Change adopted several guidelines, known as the Bali Roadmap, to tackle climate change); *see also* David Hunter, *International Climate Negotiations: Opportunities and Challenges for the Obama Administration*, 19 DUKE ENVTL. L.& POL'Y F. 247, 249 (2009) (commenting that the Bali Roadmap was negotiated by the parties to the UN Framework Convention on Climate Change as a means to ensure future binding commitments concerning environmental issues).

84. *See* Noah Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 UCLA L. REV. 837, 883–84 (2008) (stating that low-cost international treaties are often safer for a politician's career when dealing with often fickle public opinion); *see also* Phillip R. Trimble, *Beyond Verification: The Next Step in Arms Control*, 102 HARV. L. REV. 885, 890–91 (1989) (discussing that a high cost or risky treaty is often not the best option when dealing with international policy); *see also* Eric Weiner, *American Conscience Waking Up to Climate Change*, NAT'L PUB RADIO, July 7, 2007, http://www.npr.org/templates/story/story.php?storyId=11787222 (highlighting that high-profile and costly disasters caught public attention).

catastrophe, they represent the start of the cycle of public support and government action.[85] Public support is essential because it puts pressure on the governments to take responsibility to reduce emissions and negotiate international agreements.[86]

III. How International Law Addresses State Sovereignty and Citizenship

This section generally addresses the current state of international law on state sovereignty and citizenship of environmentally displaced persons. The international frameworks for state sovereignty and citizenship discussed in this section will be applied in Section IV specifically to submerged island nations.

There is little law directly on point with respect to the issues of small island nations facing global sea-level rise.[87] While states are aware of the importance of addressing the issues, they must mold and interpret current laws to address their practical impact. The treaties and agreements in this section and Section II show that the international legal community is addressing this issue even though the law is not completely formed.

A. State of International Law on Sovereign Nations

Whether a sovereign island nation will retain sovereignty after submersion depends on the application of international law concepts. The most relevant concepts and theories are: (1) the criteria for the existence of a state; (2) the right to self-determination; (3) the international preference for avoidance of statelessness; and (4) the potential for a government-in-exile.[88] These

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85. *See* Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT'L L.J. 440, 447–48 (1999) (illustrating that the pressure to maintain public support for the treaty made it more likely for NATO to maintain the bombing of Serbia); *see also* Nina E. Bafundo, Note, *Compliance with the Ozone Treaty: Weak States and the Principle of Common but Differentiated Responsibility*, 21 AM. U. INT'L L. REV. 461, 472–73 (2006) (discussing the importance of public support and the capacity of a state to meet the terms of a treaty).

86. *See* Mans Jacobsson, *The International Liability and Compensation Regime for Oil Pollution From Ships—International Solutions for a Global Problem*, 32 TUL. MAR. L.J. 1, 2 (2007) (highlighting that public attention to oil spills led to the development of several treaties); *see also* Brett J. Miller, Note, *Living Outside the Law: How the Informal Economy Frustrates Enforcement of the Human Rights Regime for Billions of the World's Most Marginalized Citizens*, 5 NW. U. J. INT'L HUM. RTS. 127, 151 (2006) (discussing that increasing public attention to violations would cause the government to listen to the voices of the people and enforce its own laws and obligations under the treaties).

87. *See* Pierre-Michael Fontaine, *The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: Evolution and Relevance for Today*, 2 INTERCULTURAL HUM. RTS. L. REV. 149, 162–63 (2007) (illustrating that a number of islands in the Pacific Ocean are in grave danger from rising seas resulting from global warming, and how the international community needs to address these dangers); *see also* Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 726–27 (2008) (explaining that there are no legal remedies or forums for small island nations to turn to as ocean levels rise).

88. *See* D. Van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 14 (1991) (showing that it has been argued that self-determination should be added to the traditional criteria for statehood because it supports the premise of organized government); *see also* Stephen Whinston, *Can Lawyers and Judges Be Good Historians?: A Critical Examination of the Siemens Slave-Labor Cases*, 20 BERKELEY J. INT'L L. 160, 172 (2002) (noting that stateless persons have limited protection under a government-in-exile because its power is limited to other states that recognize it).

four concepts are discussed in this section and are applied to the submersion question in Section IV.

There are over 190 acknowledged sovereign nations,[89] which are defined as a matter of fact, rather than of law.[90] The best-developed understanding of statehood involves the UN criteria for statehood.[91] There are four classical criteria for statehood: (1) defined territory; (2) permanent population; (3) government; and (4) capacity to enter into relations with other states.[92] Sovereignty has always depended on the first criterion—the exercise of control over some area of territory.[93] The amount of territory, however, is not necessarily determinative of statehood.[94] For example, Nauru, a sovereign nation, is only 21 square kilometers.[95] Furthermore, defined borders are not necessary. Many sovereign nations throughout history have had

89. *See* CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2008 (United States Government Printing Office 2008) (acknowledging that there are a total of 266 nations, dependent states, and other sovereign entities).

90. *See* Phil C.W. Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Straight Conflict*, 8 CHINESE J. INT'L L. 455, 455 (2009) (clarifying that a "State in fact" is not a tangible object; rather, it is analogous to a treaty in the sense that a "legal status" is attached to a "certain state of affairs by certain rules"); *see also* David O. Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U J. INT'L L. & POL. 761, 764 (1994) (discussing the declaratory theory of statehood that holds that statehood in fact is a status independent of legal recognition); *see also* F.E. Oppenheimer, *Governments and Authorities in Exile*, 36 AM. J. INT'L L. 568, 570-71 (1942) (explaining that Czechoslovakia was considered a "state in fact" even though it did not have legal recognition from certain nations).

91. *See* U.N. Charter art. 4, ¶ 1 ("Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations").

92. *See* Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097 ("The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."); *see also* Trevor A. Dennis, *The Principality of Sealand: Nation Building by Individuals*, 10 TULSA J. COMP. & INT'L L. 261, 282 (2002) (recognizing that the Montevideo requirements for statehood are a permanent population, a defined territory, effective government, and the capacity to enter into relations with other states); *see also* Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 115 (2002) (stating that the four criteria for statehood under the Montevideo Convention on the Rights and Duties of states are a permanent population, defined territory, government, and the capacity to enter into relations with other states).

93. *See* Montevideo Convention on Rights and Duties of States, *supra* note 92, art. 1; *see also* Peter Thomas Muchlinski, *Globalization and Legal Research*, 37 INT'L LAW. 221, 225 (2003) (affirming that a state's control over some territory is the basis for its sovereign status among other states); *see also* Matthew N. Bathon, Note, *The Atypical International Status of the Holy See,* 34 VAND. J. TRANSNAT'L L. 597, 611–12 (2001) (concluding that no minimal amount of territory is required for statehood).

94. *See* Thomas D. Gant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 436 (1999) (noting a general consensus that no minimum amount of territory is required for the recognition of statehood); *see also* Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan*, 15 AM. U. INT'L L. REV. 1101, 1127–1128 (2000) (examining that the territory requirement for statehood under the Montevideo Convention has been broadly interpreted and does not require any minimum territory); *see also* Dennis, *supra* note 92, at 284 (indicating that the territory requirement for statehood is irrespective of the size, area and extent of the territory).

95. *See* THE WORLD ALMANAC AND BOOK OF FACTS 791 (2009).

ongoing border disputes, but these have not put their sovereignty into question.[96] Therefore, the only condition for territory is whether there is some territory that is effectively governed.[97]

These traditional criteria for statehood are all based on the principle of effectiveness.[98] Historically, however, there have been effective entities that have not been considered states, and noneffective entities are regularly considered states.[99] While effectiveness "remains the dominant general principle . . . there should exist specific, limited, exceptions based on other fundamental principles."[100]

Furthermore, international law understandings exist to determine whether statehood terminates. First, although a state may temporarily lose or change compliance with the criteria for statehood, the state may not become extinct. In general, the loss of territory, even if great, does not affect the stability of the state per se.[101] Additionally, states that have disappeared have been re-established on the same or substantially the same territory.[102] It is sometimes difficult to distinguish between the extinction of a state and the continuation of a state with absorption into

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96. *See* Shen, *supra* note 94, at 1128–29 (stating that unsettled border disputes do not eliminate statehood); *see also* Geoffrey R. Watson, *Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement*, 47 CATH. U. L. REV. 497, 500 (1998) (affirming that border disputes between neighbors do not affect statehood status).

97. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 40 (1979) (declaring that only part of the territory must be effectively governed); *see also* Shen, *supra* note 94 at 1129 (emphasizing that territory must be effectively governed to be a sovereign nation).

98. *See* CRAWFORD, *supra* note 97, at 77 (expressing that the criteria for statehood were based mainly on the principle of effectiveness); *see also* Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 821–22 (2009) (maintaining that the Montevideo criteria are criticized for being based on the principle of effectiveness). *See generally* Jason X. Hamilton, Comment, *An Overview of the Legal and Security Questions Concerning Taiwanese Independence*, 1 LOY. U. CHI. INT'L L. REV. 91, 97 (2005) (defining the principle of effectiveness).

99. *See* CRAWFORD, *supra* note 97, at 77 (noting that Rhodesia and Formosa are examples of effective entities that are not considered to be states, while Guinea-Bissau, before Portuguese recognition, was a noneffective entity that was considered to be a state); *see also* Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131, 147–48 (2005) (quoting an arbitration commission established by the Conference on Yugoslavia that found that the Socialist Federation of the Republic of Yugoslavia no longer existed because the government no longer possessed effective power).

100. *See* CRAWFORD, *supra* note 97, at 40; *see also* Guido Acquaviva, *Subjects of International Law: A Power Based Analysis*, 38 VAND. J. TRANSNAT'L L. 345, 390 (2005) (maintaining that other factors such as responsibility should be used as criteria for international recognition); *see also* Brad R. Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 91, 107 (2009) (claiming that the international community often continues to recognize states that are no longer effective).

101. *See* Draft Articles on Succession of States in Respect of State Property, Archives and Debts, 2 Y.B. INT'L L. COMM'N 1981, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part 2) (listing rules that should govern the relationship between a predecessor state and a successor state that has taken control over a portion of the predecessor state's territory).

102. *See* Henry H. Perritt Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOREIGN AFF. 385, 411 (2003) (suggesting that occupied countries are capable of re-establishing themselves); *see also* Richard Young, Comment, *The State of Syria: Old or New?*, 56 AM. J. INT'L L. 482, 486 (1962) (indicating that the Syrian Arab Republic was considered the same state as the previous Syria).

another state. Nevertheless, the loss of independence uniformly signals the extinction of a state.[103]

Modern developments in international law have complicated the rigid, fact-based determination of statehood and have left the question somewhat more open, particularly with regard to the existence of states.[104] Interpretations of international law concepts can help frame the question of the right of self-determination. The right of self-determination has become a conflict-ridden issue among international law theorists.[105] The existence of a legal right of self-determination would be a significant exception to the idea that the creation of states is a matter of fact rather than law.[106] The UN, in its Declaration of Principles annexed to Resolution 2625 (XXV), dealt with the self-determination issue by stating, "Every State shall refrain from any action aimed at the partial or total disruption of the national unity or territorial integrity of any other State or country."[107]

Further complicating the self-determination issue is *jus cogens*, the concept of "super custom," which is a well-recognized concept without a clear content or application.[108] Self-determination has controversially been suggested as a *jus cogens* norm.[109] *Jus cogens* norms will

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103. *See* KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 589 (1954) (noting that a state's extinction comes at the moment it loses its independence); *see also* HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 87 (AMS Press Inc. 1978) (1947) (asserting that not recognizing a state is the equivalent of questioning that state's independence).

104. *See* CRAWFORD, *supra* note 97, at 80 (attributing the acceptance of *jus cogens*, or imprescriptible and peremptory international legal rules, as a recent development in international law, and its potential relevance to questions of statehood).

105. *See id.* at 84–85 (explaining that the principle of self-determination is the right of a nation to create a state that reflects its identity and interests); *see also* DEON GELDENHUYS, CONTESTED STATES IN WORLD POLITICS 29–35 (2009) (highlighting the numerous changes and different interpretations of self-determination); *see also* JEFFERY DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS 116–123 (2006) (stating that the concept of self-determination has changed significantly with each successive conflict).

106. *See* CRAWFORD, *supra* note 97, at 84–85 (explaining that "self-determination as a legal right or principle would represent a significant erosion of the principle of sovereignty"); *see also* DUNOFF ET AL., *supra* note 105, at 116–17 (noting that a state has the inherent right to defend itself).

107. *See* Declarations of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., 1883d plen., mtg., U.N. Doc. A/RES/25/2625/Annex (Oct. 24, 1970) (identifying self-determination as a principle of statehood); *see also* Major James Francis Gravelle, *Contemporary International Legal Issues—The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5, 42 (1985) (stating that self-determination does not authorize "dismemberment or amputation of sovereign states" and does not apply when "the territorial integrity of a nation" is involved).

108. *See* Christopher Blakesly et al., *Human Rights and Military Decisions: Counterinsurgency and Trends in the Law or International Armed Conflict*, 30 U. PA. J. INT'L L. 1367, 1375 (2009) (asserting that the application of *jus cogen* norms are universal); *see also* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 331 (2009) (stating that *jus cogens* norms supersede treaties and customs).

109. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 81 (1979) (denying the acceptability of self-determination as a *jus cogens* norm since it is already controversial as *jus dispositivum*); *see also* J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151, 189 n.165 (1999) (critiquing self-determination as *jus cogens* due to the relatively little voice given to women as a group in their own self-determination).

invalidate treaties and acts, thereby creating and terminating states that are respectively consistent or inconsistent with those norms.[110]

In cases where a state becomes extinct through succession or other means, international law strongly prefers the avoidance of statelessness.[111] The United Nations Conventions relating to the Status of Stateless Persons and on the Reduction of Statelessness and the Vienna Conventions on Succession of States in respect of Treaties and on Succession of States in respect of State Property, Archives and Debts[112] hinder the international acceptance of an extinction of a state before all citizens can be ensured a nationality.[113] The United Nations Convention on the Reduction of Statelessness does not allow a state to "deprive a person of his nationality if such deprivation would render him stateless."[114] Therefore, although states are allowed to make sovereign decisions related to people in their territory, the absence of nationality is so undesirable that, under these conventions, states cannot remove nationality from a person until he or she has secured membership in another nation.[115]

There is an important distinction between states and the governments of states; the extinction of a sovereign state and extinction of a government are quite different. Government is one of the criteria for statehood, and although the two are intertwined, they remain distinctly sepa-

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110. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 349 (declaring that treaties that conflict with *jus cogens* are per se invalid); *see also* Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 30–31 (2008) (comparing violation of an international law, which doesn't necessarily invalidate a treaty, with violation of a *jus cogens* norm, which does invalidate a treaty).

111. *See* Ilias Bantekas, *Repatriation as a Human Right Under International Law and the Case of Bosnia,* 7 D.C.L. J. INT'L L. & PRAC. 53, 54 (1998) (asserting that multiple international conventions have established preventative measures against statelessness by requiring the establishment of a new citizenship prior to the elimination of the previous nationality); *see also* Yoram Rabin & Roy Peled, *Transfer of Sovereignty Over Populated Territories From Israel to a Palestinian State: The International Law Perspective*, 17 MICH. J. INT'L L. 59, 80 (2008) (stating that international treaties and case law demonstrate a strong preference for the avoidance of statelessness in an attempt to protect human rights).

112. *See* United Nations Convention on the Reduction of Statelessness, art. 8, August 30, 1961, 989 U.N.T.S. 175 (emphasizing the policy against nationality deprivation when such deprivation would result in an individual's statelessness).

113. *See* Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, Preamble, *opened for signature* May 19, 2006, C.E.T.S. No. 200 (opining that it is the responsibility of states to prevent statelessness); *see also* Vienna Convention on Succession of States in respect of State Property, Archives and Debts, art. 15, Apr. 8, 1983, 22 I.L.M. 306 (proclaiming that newly created states cannot violate the people's right to nationality).

114. *See* United Nations Convention on the Reduction of Statelessness, *supra* note 112, at art. 7 (asserting that states cannot deny a person his or her nationality unless he or she obtains another nationality). *See generally* Rabin & Peled, *supra* note 111, at 79–80 (highlighting that the 1961 Convention recognizes the importance of citizenship and the need to maintain citizenship following succession).

115. *See* Christine Biancheria, *Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of Abu-Zeineh v. Federal Laboratories, Inc.,* 11 AM. U. J. INT'L L. & POL'Y 195, 202 (1996) (explaining that international law allows a state's removal of nationality from someone only upon his or her acquisition of another nationality); *see also* Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law,* 19 MICH. J. INT'L L. 1141, 1179–80 (1998) (establishing that no citizen of either contracted or acquired states will become stateless as a result of the acquirement or succession, as mandated in Article 10 of the 1961 Convention).

rate.[116] One can easily see how a state can exist without a government, though a government would likely arise within a short period of time. It is less intuitive to conceive of a government existing without a state. These cases, when a political group claims to be a country's legitimate government but for some reason resides in another country, are referred to as governments-in-exile.[117]

Most states, by policy, recognize other states rather than governments.[118] However, a state may recognize a government-in-exile as the legitimate government of a state. These governments are still considered sovereign and receive the same treatment and recognition as a state.[119] Therefore, a government-in-exile represents a country when other countries recognize

116. *See* J.P. Nettl, *The State as a Conceptual Variable*, *in* THE STATE: CRITICAL CONCEPTS 9, 16 (John A. Hall ed., 1994) (noting that there are differences between a state and a state government); *see also* Rachel Brewster, *Unpacking the State's Reputation,* 50 HARV. INT'L L.J. 231, 255 (2009) (indicating that states are ongoing institutions based on traditions and rules, which differ from the governments of these states); *see also* Nurhan Sural, *Islamic Outfits in the Workplace in Turkey, a Muslim Majority Country,* 30 COMP. LAB. L. & POL'Y J. 569, 572–73 (2009) (distinguishing states from governments by defining "State" as a "bureaucratic hegemony" and "government" as "the governing party surrounded by the bureaucratic hegemony").

117. *See* Edward Collins, Jr. & Timothy M. Cole, *Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide,* 5 D.C.L. J. INT'L L. & PRAC. 199, 201 (1996) (providing that a "government-in-exile" is a group of individuals who assert themselves as the ruling government of a state while residing in another state); *see also* Jonathan E. Hendrix, Note, *Law Without State: The Collapsed State Challenge to Traditional International Enforcement,* 24 WIS. INT'L L.J. 587, 593 (2006) (defining "government-in-exile" as a government created within a state and subsequently relocated to a foreign state); *see also* Symposium, *Constitutionalism before Constitutions: Burma's Struggle to Build a New Order*, 87 TEX. L. REV. 1657, 1673 (2009) (noting that the National Coalition Government of the Union of Burma, often referred to as a government-in-exile, currently resides in Washington D.C.).

118. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 203(1) (1987) (stating that a "state is not required to accord formal recognition to the government of another state, but is required to treat as the government of another state a regime that is in effective control of that state[.]"); *see also* STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW 13 (1998) (stating that recognition of Haiti's Aristide government was an exception to a rule that states recognize only other states) *see also* Hungdah Chiu, *The International Law of Recognition and the Status of the Republic of China*, 3 J. CHINESE L. 193, 195 (1989) (declaring that it is not necessary for a state to recognize the government of another state).

119. *See* State of the Netherlands v. Fed. Reserve Bank of N.Y., 99 F. Supp. 655, 660 (D.C.N.Y. 1951) *aff'd in part, rev'd in part on other grounds*, 201 F.2d 455 (2d Cir. 1953) (holding that the standard of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 203(1) (1987) should be applied to the Netherlands' government-in-exile); *see also* Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 170 (2002) (explaining that a government in exile still rules the state, even if the government has lost effective control).

its ability to do so.[120] A state may exercise sovereignty only inside territory occupied by its people.[121] However, enemy forces sometimes take over territory and force a state's government-in-exile to remain in the territory of a friendly nation.[122] In this case, the government-in-exile retains "the only exercise of sovereign power left to the people of the country and is the only agency representing the country with which a foreign government can deal."[123]

This acknowledgment of sovereignty and recognition allows a government to act as a state with regard to entering into foreign relations with other states, protecting the interests of their nationals, and exercising sovereign power over tangibles that have the character of national territory, such as vessels, even in the absence of territory.[124] Consequently, a recognizable entity consisting of a government, a population ruled by the government, and the ability of the government to enter into relations with other states can exist, meeting all of the criteria of statehood except for territory.[125]

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120. *See* Fang v. Kennedy, 317 F.2d 180, 185 (1963) (reporting that governments in exile have the ability to exercise sovereign power); *see also* Sloane, *supra* note 119, at 171 (affirming that governments in exile with corresponding states can still serve some of the same functions as a sovereign state).

121. *See* Sloane, supra note 119, at 170–71 (asserting that although exiled governments cannot assert any sovereign power over their territory, they are able to maintain some degree of sovereignty by performing such acts as maintaining an army, controlling national assets located outside of the occupied territory, and governing nationals in exile); *see also* Carey James, Comment, *Mere Words: The "Enemy Entity" Designation of the Gaza Strip*, 32 HASTINGS INT'L & COMP. L. REV. 643, 656 (2009) (claiming that because Israel occupies the Gaza Strip, Palestine is not able to exercise sovereign power over the territory).

122. *See* Anderson v. N. V. Transandine Handelmaatschappij, 28 N.Y.S.2d 547, 550 (N.Y. Sup. Ct. 1941) (noting that the Royal Netherlands government, which was operating out of London due to the German occupation, was recognized by the governments of the United States and Great Britain as the official government of the Kingdom of Netherlands); *see also* HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 91 n.1 (1978) (explaining that the governments of Holland, Greece, Norway, Poland, Belgium, Yugoslavia, and Luxemburg established themselves in Great Britain after being exiled during World War II).

123. *See Fang*, *supra* note 120, at 185 (affirming a judgment to deport Chinese citizens who left China before the Communist government sent the Nationalist Chinese government into exile); *see also* Ying v. Kennedy, 292 F.2d 740, 743 (D.C. Cir. 1961) (holding that Hong Kong was a country for the purposes of deportation); *see also* F.E. Oppenheimer, *Governments and Authorities in Exile*, 36 AM. J. INT'L L. 571 (1942) (noting that recognition of the Czechoslovakian government was in line with the principle that occupation does not disrupt sovereignty).

124. *See Fang*, *supra* note 120, at 185 (noting that governments-in-exile exercise power not only over their citizens, but over vessels flying their flag).

125. *See* Brad R. Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 91, 97 n.13 (2009) (stating that "[p]recise delineation of the boundaries of citizenship and territory has not been deemed an essential prerequisite to recognition of statehood"). *But see* Estates of Ungar v. Palestinian Authority, 315 F. Supp. 2d 164, 179 (D.R.I. 2004) (holding that the Palestinian Authority is not a state because it does not control territory).

Section IV will apply these concepts of existence of a state, self-determination, avoidance of statelessness, and government-in-exile to the question: What will the sovereign status of a state be after it submerges due to sea-level rise?

B. State of International Law on Displaced Citizens

The protection given to environmentally displaced persons from sea-level rise depends on international laws designed to protect displaced persons.[126] Unfortunately, neither the refugee convention nor complementary protection measures adequately address the protection of these people.[127] Section IV will further explain why environmentally displaced persons have no protection even though they should arguably have more protection due to the extent of devastation.

Global climate change affects more than sea-level rise by modifying environmental conditions all over the world.[128] Environmental stresses such as severe droughts, floods, and hurri-

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126. *See* Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment,* 2001 COLO. J. INT'L ENVTL. L. & POL'Y 1, 25 (2001) (explaining that international law has recognized the necessity of protecting human rights and the environment with the drafting of conventions and treaties that have helped protect against environmental damage and the people living in those environments); *see also* Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231, 259 (2007) (stating that international human rights law may provide protection for environmentally displaced persons when environmental treaties fail to do so); *see also* Brooke Havard, Comment, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILL. ENVTL. L.J. 65, 77 (2007) (asserting that the African Union Convention and the Cartagena Declaration's definition of a refugee may be interpreted to include environmentally displaced persons).

127. *See also* Aurelie Lopez, *The Protection of Environmentally Displaced Persons in International Law,* 37 ENVTL. L. 365, 386 (2007) (positing that the Refugee Convention requires a refugee to be outside his or her country of origin; therefore, people who are internally displaced for environmental reasons are excluded from the definition under the Convention); *see also* David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees,"* 16 GEO. INT'L ENV. L. REV. 209, 217 (2004) (asserting that the United Nations High Commissioner for Refugees defined displaced persons as any person or group that has breached an international border; however this would not apply to environmentally displaced persons or provide status that confers obligations on states); *see* Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection,* 94 IOWA L. REV. 1107, 1113–14 (2009) (explaining that the Refugee Convention provides protection for displaced persons, but does not extend to protect environmentally displaced persons because the Convention focuses on people subject to political, religious, racial, and social persecution);

128. *See* Oli Brown, *Migration and Climate Change*, 31 MIGRATION RES. SERIES 16 (2008) (indicating that climate change will lead to a change in rainfall patterns and a more intense hydrological cycle leading to extreme weather events such as droughts, storms, and floods); see *also* Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 352 (2009) (noting that the Deputy High Commissioner for Human Rights projected that by 2050, hundreds of millions more people may become permanently displaced due to rising sea levels, droughts, hurricanes, increased desertification, famines, and the alteration of ecosystems).

canes have, in the past, displaced people from their homes.[129] Each state attempts to deal with its internally displaced persons in different ways, and, in some instances, states have asked the international community to provide relief and shelter to these displaced people.[130] However, the current framework in international law is unclear on the degree or type of protection to be afforded to environmentally displaced persons.[131]

The degradation of currently livable land into uninhabitable terrain remains the focus of scientists, while international human rights law focuses on peoples' right to a dignified life.[132] However, these two schools of thought have not been combined to focus on the scientific and human rights aspects of environmentally displaced people.[133] The current definition of a refugee does not literally include environmentally displaced persons, and existing forms of complementary protection also fail to properly address environmentally displaced persons.[134] Although environmental trends and climate change should focus on assisting forced environmental

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129. *See* Lopez, *supra* note 127, at 369 (listing natural disasters, such as floods and hurricanes, as one category of environmental disasters that cause populations to flee); *see also* Keane, *supra* note 127, at 211 (illustrating the extent to which natural disasters displace populations as compared to internal or external conflicts); *see also* Jenty Kirsch-Wood et al., *What Humanitarians Need to Do*, 36 FORCED MIGRATION REV. 40, 40 (Oct. 2008) (identifying instances of population displacement because of natural disasters).

130. *See Burma in the Aftermath of Cyclone Nargis: Death, Displacement, and Humanitarian Aid: Hearing Before the Subcommittee on Asia, the Pacific, and the Global Environment*, 110th Cong. 2d sess. (2008) (highlighting the international community's pledge to provide $60 million in aid to rebuild after the devastation in Burma caused by Cyclone Nargis); *see also* Camillo Boano et al., *Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration*, FORCED MIGRATION POLICY BRIEFING 1 (Nov. 2008) at 24–25 (discussing international agreements and UN involvement in accepting and aiding environmentally displaced persons out of duty, including possibly redefining "refugee"); *see also* John Solomon & Spencer Hsu, *Most Katrina Aid from Overseas Went Unclaimed*, WASH. POST, Apr. 29, 2007 at A1 (stating that the international community offered $854 million in relief monies for the displaced victims of Hurricane Katrina).

131. *See* Falstrom, *supra* note 126, at 2 (explaining that simply moving environmentally displaced persons is not a solution and that a new system of protecting these persons must be implemented); *see also* Aminzadeh, *supra* note 126, at 257–58 (discussing the possibility that a new Convention to Protect Environmentally Displaced Persons might follow the Convention Against Torture as a model in providing protection); *see also* Keane, *supra* note 127, at 217 (maintaining that because the definition of "environmentally displaced persons" is not recognized by international law, states are not obligated to protect displaced persons).

132. *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 89 (2005) (stating that international human rights law recognizes human freedom and dignity and ensures that harms violating human rights norms are remedied).

133. *See* Boano et al., *supra* note 130, at 5 (arguing that addressing the problem of increasing environmental displacement requires creating a policy framework that incorporates scientific and academic research and questions of humanitarian protection and global humanitarian interests).

134. *See* Benjamin Glahn, *"Climate Refugees"? Addressing the Legal Gaps*, INT'L BAR ASSOC., Aug. 2009, ¶ 5-8 http://www.ibanet.org/Article/Detail.aspx?ArticleUid=B51C02C1-3C27-4AE3-B4C4-7E350EB0F442 (last visited Sept. 7, 2009) (explaining that the 1951 Convention relating to the Status of Refugees does not mention climate change or environmental degradation and neither assigns refugee status nor specifically extends protection to the environmentally displaced); *see also* Lopez, *supra* note 127, at 368–69 (asserting that the common misapplication of the term "environmental refugee" has contributed to the failure to address problems encountered in protecting environmentally displaced persons); *see also* Moberg, *supra* note 127, at 1114 (noting that guidelines in the United Nations' *Handbook on Procedures and Criteria for Determining Refugee Status* released by the U.N. High Commissioner for Refugees in 1979 excludes environmentally displaced persons from the definition of "refugee" in international law).

migration, "the current international legal regime disregards the correlations between environmental degradation and human migration."[135]

"Refugee" is a specific term of art that references a person who has been persecuted or has a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group, and who is unable or unwilling to avail him- or herself of the protection of his or her country of nationality.[136] Environmentally displaced people do not fit neatly within this definition for two reasons. First, they do not and cannot have a fear of persecution based on these enumerated protected grounds.[137] Second, they can further be distinguished because refugees' home countries are not willing to protect them, so they must look to the international community.[138] Countries containing environmentally displaced persons may be willing but unable to assist displaced people.[139]

Despite these literal differences between environmentally displaced people and refugees, the concept of an "environmental refugee" that has been used by scholars does not carry legal significance.[140] Although good arguments exist that environmentally displaced persons should be considered refugees despite not fitting within the normal refugee definition, the legal com-

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135. *See* Lopez, *supra* note 127, at 368–69 (claiming that the misunderstanding of the term "environmental refugee" has led the legal regime to ignore the correlation between environmental deterioration and human migration).

136. *See* Convention Relating to the Status of Refugees art. 1, para. A(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, 152 (defining the term "refugee" for the purpose of the United Nations Convention).

137. *See id.* (enumerating the various grounds for refugee protection as race, religion, nationality, membership of a particular social group or political opinion).

138. *See* Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment,* 2001 COLO. J. INT'L ENVTL. L. & POL'Y 1, 15 (2001) (stating that the environmentally displaced should receive international aid despite not fitting into the 1951 Convention's definition of "refugee"); *see also* Tracey King, Note, *Environmental Displacement: Coordinating Efforts to Find Solutions*, 18 GEO. INT'L ENVTL. L. REV. 543, 551 (2006) (stressing that environmentally displaced persons are in particular need of assistance from the international community because the current refugee regime cannot protect them).

139. *See* Falstrom, *supra* note 138, at 28 (finding that providing assistance to environmentally displaced persons can be costly and some host countries cannot afford to do so on their own); *see also* Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEO. IMMIGR. L.J. 855, 873 (2000) (commenting that host countries hesitate to allot their limited resources to environmentally displaced persons and aid is "given rarely and haphazardly").

140. *See* MOLLY CONISBEE & ANDREW SIMMS, ENVIRONMENTAL REFUGEES: THE CASE FOR RECOGNITION 50 (David Nicholson-Lord ed., 2003) (providing a definition for "environmental refugees" as a category of persons who have no choice but to leave their homes due to obvious environmental disruptions that endanger or seriously compromise their quality of life); *see also* Edith Brown Weiss, *Preface to the Twentieth Anniversary Issue*, 20 GEO. INT'L ENVTL. L. REV. 521, 528 (2008) (stressing that the international legal framework neither recognizes nor addresses environmental refugees); *see also* David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees,"* 16 GEO. INT'L ENVTL. L. REV. 209, 215 (2004) (explaining that environmentally displaced persons are not recognized as refugees and that conventions, commissions and policy groups do not use the term "environmental refugee").

munity has been unwilling to revise the well-established definition.[141] Therefore, classification as an "environmental refugee" does not adequately address the problem of protecting envirmentally displaced people. Because environmentally displaced persons do not have a recognized special legal status, they do not receive special rights under international law.[142]

Despite not fitting within the legal definition of a refugee, environmentally displaced persons deserve protection from potential human rights violations based on environmental degradation. Unfortunately, protection measures created for environmentally displaced persons who do not fit within the refugee definition do no better at addressing this issue than the refugee convention.[143] States have always created informal channels of assistance to nonrefugee environmentally displaced persons by responding to specific events.[144] These ad hoc forms of protection are based on human rights and are legislated by states rather than enforced by international law.[145]

The United Nations High Commissioner for Refugees (UNHCR) has recognized the importance of international protection for environmentally displaced people.[146] The UNHCR realizes that the problem is too large for any one organization to handle, but, through partner-

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141. *See* Aurelie Lopez, *The Protection of Environmentally Displaced Persons in International Law,* 37 ENVTL. L. 365, 367–68 (2007) (stating that the term "environmental refugees" has been used in error and does not sufficiently speak to the problems facing environmentally displaced persons); *see also* Brooke Havard, Comment, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILL. ENVTL. LJ. 65, 79 (2007) (asserting that the 1951 United Nations Convention Relating to the Status of Refugees definition of "refugees" is "outdated" and should be expanded to include environmental refugees).

142. *See* Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 357 (2009) (noting that there is neither a legal instrument nor a mandate in the existing international legal system with regard to climate change refugees); *see also* Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection,* 94 IOWA L. REV. 1107, 1114 (2009) (reporting that while academics use the term "environmental refugee," the legal definition of "refugee" does not include environmentally displaced persons).

143. *See* Falstrom, *supra* note 138, at 18 (explaining that although the United Nations High Commissioner for Refugees enacted a program to address environmental disasters, its primary focus is not to help the victims themselves); *see also* Keane, *supra* note 140, at 214–15 (purporting that the definitional expansion of refugees could help an environmentally displaced person to obtain adequate relief).

144. *See* Lopez, *supra* note 141, at 392 (asserting that the protection given to environmentally displaced people by states is based on human rights principles and treaties); *see also* Jane McAdam, *Complementary Protection and Beyond: How States Deal with Human Rights Protection* 1–2 (United Nations Comm'r of Refugees, Working Paper No. 118, 2005), http://www.unhcr.org/42fb1f045.html (proclaiming that, since displaced people do not fall within the meaning of refugees, many states create alternative forms of protection for them based on humanitarian principles and not international law).

145. *See* Moberg, *supra* note 142, at 1117 (emphasizing that international law places most of the burden to aid environmentally displaced people on domestic law); *see also* Havard, *supra* note 141, at 77 (demonstrating that even though the United States and Africa have taken steps to help environmentally displaced people, international help is crucial).

146. *See* UNHCR, CLIMATE CHANGE AND FORCED MIGRATION, 3, EPAU Working Papers, (Jan. 31 2008) *available at* http://www.unhcr.org/research/RESEARCH47a316182.pdf (prepared by Etienne Piguet) (stating that the UNHCR has considered including environmentally displaced persons within its protective mandate). *See generally* The Secretary-General, *Report of the Secretary-General, Climate Change and Its Possible Security Implications*, ¶ 64, U.N. Doc. A/64/350 (Sep. 11, 2009) (arguing that the empirical evidence of a relationship between climate change and conflict is strengthening).

ships, it attempts to help by coordinating environmental support activities.[147] The International Organization for Migration (IOM) and UNHCR have long been partners with the common goal of preventing and mitigating the problem of migration of environmentally displaced persons.[148] An international symposium by these two groups addressed this issue in April 1996 and put together a framework to deal with the problem.[149]

Two examples of European complementary protections include the Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof,[150] and the Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the

147. *See* Antonio Guterres, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 10–11 (Aug. 14, 2009), http://www.unhcr.org/4901e81a4.html (remarking that although the UNHCR's main function is to protect refugees, it still recognizes other displaced people since their problems are similar).

148. *See* U.N. Executive Committee of the High Commissioner's Programme, Standing Committee, *Update on Implementation of the Agenda for Protection*, ¶ 14, U.N. Doc. EC/53/SC/CRP.10 (June 3, 2003) (providing examples of UNHCR activities and partnerships as an indication of progress in meeting its institutional goals); *see also* Geoff Gilbert ed., *Note on International Protection United Nations General Assembly Executive Committee of the High Commissioner's Programme Fifty-fourth Session 2 July 2003*, 16 INT'L J. REFUGEE L. 124, 130 (2004) (analyzing the mechanics and tools of refugee protection used by UNHCR and other actors, including the IOM).

149. *See* Symposium, *Environmentally Induced Population Displacements and Environmental Impacts Resulting from Mass Migrations*, UN High Comm'r for Refugees Policy Group (Oct. 1996), http://www.un hcr.org/refworld/docid/4a54bbd6d.html (addressing concerns for environmentally displaced people).

150. *See* Council Directive 2001/55, 2001 O.J. (L 212) 12 (EC) (discussing the Directive on Temporary Protection and the coordination between Member States in granting such protection).

Protection Granted.[151] Both of these directives provide minimal protection for environmentally displaced people.[152]

The United States has a discretionary regime of temporary protection based on the Immigration Act of 1990.[153] Temporary Protected Status may be granted to individuals in the following circumstances:

> . . . 2) There has been an earthquake, flood, drought, epidemic, or other environmental disaster resulting in a substantial, but temporary, disruption of living conditions; the foreign State is unable, temporarily, to handle adequately the return of its nationals; and the foreign State officially has requested temporary protection for its nationals in the United States; or 3) There exist extraordinary and temporary conditions that prevent nationals from returning in safety, unless the Attorney General finds that permitting the aliens to remain temporarily is contrary to the national interest.[154]

It is uncertain how much protection this affords environmentally displaced persons, especially since the language does not effectively offer any proactive assurances to those in danger of displacement.[155] It does not give protection to migrants because it requires a person to be already present in the United States before invoking this temporary protection.[156] Furthermore, the person must not be capable of returning to his home country because of temporary

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151. *See* Council Directive 2004/83, 2004 O.J. (L 304) 12 (EC) (explaining that the purpose of the Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refuges or as persons who otherwise need international protection and the content of the protection granted).

152. *See also* SATVINDER SINGH JUSS, INTERNATIONAL MIGRATION AND GLOBAL JUSTICE 172 (2006) (noting that environmentally displaced person are not afforded all of the same rights as refugees but should be granted some protection because of their plight); *see also* LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF ECOLOGICAL REFUGEES 180–84 (Earthscan Publications 2009) (highlighting the vulnerability of environmentally displaced persons to the ravages of famine and death without the protection and intervention of the international community); *see* Aurelie Lopez, *The Protection of Environmentally Displaced Persons in International Law,* 37 ENVTL. L. 365, 392–400 (2007) (examining the sufficiency and efficiency of the treatment by international law of environmentally induced migrants);

153. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (outlining the rights of legal immigrants to seek entrance into the United States and the application process for permanent residency or visas); *see also* Evangeline Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 27, 31 n.9 (1992) (stating that the Attorney General of the United States may, under authority granted to him by the Immigration Act, grant temporary protected status to aliens of foreign states); *see also* Lopez, *supra* note 152, at 400 (noting that the granting of temporary protection to foreign nationals is a discretionary decision made by the Attorney General of the United States).

154. *See* Immigration and Nationality Act, 8 U.S.C. § 1254a (b)(1)(B)-(C) (2000) (discussing in what circumstances the Attorney General would "designate" a foreign state as too dangerous to return an alien to).

155. *See* Sarah Anchors, *Temporary Protected Status: Making the Designation Process More Credible, Fair, and Transparent*, 39 ARIZ. ST. L.J. 565, 579 (2007) (contending that temporary protected status has not lived up to the humanitarian goals Congress intended). *See generally* Michelle Holmes, *What About My Kids? Why Congress Should Amend Either NACARA or Temporary Protected Status to Extend Permanent Residency to Salvadorian, Guatemalan, and Honduran Children*, 14 SW. J. L. & TRADE AM. 427, 435 (2008) (asserting that as of 2006, there were over 340,000 people living in the United States under Temporary Protected Status).

156. *See* Immigration and Nationality Act, 8 U.S.C. § 1254a (c)(1)(A) (2000) (explaining the criteria for aliens to be eligible for temporary protected status under the Act).

conditions or because the country cannot handle the return of its nationals.[157] This protection can only be granted under very narrow circumstances.[158] Although this does not adequately address permanently environmentally displaced persons, it does evince the United States' willingness to aid these individuals.[159]

An international regime of complementary protection to deal systematically with environmentally displaced persons would be a step in the right direction.[160] Sufficient support exists in international law to develop a new convention on environmentally displaced persons in inter-

157. *See id.* at § 1254a(b)(1)(B)-(C) (noting that the Attorney General may designate the natives of a state as deserving of protection if he finds that there are "extraordinary" and "temporary" conditions preventing aliens from returning to that state).

158. *See* Holmes, *supra* note 155, at 434 (discussing how the major requirements for an alien to obtain temporary status prevent many individuals from obtaining it); *see also* Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime,* 94 AM. J. INT'L L. 279, 285 (2000) (indicating that to obtain temporary status the individual must be present in the United States when the Attorney General acknowledges the originating state's crisis).

159. *See* Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 543–44 (1998) (maintaining that while temporary protection has failed to protect numerous people, the United States has shown leadership in its efforts to help those in need). *See generally* Tara Malone, *"We Will Live One Day at a Time": Liberians Safe From Forced Return, for Now,* CHI. DAILY HERALD, Sept. 16, 2007, at 1 (illustrating that while the United States has been willing to help, more needs to be done to protect environmentally displaced people).

160. *See* Lopez, *supra* note 152, at 402 (formulating a new plan for complementary protection of environmentally displaced persons); *see also* Brooke Havard, Comment, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILL. ENVTL. LJ. 65, 79–80 (2007) (proposing that broadening the Convention definition of a refugee would help to protect a much greater number of environmentally displaced persons).

national treaties and through customary law.[161] A new and successful convention would address both the cause and the result of the environmental degradation.[162]

IV. How International Law on Sovereignty and Citizenship Addresses Sea-Level Rise and Small Island Nations

The international laws and obligations discussed in Section III, when directly applied to the problem of displaced nations and people due to global sea-level rise, do not adequately answer questions of sovereignty, citizen displacement, and state responsibility.[163] This Section discusses how different treaties and international custom, applied to the problem of sea-level rise, do not adequately answer the questions of whether a submerged state will remain sovereign or what will be the status of displaced citizens. Although current international law can be applied in different ways to these issues, it sometimes fails to address them completely.

A. International Law Applied to Sovereignty When Nations Are Submerged Due to Sea-Level Rise

The question of whether a submerged nation may remain a sovereign state has never before required attention.[164] This unique question requires the discussion of general principles, the purposes behind the principles, and general international law concepts such as equity. Applying the concepts from Section III—criteria for state existence, the right to self-determination, avoidance of statelessness, and governments-in-exile—it is likely that the loss of territory of submerged states will lead to extinction of those states.

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161. *See* Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment,* 2001 COLO. J. INT'L ENVTL. L. & POL'Y 1, 23–24 (2001) (arguing that existing support for a new convention is found in past treaties, conventions, and other international relations); *see also* Lopez, *supra* note 152, at 403 (claiming that there is already support for a new convention for environmentally displaced persons).

162. *See* Vikram Odedra Kolmanskogg, *Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration*, NORWEGIAN REFUGEE COUNCIL, Oslo, Norway, Apr. 2008, at 34 (suggesting that dealing with the root causes of forced migration must go hand-in-hand with protecting the environmentally displaced); *see also* Aurelie Lopez, *The Protection of Environmentally Displaced Persons in International Law,* 37 ENVTL. L. 365, 403 (2007) (declaring that a new convention on the protection of environmentally displaced people would examine the root cause of the problem in order to prevent it in the future); *see also* Fabrice Renaud et al., *Control Adapt or Flee: How to Face Environmental Migration?*, 5 INTERSECTIONS 33 (May 2007) (arguing the need to implement programs that address the causal relationship between environmental degradation and forced migration).

163. *See* Richard S.J. Tol & Roda Verheyen, *State Responsibility and Compensation for Climate Change Damages—a Legal and Economic Assessment*, 32 ENERGY POLICY 1109, 1116 (2004) (indicating that sea-level rise may cause country or island states to disappear, resulting in the loss of their maritime zones and sovereignty rights); *see also* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1644 (2007) (noting that international policy focuses on adaptation while arguably lacking mechanisms to deal with those displaced by sea-level rise); *see also* Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC JOURNAL OF INT'L L. 2008, 1,2 (suggesting that international laws do not adequately address the impact of climate change on those states least able to adapt).

164. *See* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents,* 37 COLUM. J. TRANSNT'L L. 403, 457 (1999) (finding that the international community's definition of statehood is fluid and constantly in flux); *see also* John A. Duff, *Symposium: Territory Without Boundaries: How the Marine Environment Washes Over Traditional Territorial Lines,* 30 MICH. J. INT'L L. 543, 653 (2009) (commenting on the precarious legal status of submerged island nations).

States are most often terminated by agreement when a successor state takes over.[165] The question of whether a state is terminated after sea-level rise does not rely on an agreement or include a successor state.[166] Therefore, the traditional criteria for state existence signals whether a submerged state still exists. While the loss of territory, permanent population, or government does not terminate a state per se, these factors nevertheless remain the requirements of a legitimate state.[167] Submerged nations will no longer have territory and, as far as environmental science predicts, will have no hope of regaining the lost territory.[168] The lack of this very important criterion for statehood would signify the lack of statehood even without a relevant treaty.

Territory is a necessary part of statehood because it allows a state and its government to be effective by having a physical identity.[169] Although climate change is a unique issue, it would be difficult to implement, or to even form international consensus around, such a huge exception to this fundamental and long-understood requirement of statehood in international law.[170] While a state may legitimately be relocated and recognized on new or different territory, a state with no territory is simply not a state and cannot be recognized.[171]

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165. *See* Council of Europe, *Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession*, March 15, 2006, CETS 200 (discussing the responsibilities of successor states); *see also* Draft Articles on Succession of States in Respect of State Property, Archives and Debts, 2 Y.B. Int'l L. Comm'n 1981, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part 2) (listing and defining rules and regulations that states should abide by in the event that they are replaced by another successor state).

166. *See* Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 355–56 (2009) (addressing the new concerns of sinking states); *see also* Jeremy Firestone et al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219, 257 (2005) (explaining the resettlement process for displaced persons).

167. *See* JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 82 (1994) (explaining that the requirements for statehood were outlined in the Montevideo convention and that many countries are not initially recognized as states because of human rights violations as depicted in apartheid South Africa); *see also* Firestone, *supra* note 166, at 257 (addressing the resettlement process for displaced persons).

168. *See* Lopez, *supra* note 162, at 372 (discussing that once sea levels rise, nations will have no hope of regaining lost territory); *see also* ELIZABETH A. STANTON & FRANK ACKERMAN, FLORIDA AND CLIMATE CHANGE: THE COST OF INACTION 16 (2007), http://www.ase.tufts.edu/gdae/Pubs/rp/Florida_hr.pdf (stating that island nations would be devastated by sea-level rise).

169. *See* James S. Anaya & Robert A. Williams Jr., *The Protection of Indigenous People's Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 75 (2001) (opining that territories are meaningless unless the physical identification of property is determined and marked); *see also* Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA J. INT'L ECON. L. 745, 758 (1997) (stating that a demarcated geographic territory enables baseline identification of a State to occur).

170. *See* Roy Smith, *Place and Chips: Virtual Communities, Governance and the Environment*, 3 GLOBAL ENVTL. POL. 88, 88–90 (2003) (contemplating the validity of cyber-states as nonterritorial sovereign entities); *see also* Thomas Biolsi, *Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle*, 32 AM. ETHNOLOGIST 239, 24–55 (May 2005) (proposing a theoretical understanding of sovereignty in which a territory can be an "imagined place," allowing for multiple layers of sovereignty, even over nonterritorial "political spaces," and how it can be applied to indigenous peoples including Native Americans).

171. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 40 (1979) (noting that a state cannot exist without a territory); *see also* Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 704 (2005) (stating that the International Court would decline to hear a case brought against a terrorist group since such groups are not states due to a lack of territory).

Citizens of submerged states may attempt to find other territory to preserve statehood.[172] Severe future problems may be mitigated by recognizing continued sovereignty of these nations even without physical territory.[173] For example, following the submersion of an island nation, its citizens will be forced to move to some other territory.[174] If former sovereign people reside in an area, they can argue for their right to self-determination, allowing them to secede from the state that graciously accepted the displaced people.[175] Even an agreement that allows displaced citizens to reside in a territory, but not to govern it, may be invalidated if self-determination is truly a *jus cogens* norm.[176] Therefore, people who have relocated to a new territory may attempt to use the principle of self-determination to create a new state based on the one lost to rising waters.[177]

This potential issue could be preempted by allowing the continued sovereignty of a nation despite its lack of territory.[178] A strong culture along with continued international recognition

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172. *See* Aurelie Lopez, *The Protection of Environmentally Displaced Persons in International Law,* 37 ENVTL. L. 365, 372 (2007) (discussing how the people of Tuvalu will have to leave their island and find another because of the rise in sea levels caused by global warming); *see also* Ruth Gordon, *The Climate of Environmental Justice: Taking Stock: Climate Change and the Poorest Nations: Further Reflections on Global Inequality*, 78 U. COLO. L. REV. 1559, 1595 (2007) (stating that, due to rising sea levels, some citizens of Kiribati have been forced to relocate and other island states such as Tuvalu, Niue and the Marshall Islands are considering removing their citizens to Australia); *see also* John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477, 498 (2009) (explaining that small island states affected by rising sea levels, including the Maldives, Tuvalu, and Kiribati, are realistic in planning for the possibility of evacuating their inhabitants to neighboring countries).

173. *See* Smith, *supra* note 170, at 85–90 (assessing the validity of a virtual, global sovereign entity); *see also* Biolsi, *supra* note 170, at 24–55 (proposing a theoretical understanding of sovereignty in which a territory can be an "imagined place," allowing for multiple layers of sovereignty, even over nonterritorial "political spaces," and how it can be applied to indigenous peoples including Native Americans).

174. *See* Brooke Havard, Comment, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILL. ENVTL. LJ. 65, 73 (2007) (detailing that almost 30 percent of the population of the island of Tuvalu has been forced to flee as a result of rising ocean waters).

175. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, Art. 1, 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316 (Dec. 19, 1966) (recognizing that all people have the right of self-determination, which allows them to freely determine their political status); *see also* International Work Group for Indigenous Affairs [IWGIA], *Conference on Indigenous Peoples' Self-Determination and the Nation State in Asia*, ¶¶ 8–10 (Apr. 18-21 1999) (Philippines) (declaring that self-government and autonomy are two of the ways to exercise self-determination).

176. *See* United Nations Conference on the Law of Treaties, *Vienna Convention on the Law of Treaties,* Art. 53, U.N. Doc. A/CONF.39/27 (May 23, 1969) (establishing that a treaty is void if it conflicts with a *jus cogens* norm); *see also* CRAWFORD, *supra* note 171, at 81 (explaining that a contract that violates *jus cogens* norms is automatically invalid).

177. *See* Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 219–220 (2001) (claiming that independence, though rarely chosen, should be an option for people seeking to exercise the right of self-determination). *See generally* Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 AM. J. INT'L L. 453, 468 (2000) (emphasizing that while the right to secession is not unlimited, it does exist).

178. *See* Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291, 329 (2001) (recognizing that the lack of territory did not prevent the Holy See from exercising sovereignty); *see also* Matthew N. Bathon, Note, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT'L L. 597, 604 (2000) (observing that the Holy See retained its international personality even while it lacked territory). *But see* Jianming Shen, *Sovereignty, Statehood, Self-Determination and the Issue of Taiwan,* 15 AM. U. INT'L L. REV. 1101, 1129 (2000) (noting that territory is inseparable from the notion of a sovereign state).

may allow a state to be effective without territory.[179] An agreement where people may reside on another state's territory yet remain citizens of the submerged state could fulfill the concerns of all citizens.[180]

Although state sovereignty may not continue past submersion, continued government sovereignty provides another option for protecting citizens.[181] The government of a submerged state may still hold the ability to negotiate with other states and exercise power over its people while residing in another nation.[182] Although this would be unique, the governments could still be considered legitimate but in exile due to environmental disasters rather than enemy forces. States act exclusively through their governments.[183] Therefore, retaining a sovereign government is potentially more important to citizens than retaining identity as a sovereign nation.[184]

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179. *See* Kurt Martens, *The Position of the Holy See and Vatican City State in International Relations*, 83 U. DET. MERCY L. REV. 729, 759 (2006) (concluding that the lack of territory did not stop the Holy See from engaging in diplomatic relations); *see also* Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835, 1855 n. 161 (1996) (arguing that the Holy See retained an international personality because it was able to engage in international treaties).

180. *See* Nedzad Basic, *International Law and Security Dilemmas in Multiethnic States*, 8 ANN. SURV. INT'L & COMP. L. 1, 13 (2002) (asserting that self-determination implies only the right to self-governance with no implication with regard to a right to secede or to otherwise claim territory); *see also* Cherylyn Brandt Ahrens, Note, *Chechnya and the Right of Self-Determination*, 42 COLUM. J. TRANSNAT'L L. 575, 582 (2004) (positing that the final act of the Conference on Security and Co-operation in Europe understood self-determination not to include the ability to secede).

181. *See* HELEN M. STACY, HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY, CULTURE 100 (2009) (examining the importance of a sovereign government in protecting its citizens from contemporary world conditions); *see also* David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 BYU J. PUB. L. 1, 17 (2003) (defining sovereignty as authority given to a government by its citizens, thus endowing the government with the responsibility to protect the welfare of its citizens).

182. *See* REBECCA M.M. WALLACE, INTERNATIONAL LAW 81 (4th ed. 2002) (1986) (offering examples of situations where a de jure government has functioned successfully while in exile); *see also* STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW 13, 183 (1998) (stating that a government may be recognized in international forums even if it is in exile).

183. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 201 cmt. d–e (1987) (recognizing that a qualification of statehood is the ability of its chosen government to conduct international and domestic relations); *see also* TALMON, *supra* note 182, at 13 (asserting that states are actors recognized by their chosen form of government).

184. *See* Johan Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT'L L. 907, 916, 927 (2006) (noting that today, national borders have become blurred and showing situations in which governments have remained sovereign despite their lack of statehood); *see also* Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 166 (2002) (illustrating that retaining a country's true legal status is vital to both its right to self-determination and its future ability to return to statehood).

Governments-in-exile usually operate under the assumption that they will one day return to their state and regain power.[185] A submerged nation's government would be in exile in perpetuity, thus undermining the concept of a government-in-exile. Fortunately, the term "government-in-exile" does not have a specific legal meaning; it signifies a state's representative group.[186] Therefore, recognizing a submerged nation's government as one in exile is feasible and is a way in which the interests of environmentally displaced nationals can retain government protection until an appropriate solution is reached.[187]

An appropriate or even necessary solution, if no agreement is reached before the destruction of a nation, would be a temporary government-in-exile.[188] This would give the destroyed nation prolonged ability to negotiate a proper solution for its people.[189] It would also recognize that "a man's 'country' is more than the territory in which its people live."[190]

Finally, there may be difficulty in the extinction of a state before its citizens have become nationals of other states. The treaties on avoidance of statelessness give the citizens of submerged nations some footing to claim continued sovereignty—at least until other nationality is

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185. *See* The Situation of Democracy and Human Rights in Haiti, G.A. Res. 46/7, ¶¶ 1–2, U.N. Doc. A/RES/46/7 (Oct. 11, 1991) (declaring the Haitian military government's coup d'état illegal and calling for the reinstatement of President Jean-Bertrand Aristide); *see also* Edward Collins, Jr. & Timothy M. Cole, *Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide,* 5 D.C.L. J. INT'L L. & PRAC. 199, 221 (1996) (discussing the case study of President Jean-Bertrand Aristide's government-in-exile and his efforts to return to Haiti).

186. *See* TALMON, *supra* note 182, at 13–14 (1998) (analyzing the concept that recognized governments-in-exile have greater representative and jurisdictional competence than nonrecognized governments); *see also* Regina M. Clark, Note, *China's Unlawful Control Over Tibet: The Tibetan People's Entitlement to Self-Determination*, 12 IND. INT'L & COMP. L. REV. 293, 299 (2002) (explaining the term "government-in-exile" merely to highlight the location of the government, while the authority is attributed to the recognition of the government).

187. *See* Sloane, *supra* note 184, at 167 (admitting the lack of a formal legal status for governments-in-exile, but noting their importance in the international community). *See generally* Daniel C. Turack, *China's Human Rights Record Since Tiananmen 1989 and the Recent Mixed Response of the United States*, 23 GA. J. INT'L & COMP. L. 507, 526 (1993) (demonstrating how recognition of a government-in-exile by the United States has prolonged the resolution of a conflict).

188. *See* Tsering Kheyap, Note, *Homeless but Not Hopeless: How the Tibetan Constitution Governs a People in Exile*, 36 HASTINGS CONST. L.Q. 353, 365–66 (2009) (discussing the issues surrounding the recognition of a government-in-exile and its effects on the international community). *But see* Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 52 (1997) (illustrating the problems of loyalty and conflicts that would occur if the PLO were to establish itself as a government-in-exile).

189. *See* Michael J. Kelly, *Political Downsizing: The Re-emergence of Self-Determination and the Movement Toward Smaller, Ethnically Homogenous States,* 47 DRAKE L.REV. 209, 269 (1999) (detailing the PLO negotiating for land after becoming a government-in-exile). *See generally* John S. Hall, Note, *Chinese Population Transfer in Tibet,* 9 CARDOZO J. INT'L & COMP. L. 173, 196 (2001) (nothing the authority of the Tibetan government in exile and showing its capability in negotiating with China on the future of the country).

190. *See* Fang v. Kennedy, 317 F.2d 180, 185 (1963) (construing the statutory "term" of country to mean the "territory from which the alien came from" but also the state in which the sovereign power is exercised on behalf of the people); *see also* United States v. The Recorder, 27 F. Cas. 718, 721 (1847) (maintaining that a country is something broader than a place that is occupied by a community and therefore cannot be clearly defined).

secured. The avoidance of statelessness is a major concern of the international community.[191] Under existing treaties, predecessor states and successor states have responsibilities both to allow and not to withdraw nationality from persons who would then become stateless.[192]

The United Nations prohibits a state from denationalizing a citizen until the citizen has been granted citizenship by another state.[193] Therefore, immediate extinction of a submerged nation would be against international policy because it would remove nationality from many people without securing new states that are willing to immediately accept all people and grant them citizenship.[194]

Although this article has not included any unlivable island nations in its working definition of a submerged nation, sea-level rise may cause the unusual instance of a nation whose livable land is submerged while some physical land remains above water. This situation may be considered a total loss of territory and can be treated as suggested above.[195] However, the pres-

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191. *See* U.N. Framework Convention on Climate Change (UNFCCC), Submission of United Nations High Comm'r for Refugees (UNHCR), *Climate Change and Statelessness: An Overview,* ¶¶ 7–9 (May 15, 2009), U.N. Doc. FCCC/AWGLCA/2009/MISC.5 (asserting that statelessness is a national right and should be prevented); *see also* Rachel Settlage, Note, *No Place to Call Home: Stateless Vietnamese Asylum-Seekers in Hong Kong*, 12 GEO. IMMIGR. L.J. 107, 192 (1997) (describing statelessness as highly undesirable among the international community).

192. *See* Universal Declaration of Human Rights, G.A Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (outlining the basic nationality rights of individuals); *see also* United Nations Framework Convention on Climate Change art. 2, May 9, 1992, S. Treaty Doc. No. 30813-30843 (acknowledging that states should implement effective environmental legislation in light of the global climate change).

193. *See* United Nations Convention on the Reduction of Statelessness, art. 8, August 30, 1961, 989 U.N.T.S. 175 (declaring that an agreeing state will not "deprive a person of its nationality" unless otherwise described).

194. *See* High Comm'r for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, ¶ 71, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) (proclaiming that there are protection obligations to individuals whose rights are affected by climate change); *see also* Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action,* 33 HARV. ENVTL. L. REV. 439, 456 (2009) (questioning what obligations states have once the citizens of small island become stateless); *see also* Obiora Chinedu Okafor, *International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa,* 41 HARV. INT'L. L.J. 503, 535 (2000) (distinguishing the proposition that submerged nations will be subsumed by other states because of the concept of forced unification has resulted in great conflict); *see also* Zsuzsanna Deen-Racsmany, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court,* 95 A.J.I.L. 606, 608 (2001) (noting that is within the states' power to determine who its nationals are and states may object to the validity of a person's nationality).

195. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY 855 (James J. McCarthy et al., eds., 2001) [hereinafter IPCC CLIMATE CHANGE] (noting the limited options that small islands have with respect to adapting to rising sea levels); *see also* William C. Burns, *Global Warming—The United Nations Framework Convention on Climate Change and the Future of Small Island States*, 6 DICK. J. ENVTL. L. & POL'Y 147, 166–68 (1997) (acknowledging that because of rising sea levels, a multitude of small island nations, including the Maldives, will have their lands wholly submerged).

ence of physical land may change the analysis under international law and therefore will be addressed briefly in this section.[196]

Major countries would likely approach this situation in different ways. While many countries would be unwilling to accept a large number of migrants from a fully submerged nation, they might be interested in absorbing the submerging state to acquire the small amount of non-submerged land because of the unique benefits of the Law of the Sea; many disputes have occurred over small, uninhabited islands because the rights to the island include the rights to a 200-mile exclusive economic zone (EEZ) and continental shelf (CS).[197] These rights would be particularly valuable with a lot of land very close to the surface of the water because it would create reef habitat for fish and other sea creatures to which the owning country would have exclusive rights.[198] In this situation, many countries might be willing to fight for the ownership of the small island nation.

B. International Law Applied to Citizens When Land Is Lost Due to Sea-Level Rise; Applicability of the "Refugee" Definition

As previously stated, there is no comprehensive law dealing with environmentally displaced persons. Environmentally displaced persons, including citizens of countries that have been submerged due to sea-level rise, deserve a greater protective status than they currently have.[199] These environmentally displaced people cannot be internally relocated, temporarily moved to another state, or be considered nationals of their home state if the state no longer exists, which makes them different from the conventional temporarily environmentally displaced persons.[200] Because of these differences, the current law is less adequate for them than for a conventional environmentally displaced person.

The term "refugee" can be applied specifically to those people who face displacement from sea-level rise. This application is different from a typical environmentally displaced person for

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196. *See* U.N. Economic & Social Council [ECOSOC], Sub-commission on the Promotion and Protection of Human Rights, *Expanded Working Paper by Françoise Hampson on the Human Rights Situation of Indigenous Peoples in States and Other Territories Threatened With Extinction for Environmental Reasons*, ¶13, U.N. Doc. E/CN.4/Sub.2/2005/28 (June 16, 2005) (recognizing legal questions concerning individuals' rights when a state partially or fully disappears due to environmental reasons).

197. *See* United Nations Convention on the Law of the Sea, arts. 56, 76, Dec. 10, 1982, 1833 U.N.T.S. 397 (defining the exclusive economic zone, continental shelf, and rights associated with each); *see also* Michael Bennett, *The People's Republic of China and the Use of International Law in the Spratly Islands Dispute*, 28 STAN. J. INT'L L. 425, 431 (1992) (highlighting China's legal acquisition of the Spratly Islands as an economic maneuver to control the path of the trade ships and oil tankers).

198. *See* R.R. CHURCHILL, THE LAW OF THE SEA 289–90 (Manchester Press 3d ed. 1999) (describing the fishing rights of the coastal state as well as the economic advantages this access to these fishing areas has provided); *see also* ROBERT L. FRIEDHEIM, NEGOTIATING THE NEW OCEAN REGIME 135 (U.S.C. Press 1993) (finding that the coastal state exercises sovereign rights over all the natural resources within the EEZ).

199. *See* (concluding that environmental harm including natural disasters persecutes citizens under the Refugee Convention); *see also* Gregory S. McCue, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT'L ENVTL. L. REV. 151, 153 (1993) (positing that the term "refugee" should include those people who move due to environmental disasters affecting their home).

200. *See* Lopez, *supra* note 199, at 374–73 (claiming that Tuvaluans are paradigmatic of the inability of inhabitants to internally relocate or temporarily move within a reasonable time).

the reasons stated above. Persons displaced due to sea-level rise do not fit within the refugee definition despite arguments that the refugee convention should protect them.[201] There are four elements of the refugee definition in which a person must fit to be considered a refugee: (1) the person must have been persecuted or have a well-founded fear of persecution; (2) the persecution is based on a protected ground; (3) the person is outside the country of nationality; and (4) the person is unable or unwilling to avail him- or herself of his or her own government's protection.[202]

The first element of refugee status is persecution.[203] While the term "persecution" is not defined in the convention, the general understanding of the term found in basic human rights law is a "deprivation of fundamental human rights"[204] that includes both life and liberty.[205] There is no dispute over whether the destruction caused by sea-level rise to citizens from a small island nation would be persecution. At the point when a country is unlivable, forcing a citizen physically to remain or to be returned would fit within the normal definition of persecution.[206]

The second element for refugee status is that the persecution is based on an enumerated category.[207] Environmentally displaced persons do not fit within the refugee definition because their persecution is not based on any of the enumerated characteristics of a refugee. Generally, environmental destruction does not focus on individuals because of their race, religion, nation-

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201. *See* Convention Relating to the Status of Refugees art. 1, para. A(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (concluding that refugees are defined as stated, and omitting environmental harm such as sea-level rise from the definition of "refugee"); *see also* Andrew E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 279 (1985) (finding that victims of natural disasters are not refugees because they do not suffer from violent persecutory acts, such as genocide or torture).

202. *See* Convention Relating to the Status of Refugees, *supra* note 201, at art. I, para. A(2) (setting forth the definition of a refugee).

203. *See id.* at art. I, para. A(2) (positing that fear of persecution may be founded on reasons of race, religion, nationality or membership of a particular social group or political opinion).

204. *See* T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 5 (1991) (providing the general understanding of the term "persecution" with respect to refugee status); *see also* In re Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996) (defining the term "persecution" as acts that cause harm or suffering intended to overcome a characteristic the victim possesses).

205. *See also* U.N. High Comm'r on Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) (asserting that threats to life or freedom constitute persecution); *see also* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 3, 8 (2d ed. 1996) (opining that persecution includes threats to life and liberty); *see* Aleinikoff, *supra* note 204, at 6 (explaining that persecution involves serious risks to life and liberty).

206. *See* Convention Relating to the Status of Refugees, *supra* note 201, at art. I, para. A(2) (discussing persecution as a state's inability to protect its citizens or to protect its citizens with fundamental human rights).

207. *See id.* at art. I, para. A(2) (defining the second element to obtain refugee status); *see also* McCue, *supra* note 199, at 153 (explaining that environmentally displaced persons do not fall within the traditional categorization of refugees); *see also* Jeanhee Hong, Note, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J.L. & PUB. POL'Y 323, 323 (2001) (demonstrating that the current legal definition of "refugee" excludes environmentally displaced persons).

ality, membership in a particular social group, or political opinion.[208] Although these particular environmentally displaced persons may fit within an enumerated category, this does not get them closer to falling within the refugee definition. These environmentally displaced persons may attempt to claim an enumerated category in two ways. First, they may argue that their small island nationality is in the category of persecution. They could also argue that they belong to the particular social group of citizens of small island nations. Because these are both enumerated categories in the refugee definition, they could argue that they should be afforded refugee status. However, the persecution must be *based* on one of these categories.[209] Here, these people are not being persecuted because of their nationality or their membership in a social group; nationals of small island nations are, by circumstance, the people who are most affected by the problem.

Citizens of small island nations, unlike the majority of environmentally displaced persons, can make a respectable argument that their persecution is based on the enumerated categories above. Because the persecution directly comes from polluting nations that have knowledge of the harm they are causing, citizens of island nations can argue that the persecution is based on their status as citizens and their nationality.[210] This argument is very weak because the citizens are not personally targeted for the persecution; the persecution or situation that will cause the human rights violations is steps removed from the act of the polluters.[211] The persecution occurs at the hands of nature rather than a government.[212] However, the persecution is personal and would recur only when a person returns to his native state.

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208. *See* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 92–93 (1991) (reasoning that victims of environmental harm are not refugees because such harm is not caused by one of the five protected grounds); *see also* U.N. High Comm'r on Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶¶ 34, 39, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) (recognizing that the definition of a refugee does not include victims of natural disaster); *see also* Shacknove, *supra* note 201, at 279 (finding that victims of natural disasters are not refugees because they do not suffer from violent persecutory acts, such as genocide or torture).

209. *See* Convention Relating to the Status of Refugees, *supra* note 201, at art. I, para. A(2) (discussing the nexus requirement in the refugee definition); *see* 382–83 (2007) (explaining that generally environmentally displaced persons are not included in the traditional definition of refugee; however, there are certain circumstances in which they may fit under one of the enumerated categories); *see also* Aurelie Lopez, *The Protection of Environmentally Displaced Persons in International Law,* 37 ENVTL. L. 365, 382–83 (2007) (explaining that generally environmentally displaced persons are not included in the traditional definition of refugee; however, there are certain circumstances in which they may fit under one of the enumerated categories).

210. *See* Convention Relating to the Status of Refugees, *supra* note 201, at art. I, para. A(2) (defining "refugee" to include persons fearing persecution due to their nationality); *see also* Universal Declaration of Human Rights, G.A Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) at Art. III (identifying the basic human rights that the international community recognizes and emphasizing the right of an individual to liberty and security).

211. *See* Convention Relating to the Status of Refugees, art. I, para. A(2), July 28 1951, 19 U.S.T. 6529, 189 U.N.T.S. 150, art. 1 (providing that a "refugee" must be a target of persecution).

212. *See* SUE ROAF ET AL., ADAPTING BUILDINGS AND CITIES FOR CLIMATE CHANGE: A 21ST CENTURY SURVIVAL GUIDE 136–40 (2d ed. 2009) (positing that countries which continue to pollute and disregard the consequences of their action should be considered to rise to the level of persecutory behavior); *see also* LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF ECOLOGICAL REFUGEES 27–30 (Earthscan Publications 2009) (comparing the refugees who are fleeing their home countries due to "ethnic cleansing" to be on the same level of those individuals fleeing due to ecological disasters).

The third element for refugee status is the requirement that a person must be outside his country of nationality.[213] Therefore, a person must physically travel to another country before refugee status may be granted.[214] While many citizens of small island nations have the means to travel, they must, at the time they acquire refugee status, be unable to return to their country of origin. This element cannot be effectively addressed for citizens of small-island nations because there is no longer a home country to which they can return. Therefore, this requirement is detrimental to the inclusion of potentially environmentally displaced citizens of small island nations in the refugee definition.

The fourth and final element for refugee status is that a person must be unable or unwilling to avail himself of government protection.[215] The inability to access protection from one's state of nationality is a fundamental aspect of the refugee definition.[216] After World War II, the Refugee Convention arose out of concern for European refugees who were persecuted by their states of nationality.[217] The state-inflicted persecution, therefore, forced people to seek refuge and assistance from other states. It has been shown that environmentally displaced persons are generally not being persecuted by their states and can actually seek assistance from their states even if only limited in nature.[218] However, persons fleeing from global sea-level rise may not, in fact, be able to avail themselves of the protection of their own states.[219] There are two reasons

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213. *See* Convention Relating to the Status of Refugees, *supra* note 211, at art. 1, para. A(2) (examining the third definitional requirement for "refugee"); *see also* Susan Glazebrook, *Human Rights and the Environment*, 40 VICT. U. WELLINGTON L. REV. 293, 341 (2009) (explaining a requirement of refugee status is for one to be outside his or her country of origin).

214. *See* Convention Relating to the Status of Refugees, *supra* note 211, at art. I, para. A(2) (citing an implied definitional requirement that a refugee must be outside his or her country of nationality or habitual residence).

215. *See* Convention Relating to the Status of Refugees, *supra* note 211, at art. I, para. A(2) (noting the final requirement for refugee status under the Convention as unwillingness or inability to avail one's self of one's government); *see also* Matthew Smith, *The Relevance of the Work of the International Criminal Court to Refugee Status Determinations*, 20 INT'L J. REFUGEE L. 166, 167–68 (2008) (proclaiming an important requirement in seeking refugee status is unwillingness to avail himself the protection of his country).

216. *See* Convention Relating to the Status of Refugees, *supra* note 211, at art. I, para. A(2) (providing that "refugee" includes those who are unable to avail themselves of protection from their state); *see also* Carly Marcs, *Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm Within the Meaning of the Refugee Convention*, 24 AM. U. INT'L L. REV. 31, 53–54 (2008) (suggesting that the inability to obtain state protection is satisfied when the country of origin cannot provide such protection).

217. *See* Alice Edwards, *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders*, 30 MICH. J. INT'L L. 763, 775 (2009) (claiming that a few years after the war the refugees fleeing unfriendly states became significant state interests); *see also* Brigette L. Frantz, *Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms,* 5 AVE MARIA L. REV. 499, 506 (2007) (stating that the Refugee Convention was born in response to the increased number of stateless persons); *see also* Marisa Silenzi Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post–September 11 Treatment of Refugees and Asylum-Seekers*, 84 DENV. U. L. REV. 1121, 1124 (2007) (recognizing that the Refugee Convention was created in order to provide protection to displaced refugees).

218. *See* Lopez, *supra* note 209, at 377 (noting that environmentally displaced people can sometimes count on limited state protection); *see also* Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment,* 2001 COLO. J. INT'L ENVTL. L. & POL'Y 1, 5–6 (2001) (indicating that environmental refugees do not suffer from one of the five categories under which states categorize individuals who are persecuted).

219. *See* Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 352 (2009) (emphasizing that hundreds of millions of people may become permanently displaced due to rising sea levels by 2050).

for this: the extent of devastation may prevent the state from providing even minimal protection or a home state may not exist to provide protection.[220]

Citizens from a destroyed nation should not be punished simply because their state is unable to protect them. These people more closely fit within the strict definition of a refugee than other environmentally displaced people because they may have absolutely no access to government protection. Those who encourage the use of the term "environmental refugee" make the argument that while migrants make voluntary decisions to leave their homes, refugees are compelled to flee by drastic and unsafe changes, which should include in their meaning *environmental* changes.[221] This would apply more to people facing global sea-level rise than any other environmental disaster.

There are very persuasive policy reasons why these environmentally displaced persons should not be included in the refugee definition. However, even if they should be included, it is unlikely to happen without a major overhaul of the 1951 Refugee convention.

Expanding the refugee definition to include environmentally displaced persons, even only those displaced due to global sea-level rise, would have a huge impact on states.[222] There are two problems with this inclusion: environmentally displaced persons need protections different from those given in the Refugee Convention, and refugees within the definition, if expanded, may have less protection.[223] Currently, there are many refugees within the existing definition who must be afforded protection by other states. Adding thousands more people into this definition would put a strain on the already limited resources of the UNHCR.[224] The people the

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220. *See* Alan Carlin, *Why a Different Approach Is Required If Global Climate Change Is to Be Controlled Efficiently or Even at All*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 685, 733 (2008); *see also* Samuel Pyeatt Menefee, *"Half Seas Over": The Impact of Sea Level Rise on International Law and Policy,* 9 UCLA J. ENVTL. L. & POL'Y 175, 215 (1991) (announcing that an extreme rise in sea level could cause the disappearance of several island nations).

221. S*ee also* Marcs, *supra* note 216, at 33–34 (advocating that the Refugee Convention should expand its definition to include the approximately 50 million environmentally displaced persons caused by global warming); *see* Brooke Havard, Comment, *Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law*, 18 VILL. ENVTL. L.J. 65, 78–79 (2007) (proclaiming that the Refugee Convention should revise its understanding to include the prediction of 50 million environmental refugees by the year 2010);

222. *See* David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees,"* 16 GEO. INT'L ENVTL. L. REV. 209, 215–16 (2004) (arguing that expanding the definition of "refugee" would devalue current protection, that most refugees are internally displaced, and the number of environmentally displaced persons is enormous); *see also* Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection,* 94 IOWA L. REV. 1107, 1128 (2009) (stressing that altering the definition of "refugee" to include environmentally displaced persons would have negative results on existing refugee and asylum programs).

223. *See* Aurelie Lopez, *The Protection of Environmentally Displaced Persons in International Law,* 37 ENVTL. L. 365, 377 (2007) (stating that environmentally displaced persons can resort to the support of their own governments while true political refugees must look to the international community for security); *see also* Tracey King, Note, *Environmental Displacement: Coordinating Efforts to Find Solutions*, 18 GEO. INT'L ENVTL. L. REV. 543, 551, 554 (2006) (purporting that an expansion of the current definition of "refugee" to include environmentally displaced persons would be detrimental to both political refugees and environmentally displaced persons).

224. *See* King, *supra* note 223, at 554 (explaining that the UNHCR has limited resources and that the inclusion of environmentally displaced persons in the definition of refugee would not be sufficient to protect this class of persons); *see also* Keane, *supra* note 222, at 215–16 (emphasizing that refugees encompassed in the existing definition are afforded protection by other states; thus, expanding the definition to include environmentally displaced persons would further diminish the UNHCR's limited resources).

1951 convention does not cover are potentially as great in number as the people it does cover.[225] Therefore, it would be more efficient to extend similar protection that is narrowly tailored to environmental persecution, rather than squeeze these people into narrowly tailored protection for those escaping human persecution. Though refugee protection would be better than no protection, refugee protection does not adequately address the crisis these environmentally displaced people are facing.[226] International organizations have addressed their reluctance to include environmentally displaced persons as refugees. For example, the IOM, UNHCR, and Refugee Policy Group (RPG) decided not to use the term "environmental refugee."[227] The refugee definition has not been expanded because, as put by the Refugee Participation Network (RPN), it would "not only dilute the refugee concept but would do nothing to clarify questions of institutional responsibility in relation to prevention and response."[228]

Even if it were appropriate to allow environmentally displaced persons into the definition of refugee, it is unlikely to happen. The Refugee Convention has remained consistent for 56 years, and many state governments have solidified practices based on the current refugee definition.[229] Without a strong international consensus and push to modify the definition, it is unlikely to change.

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225. *See* King, *supra* note 223, at 554 (asserting that expanding the definition of "refugee" beyond people fleeing political persecution could potentially include an infinite class of people); *see also* Marjoleine Zieck, *Doomed to Fail from the Outset? Unhcr's Convention Plus Initiative Revisited*, 21 INT'L J. REFUGEE L. 387, 388–89 (2009) (illustrating the validity of the 1951 Refugee Convention but acknowledging that it does not suffice to meet contemporary and future challenges).

226. *See* Sumudu Atapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive This Onslaught?* 20 COLO. J. INT'L ENVTL. L. & POL'Y 35, 60 (2008) (discussing the need for international interdependency in the area of nonpolitical human displacement due to environmental factors); *see also* Falstrom, *supra* note 218, at 23 (claiming that more action is needed by individual states in order to avoid migration due to environmental conditions).

227. *See* Lopez, *supra* note 223, at 388 (referencing the fact that the UNHCR, RPG, and IOM have all opted out of using the term "environmental refugee"); *see also* Keane, *supra* note 222, at 215 (2004) (noting the reluctance of international organizations including the UNCHR, RPG, and IOM to use the term "environmental refugee"). *But see* Communication from the Commission to the Council and the European Parliament, Thematic Programme for Environment and Sustainable Management of Natural Resources Including Energy, at 19, COM (2006) 20 (using the term "environmental refugees" for assistance purposes within the European Commission).

228. *See* Sarah Collinson, *International Migration and Population Pressures: An Essay on a Ditchley Foundation Conference Held at Ditchley Park, Oxfordshire, England, 16–18 September 1994*, 7 J. REFUGEE STUDIES 418, 427 (1994) (quoting the Ditchley Conference majority idea that "environmental refugee" should be limited only to forced migration by politics or other manmade factors); *see also* Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEO. IMMIGR. L.J. 855, 867 (2000) (demonstrating the reluctance of RPN to use the term "environmental refugee" because of its potential to dilute the concept of the refugee and inability to clarify institutional responsibility).

229. *See, e.g.*, 1980 Refugee Act, INA § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A) (2000)) (adopting the Refugee Convention's definition of "refugee"); *see also* Jessica Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition,* 6 N.Y.U. ENVTL. L.J. 480, 499–500 (1998) (asserting that the Refugee Convention's definition of refugees has become entrenched in state institutions and practices).

C. Effectiveness of Measures Complementary to the Refugee Convention

The complementary measures in the United States and Europe set forth in Section III do not provide protection to environmentally displaced people due to sea-level rise.[230] European complementary protection directives expand the category of people who are eligible to those who do not qualify as refugees but "face a real risk of suffering serious harm."[231] However, this protection allows discretion by individual states in applying the rules.[232] In the face of a major migration, benevolent states may face pressure to do more than they would like, and states who do not want to give protections would not have to give them.[233] The complementary protections in the United States deal only with temporary migration, and they would not at all address the displaced people who could never return home. Therefore, these complementary measures protect those displaced by sea-level rise even less than they protect generally environmentally displaced people.

V. Proposals

The magnitude of this anticipated problem demands that the international community quickly address the problem of global sea-level rise and its potential effects on small island nations. Fortunately, the foresight that science has provided allows an extended period of time for the international community to agree upon mutually beneficial solutions. If the states address remedial solutions now, more time can be spent to optimize solutions. If there is delay until post-disaster or until a disaster is imminent, suboptimal solutions will likely be implemented for all parties.

Furthermore, because this is the first problem of its type, and no comprehensive international law exists to guide solutions, the situation calls for new forms of binding customs and treaties. Therefore, the uniqueness, magnitude, and pace of this problem give the international community an opportunity to create solutions that are in the best interests of all countries. The ability to create lasting solutions lies with states and the issue of state responsibility will determine outcomes.

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230. *See* Lopez, *supra* note 223, at 394 (alleging that complementary protections in Europe do not provide a satisfactory outcome for environmentally displaced persons); *see also* Moberg, *supra* note 222, at 1127 (stating that complementary measures in the United States do not provide adequate protection to environmentally displaced persons).

231. *See* Council Directive 2001/55, 2001 O.J. (L 212) 12 (EC) at art. 2(e) (defining "persons eligible for subsidiary protection"). *See generally* Jane McAdam, *The European Union Qualification Directive: The Creating of a Subsidiary Protection Regime*, 17 INT'L J. REFUGEE L. 461, 461 (2005) (stating that European states traditionally allowed persons not technically "refugees," but who nevertheless had valid need for protection, to remain in their territories).

232. *See* Council Directive, *supra* note 231, at art. 2(e) (allowing states to provide subsidiary protection to individuals other than those falling within the refugee definition); *see also* McAdam, *supra* note 231, at 465 (suggesting that the "ad hoc national approach" poses problems for international burden shifting because states define complementary protection by executive direction).

233. *See* Council Directive, *supra* note 231, at art. 2(e) (permitting protection upon a showing of a substantial ground for believing the displaced would face a real risk of suffering serious harm).

A. State of International Law on Responsibilities of States for Preventing and Mitigating Effects of Sea-Level Rise

State responsibility in international law comes from two sources: customary international law and treaties.[234] The international community understands the effects of global climate change and agrees that states have responsibilities, as evidenced by treaties.[235] However, the agreed-upon responsibilities are proactive and based on prevention of harm. There are no agreements enumerating postdisaster responsibilities of states.[236] Therefore, prevention responsibilities can be found in both treaties and international customary law, but post-disaster responsibilities must currently be derived solely from international customary law.

1. State Responsibilities for Prevention of Climate Change

International treaties and agreements, such as the Stockholm Declaration[237] and the Rio Declaration[238] set forth nonbinding obligations for states. Under these documents, states have the sovereign right to exploit their own resources with the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[239] It has been argued that these documents

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234. *See* Statute of the International Court of Justice art. 38(1), June 26, 1945, 33 U.N.T.S. 993 (establishing that the International Court of Justice can apply both customary international law and international conventions); *see also* Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2276 (1997) (explaining that both customary law and treatises remain important sources of international law).

235. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3. Dec. 11, 1997, 2303 U.N.T.S. 148 (illustrating the global community's agreement on the importance of reducing greenhouse gases); *see also* Michael S. Smith, Note, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 387, 416 n.141 (2007) (stating that the Framework Convention on Climate Change was the global community's response to concerns regarding climate change).

236. *See* RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 232 (2005) (noting that development of rules establishing state liability and responsibility for environmental damage has been largely ignored by governments and policy makers); *see also* Francisco Orrego Vicuna, *Resolution on Responsibility and Liability: Responsibility and Liability for Environmental Damage Under International Law: Issues and Trends*, 10 GEO. INT'L. ENVTL. L. REV. 279, 279-82 (1998) (explaining that given the current emphasis on preventive measures, there is a need for a "conceptual evolution" that integrates rules on compensation and restoration with rules related to preventive obligations).

237. *See* U.N. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, princ. 1, U.N. Doc. A/Conf.48/14 (June 16, 1972) (establishing the obligations of states in protecting and improving the human environment).

238. *See* U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/5Rev. 1 (June 14, 1992) (enumerating state responsibility to not cause harm to the environment of other states).

239. *See* U.N. Conference on Environment and Development, *supra* note 238, at princ. 2 (declaring that states possess the right to use their own resources, but also have a responsibility not to harm the environments of other states).

extend to creating a human right to a clean environment[240] based on the first principle of the Stockholm Declaration, which states, "Man has the fundamental right to freedom, equality and adequate conditions of life in an environment."[241] The subsequently enacted Rio Declaration did not acknowledge this fundamental right so strongly.[242] Instead, it says that human beings are the central concern for development and are entitled to a healthy and productive life in harmony with nature.[243] However, states have the sovereign right to exploit their own resources based on their own environmental policies, so long as they do not cause damage outside of their own jurisdiction.[244]

The UNFCCC provides guidelines for states' obligations to prevent further climate change problems.[245] Article 2 of the Convention says the obligation of states to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system," and that "[s]uch a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."[246] However, as mentioned earlier, the UNFCCC is a nonbinding legal agreement, meaning that Article 2 obligations cannot be enforced.[247]

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240. *See* Alexander Gillespie, *Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL'Y 107, 122 (2003) (discussing the approach that there should be an enforcement of the human right to a clean environment); *see also* David L. Markell, *Thinking Globally and Acting Locally: Reflections About the Possible Impacts of "Globalization" in the Evolution of SEQRA*, 65 ALB. L. REV. 461, 464 (2001) (recognizing that there is a '"good neighbor"' notion evidenced by the 1972 Stockholm Declaration and the 1992 Rio Declaration).

241. *See* U.N. Conference on the Human Environment, *supra* note 237, at princ. 1 (clarifying the right of all people to a clean environment and the duty of this generation to preserve such an environment for future generations).

242. *See* U.N. Conference on Environment and Development, *supra* note 238, at princ. 1 (stating that all people have the right to a quality life within the environment); *see also* David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back or Vice Versa?* 29 GA. L. REV. 599, 614 (1995) (emphasizing that although Principle 1 of the Rio Declaration addresses a standard requiring a minimally acceptable environment, it falls short of enunciating that right).

243. *See* U.N. Conference on Environment and Development, *supra* note 238, at princ. 1 (indicating that human beings are entitled to a healthy and productive life so long as there is harmony with nature); *see also* Carrie C. Boyd, *Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?,* 32 WM. & MARY ENVTL. L, POL'Y REV. 483, 487–88 (2008) (noting that the objective of both the Stockholm Declaration and the Rio Declaration and recognizing that the latter speaks to the human right to development is in contrast to the right to a healthy environment).

244. *See* U.N. Conference on Environment and Development, *supra* note 238, at princ. 2 (explaining that each state may "exploit their own resources," but must also avoid damaging the environment beyond their borders).

245. *See* United Nations Framework Convention on Climate Change art. 2, May 9, 1992, S. Treaty Doc. No. 102-38 (1992), 1771 U.N.T.S. 107 (recognizing the need for countries to work together to reverse the damage to the environment).

246. *See* United Nations Framework Convention on Climate Change, *supra* note 245, at art. 2 (setting the ultimate goal of achieving stabilization of greenhouse gas concentrations in the atmosphere within a specific time period).

247. *See* Harro van Asselt & Joyeeta Gupta, *Stretching Too Far? Developing Countries and the Role of Flexibility Mechanisms Beyond Kyoto*, 28 STAN. ENVTL. L.J. 311, 322 (2009) (claiming that the lack of legally binding quantified emission limitations and reduction obligations for developed countries limited the UNFCCC's effectiveness); *see also* Sarah A. Peay, *Joining the Asia-Pacific Partnership: The Environmentally Sound Decision?*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 477, 490 (2007) (stressing that because of the voluntary nature of UNFCCC the signatories were under no binding obligation to implement its provisions).

This soft obligation set forth by the UNFCCC became a legally binding obligation to all parties who signed on to the Kyoto Protocol.[248] Therefore, states are legally obligated to reduce emissions to 5 percent below their 1990 levels between 2008 and 2012.[249] The United States has not ratified the Kyoto Protocol and therefore is not legally bound by its provisions.[250]

In addition to countries setting out their obligations in treaties, international customary law sets forth further obligations.[251] The greatest obligation of customary international law that affects global climate change is the general principle that a state may not use its territory to harm the interests of another state.[252] This long-standing principle has been extended to environmental harm.[253] There are also other relevant principles in international law, including the notion that the polluter pays because pollution is a negative externality imposed by one nation on others.[254] Furthermore, because the world is a common space, the "tragedy of the com-

248. *See* Reuven S. Avi-Yonah & David Uhlman, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming Than Cap and Trade*, 28 STAN. ENVTL. L.J. 3, 17 (2009) (stating that Kyoto protocol was the first international agreement imposing mandatory reduction of greenhouse gas emissions); *see also* Christina K. Harper, *Climate Change and Tax Policy*, 30 B.C. INT'L & COMP. L. REV. 411, 416–17 (2007) (explaining that by signing and ratifying the Kyoto Protocol the industrial nations transformed their voluntary pledges into legally enforceable obligations).

249. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3. Dec. 11, 1997, 2303 U.N.T.S. 148 (obligating the parties to reduce their overall greenhouse gas emissions by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012).

250. *See* People v. Gen. Motors Corp., No. C06-05755, 2007 U.S. Dist. LEXIS 68547, at *13 (N.D. Cal. Sept. 17, 2007) (noting that even though President Clinton signed the Kyoto Protocol it was never presented to the Senate for approval); *see also* Bernard Simon, *Canada's Oil Sector Fights Pollution Plan*, N.Y. TIMES, Nov. 26, 2002, at W1 (asserting that the White House refused to approve the Kyoto Protocol because of its potentially negative impact on the U.S. economy).

251. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102(2) (1987) (describing customary international law as "results from a general and consistent practice of states followed by them from a sense of legal obligation"); *see also* Karlie Shea Clemons, *Hydroelectric Dams: Transboundary Environmental Effects and International Law,* 36 FLA. ST. U. L. REV. 487, 502–03 (2009) (citing both the Stockholm and Rio Declarations as sources of international customary law in relation to transboundary watercourses and hydroelectric dams).

252. *See* United States v. Canada, 3 R. Int'l Arb. Awards 1911 (1938), *reprinted in* 35 AM. J. INT'L L. 684, 684 (1941) (declaring that one party may not use its territory in a way that injures the rights of another's territory); *see also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9) (admitting that it is a general and well-recognized rule that every state is under an obligation not to allow its territory to be used for acts harmful to the other states).

253. *See* United States v. Canada, *supra* note 252, at 684 (holding that one party may not use its territory in a way that injures the rights of another's territory). *Cf.* the Reclamation Project Act of 1939. 53 Stat. §1187 (reserving the right of authorities to deny any use of Reclamation Project land and water surfaces that interferes with the Reclamation's rights or operations).

254. *See* The Queen v. Secretary of State for the Environment and Ministry of Agriculture, 1999 E.C.R I-2603 ¶ 17, (citing the principle that environmental damage should be corrected by those who caused it); *see also* Shubhankar Dam & Vivek Tewary, *Polluting Environment, Polluting Constitution: Is a "Polluted" Constitution Worse than a Polluted Environment?,* 17 J. ENVTL. L. 383, 387 (2005) (defining the polluter-pays principle as placing the burden of financial responsibility on the party or parties who have contributed to the undertakings or production that have caused the pollution).

mons" is a relevant consideration.[255] The environment is a shared resource, and without an obligation to conserve, countries will take and pollute according to their own self-interest.[256]

The precautionary principle states that, when in doubt of the outcome, protective concerns should prevail, and the ability to perform a potentially harmful activity should not be allowed.[257] This applies directly to climate change because lack of full scientific certainty is not a reason to postpone cost-effective measures that can prevent environmental degradation. Of course, all of these principles must be balanced against the concept of a state's sovereignty to use its territory and resources.[258]

State responsibilities differ between developed and developing states.[259] The notion of sustainable development is relevant to developing nations and their ability to pollute and create harm. This is an attempt to balance the economic interest of developing countries with an

255. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE MAG. 1243, 1244–45 (1968) (discussing the inevitable depletion of natural resources in common or public areas.); *see also* Daniel W. Bromley & Michael M. Cernea, *The Management of Common Property Natural Resources,* WORLD BANK DISCUSSION PAPERS No. 57, Oct. 31, 1989 (noting that common resources, without proper management, will be used up quickly by the world's growing population).

256. *See* Robert Farrell, *The Coming War for Earth's Resources*, THE REAL TRUTH, May 2, 2008, at 7 (outlining the negative effects of dwindling natural resources); *see also* Hardin, *supra* note 255, at 1244–45 (discussing the inevitable depletion of natural resources in common or public areas.); *see also* Dr. Ranee K.L. Panjabi, *Idealism and Self-Interest in International Environmental Law: The Rio Dilemma*, 23 CAL. W. INT'L L.J. 177, 196–97 (1992) (arguing that devoid of environmental idealism, self-interest will continue to be the guiding principle of foreign and domestic policy).

257. *See* IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: PERSPECTIVES AND PROSPECTS 2 (Elizabeth Fisher, Judith Jones & René von Schomberg eds., 2006) (recognizing the precautionary principle as prohibiting decision makers from using a "lack of full scientific certainty" as a basis for not attempting to prevent threats of harm); *see also* David VanderZwaag, *The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces*, 8 J. ENV. L. & PRAC. 355, 356 (1998) (expressing the principle's requirement to be more proactive when an environmental effect is scientifically uncertain).

258. *See* U.N. Charter art. 2, para. 1 (proclaiming the sovereign equality of all states); *see also* Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215, 250 (1996) (noting that Principle 21 of the Stockholm Declaration limits state sovereignty by balancing it with the duty to prevent environmental harm); *see also* James E. Hickey, Jr. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law,* 14 VA. ENVTL. L.J. 423, 440 (1995) (stating that state sovereignty must be balanced with the international community's interest in protecting the environment).

259. *See* C. Russell H. Shearer, *International Environmental Law and Development in Developing Nations: Agenda Setting, Articulation, and Institutional Participation*, 7 TUL. ENVTL. L.J. 391, 407–08 (1994) (listing the different responsibilities of developed and developing nations with respect to environmental issues); *see also* Ann E. Prouty, Note, *The Clean Development Mechanism and Its Implications for Climate Justice*, 34 COLUM. J. ENVTL. L. 513, 513–14 (2009) (explaining that the international community places different expectations on developed and developing nations regarding climate change).

interest in preserving the environment. Developing countries received fewer obligations than developed countries in the Kyoto Protocol, presumably for this reason.[260]

International environmental protection has been approached as a state responsibility issue. The Stockholm Declaration suggests a standard of strict liability for environmental damage, but some cases suggest that a state must have knowledge of environmental damage before it is liable.[261]

2. State Responsibilities to Citizens and Nations Affected by Climate Change

No treaties or agreements set forth binding obligations to protect displaced people and nations due to global climate change.[262] However, the customary principles in international human rights law regulate State obligations to affected citizens.[263] The potential sea-level rise disasters will force countries to stand by fundamental human rights claims.

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260. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 3. Dec. 11, 1997, 2303 U.N.T.S. 148 (establishing obligations for developed countries); *see also* Richard B. Stewart, *Economic Incentives for Environmental Protection: Opportunities and Obstacles, Environmental Law*, *in* THE ECONOMY AND SUSTAINABLE DEVELOPMENT: THE UNITED STATES, THE EUROPEAN UNION AND THE INTERNATIONAL COMMUNITY 171, 237 (Richard L. Revesz et al. eds., 2000) (noting that, under the Kyoto Protocol, developed and developing countries have differing obligations to mitigate climate change); *see also* Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 A.J.I.L. 276, 279–80 (2004) (illustrating the less stringent obligations of developing countries as dictated by the Kyoto Protocol).

261. *See* Susan E. Holley, *Global Warming: Construction and Enforcement of an International Accord*, 10 STAN. ENVTL. L.J. 44, 93 (1991) (recognizing that the Stockholm Declaration has been interpreted to support a strict liability standard for extraterritorial environmental damage). *But see* Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 362 n.1 (Sept. 22, 1995) (noting that a state must have knowledge of a harmful environmental effect before it is held liable).

262. *See* Lolita Buckner Inniss, *A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325, 368–69 (2007) (showing that even though no specific treaty exists to protect displaced people, the United Nations has created guiding principles to be used in such cases); *see also* Trevor L. Gross, *Improvement With Impunity: Development-Induced Displacement and the Guiding Principle 6(2)(c) Proportionality Test Applied to the Merowe Dam Project in Sudan*, 24 AM. U. INT'L L. REV. 377, 382–83 (2008) (claiming that since no specifically binding laws exist to aid displaced people, determining proper actions to take in such situations is difficult).

263. *See* Philippe Cullet, *Liability and Redress for Human Induced Global Warming: Towards an International Regime*, 43A STAN. J. INT'L L. 99, 107–08 (2007) (stating that the International Law Commission governs state responsibility for all wrongful acts); *see also* Sarah E. Hager, *Zimbabwe: Why the United Nations, State, and Non-State Actors Failed to Effectively Regulate Mugabe's Policy of Internal Displacement*, 37 CAL. W. INT'L L.J. 221, 247–48 (2007) (proclaiming that the United Nation's Guiding Principles on Internal Displacement are based on human rights).

The Universal Declaration of Human Rights states that no one shall be denied his or her nationality.[264] Therefore, if a state ceases to exist, the citizens of that state must acquire the nationality of a successor state. Nationality is a fundamental human right and, regardless of the state of the world, all humans deserve a country with reciprocal rights and duties.[265] Other threatened fundamental human rights include the right to life.[266]

The Universal Declaration of Human Rights does not address any environmental human rights.[267] In fact, no treaties explicitly provide for the right to a well-protected environment.[268] Unfortunately, the declaration cannot implore the international community to prevent climate change because human rights based upon environmental considerations currently have no standing in international law.[269] Human rights protection is one of the few existing areas of international law that retroactively addresses the sea-level rise problem rather than proactively

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264. *See* Universal Declaration of Human Rights, G.A Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) art. 15 (proclaiming the universal right of individuals not to be deprived of their nationality).

265. *See* Universal Declaration of Human Rights, *supra* note 264, at art. 15 (codifying the principle of the right to a nationality as well as to the illegality of being arbitrarily deprived of nationality); *see also* High Comm'r for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, ¶ 71, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) at n.9 (citing to an exhaustive list of sources, covenants and conventions within which the right to a nationality is extant and clearly elucidated).

266. *See* Universal Declaration of Human Rights, *supra* note 264, at art. 3 (declaring the proposition that "[e]veryone has the right to life, liberty and security of person"); *see also* B.J. Ramcharan, *The Concept and Dimensions of the Right to Life*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 1, 7–8 (B.J. Ramcharan ed., 1985) (listing examples of situations where the right to life is being threatened).

267. *See* Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 23 (2001) (explaining that environmental human rights can be inferred from the Universal Declaration of Human Rights); *see also* Lucia A. Silecchia, *Environmental Ethics from the Perspectives of NEPA and Catholic Social Teaching: Ecological Guidance for the 21st Century*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 659, 795 (2004) (noting that Pope John Paul II advocated to include a clean environment as a right in the International Declaration of Human Rights, evincing the lack of such a right in the document).

268. *See* Alexander Gillespie, *Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVT L. & POL'Y 107, 124 (2003) (commenting that despite the allure of the philosophy of a right to a decent environment, no international treaty explicitly refers to such a right between its parties); *see also* John H. Knox, *Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment*, 12 N.Y.U. ENVL L.J. 153, 155 (2003) (proclaiming that the international popularity of Environmental Impact Assessments has not translated into a global treaty on transboundary assessments).

269. *See* Gillespie, *supra* note 268, at 123 (indicating that the right to standing based on arguments of protection of rights of future generations holds no veracity in international law); *see also* ELLI LOUKA, INTERNATIONAL ENVIRONMENTAL LAW: FAIRNESS, EFFECTIVENESS AND WORLD ORDER 54 (2006) (noting that human rights are not precisely referred to or protected in international environmental law); *see also* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 293–94 (2003) (commenting that international instruments do not explicitly state that environmental rights are a human right).

preventing it.[270] Human rights require no preemptive obligations or responsibilities, but require states to act, post-disaster, to prevent any violations of human rights.[271]

As shown in Section III, the Kyoto Protocol provides legally binding obligations on many states to reduce emissions. Although the Kyoto Protocol is an instrument of legal obligation, it does not have a large enough effect on overall world emissions.[272] The main weaknesses in the Kyoto Protocol are the absence of the United States and the inability to include developing nations.[273] The United States, as the largest emitter of greenhouse gases,[274] weakened the effect of the Kyoto Protocol not only by refusing to ratify it, but also by continuing to emit as it pleases, threatening the effectiveness of the Protocol that required 55 percent of developed countries to ratify it before it came into effect.[275] Furthermore, developing nations are not sub-

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270. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 734 (Martin Parry et al., eds. 2007) (finding that rapid sea-level rise may limit adaptation possibilities and policies and lend a sharper focus on migration tactics); *see also* Michael G. Faure & Andre Nollkaemper, *Liability as an Instrument to Prevent and Compensate for Climate Change*, 26 STAN. ENVTL. L.J. 123, 172 (2007) (asserting that, because a claim of retroactive liability is estopped in international law, legal allegations against greenhouse-gas emitting countries can serve no purpose in terms of prevention of climate change).

271. *See* Universal Declaration of Human Rights, *supra* note 264, at 72 (declaring that all individuals have a "right to life, liberty, and security of person"). *But see* Walter Kälin & Claudine Haenni Dale, *Disaster Risk Mitigation–Why Human Rights Matter*, 31 FORCED MIGRATION REV. 38, 39 (2008) (declaring that a state is liable for failure to uphold a duty to protect life when a disaster is predictable and manageable prior to its occurrence).

272. *See* Joyeeta Gupta, *Developing Countries and the Post-Kyoto Regime*, *in* THE KYOTO PROTOCOL AND BEYOND: LEGAL POLICY CHALLENGES OF CLIMATE CHANGE 161, 177 (W.T. Douma et al. eds., 2007) (suggesting that it is unlikely that developing countries with high greenhouse gas emissions, such as China and India, will accept regulations without the United States' participation); *see also* Harro van Asselt & Joyeeta Gupta, *Stretching Too Far? Developing Countries and the Role of Flexibility Mechanisms Beyond Kyoto*, 28 STAN. ENVTL. L.J. 313–14 (2009) (recognizing that the goals of the Kyoto Protocol require greater regulations on greenhouse emissions in order to succeed).

273. *See* Gillespie, *supra* note 268, at 117–19 (arguing that, despite the efforts to stabilize greenhouse gas emissions, the refusal of the United States to participate and the exclusion of developing countries has inhibited the success of the Kyoto Protocol); *see also* Richard L. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1173 (2009) (rationalizing that competition between developing and developed countries deters the reduction of global emissions since the United States remains a major producer of greenhouse gases).

274. *See* GLOBAL CLIMATE CHANGE AND U.S. LAW 6 (Michael B. Gerrard ed. 2007) (establishing that the United States was the leading producer of greenhouse gases in 2000); *see also* ELIZABETH A. STANTON & FRANK ACKERMAN, FLORIDA AND CLIMATE CHANGE: THE COST OF INACTION 6, (2007), http://www.ase.tufts.edu/gdae/Pubs/rp/Florida_hr.pdf (reporting that the United States is responsible for over one-fifth of the global production of greenhouse gases).

275. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 25, para. 1 Dec. 11, 1997, 2303 U.N.T.S. 148 (requiring that a total of 55 countries participating in the convention and listed under Annex I, and accounting for 55 percent of the total carbon dioxide emissions for 1990, accept the document in order for it to be enforceable).

ject to mandatory emission controls of greenhouse gases.[276] While this may be appropriate for socioeconomic reasons, it greatly influences climate change because the developing nations are quickly becoming major emitters of greenhouse gases.[277]

Despite the problems with the Kyoto Protocol, even if it were to be ratified by the United States and included developing nations, it might still be too late to prevent harm from the perspective of small island nations.[278] The 5 percent target is insignificant when compared to global emissions reaching half of their current levels by 2050, which is the suspected threshold to prevent the melting of the Greenland ice sheet.[279] Because of the weakness of the Kyoto Protocol, there are no hard international obligations that look promising enough to prevent a sea-level rise disaster to many small island nations.

B. Potential Comprehensive Solutions

While the issues of sovereignty, citizenship, and state responsibility have been analyzed separately throughout this paper, the three are intertwined, and solutions may be adequate only by addressing all three in their interrelatedness.

Islands that have not fully submerged but have become unlivable provide the best comprehensive solution. Most small island nations do have points of higher elevation that would create a valuable exclusive economic zone after the livable portion of the island was submerged. Many states would likely be willing to partner with these small island nations and give their people full citizenship rights in exchange for the small territory with valuable resources. states may be willing to accept responsibility for the nations and bid on the ability to do so. In the case where

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276. *See* Kyoto Protocol, *supra* note 275, at art. 3, para. 1 (listing only industrialized nations and those undergoing a transition to a market economy under Annex I).

277. *See* Kyoto Protocol, *supra* note 275, at art. 25, para. 1 (applying its provisions to states accounting for at least 55 percent of total carbon dioxide emissions for 1990); *see also* John C. Dernbach, *Achieving Early and Substantial Greenhouse Gas Reductions Under a Post-Kyoto Agreement*, 20 GEO. INT'L ENVTL. L. REV. 573, 593, 597 (2008) (acknowledging that even though developing countries have contributed the least to accumulated greenhouse gases and have little if any financial and technological resources to combat the problem, they are expected to produce at least two-thirds of the estimated global increase in carbon dioxide emissions over the next 10 years); *see also* Sarah A. Peay, *Joining the Asia-Pacific Partnership: The Environmentally Sound Decision?*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 477, 499 (2007) (discussing U.S. concern that developing countries have no incentive to reduce the consumption of coal and other fossil fuel because they are not bound by the Kyoto Protocol).

278. *See* Sean Cumberlege, *Multilateral Environmental Agreements: From Montreal to Kyoto—A Theoretical Approach to an Improved Climate Change Regime*, 37 DENV. J. INT'L L. 303, 204 (2009) (stating that although the Kyoto Protocol has been ratified by 174 countries, it has not been effective in mitigating climate change); *see also* Alexander Gillespie, *Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVT L. & POL'Y 107, 117–18 (2003) (asserting that if the international community continues at the current pace, it will be too late to reverse the harmful effects of climate change).

279. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT: AN ASSESSMENT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 40–41 (Nov. 12, 2007) (declaring that the sea level rise will have a highly negative impact on the small islands including the scarcity of water resources by the midcentury); *see also* John Roach, *Greenland Ice Sheet Is Melting Faster, Study Says*, NATIONAL GEOGRAPHIC NEWS, Aug. 10, 2006, *available at* http://news.nationalgeographic.com/news/2006/08/060810-greenland.html (describing how Greenland's ice sheet is melting faster than predicted).

multiple states are eager to absorb a small island nation, the state that has the resources to accept new citizens and the greatest ties to the small island nation through economic dealings or cultural similarity should obtain the country.

A comprehensive solution is more difficult when a small island nation completely submerges. As discussed, this total absence of territory likely makes an entity not a state. Normally, the sovereignty issue would be clear. However, the citizenship issue and the state responsibility issue complicate the simple application of the classic rules for sovereignty because the citizens of the sovereign nation cannot be protected by a successor state. Since the citizens will have to move to some new territory and may desire to preserve the right to self-determination, and since they are in danger because of large polluting nations, perhaps the international community should search for land for these small island nations. However, attempts to do this in the past have been a source of immense conflict, such as the case of Israel. Therefore, dissolving the sovereignty of a submerged state may not only be more consistent with international law, but more simple and peaceful.

The dissolution of a state still leaves in question the future citizenship for the state's former citizens. If a state were to remain a sovereign entity, the former citizens would remain citizens regardless of where they resided. However, without a sovereign state, citizens of small island nations would need to become citizens of new states to avoid a human rights violation. Therefore, some internationally agreed-upon regimen must be implemented to allocate the displaced persons to other countries.

The Refugee Convention is not applicable to environmentally displaced persons and cannot be used to assist citizens of small island nations.[280] Besides its shortcomings in the definition of a refugee, the Convention does not afford citizenship rights to refugees, which is essential in these cases. There are two ways to distribute the environmentally displaced citizens. One option would be for all of the citizens of a state to be absorbed by one nation, as would be the case if a nation took over to obtain economic benefits of above-water territory. Another option would be for multiple states to take percentages of citizens based on agreements or based on the amount each state has contributed to an island nation's devastation.

Because states may be responsible for accepting more citizens based on the amount of pollution and contribution to greenhouse gases, state responsibility is a very important determination. When dealing with responsibilities of reducing carbon emissions, developed nations that are the largest emitters have had the burden fall on them. This may be appropriate because developed nations may have the means to reduce their emissions, and those reductions could noticeably affect temperatures. However, by these developed nations accepting a greater

280. *See* Susan Glazebrook, *Human Rights and the Environment*, 40 VICT. U. WELLINGTON L. REV. 293, 307 n.80 (2009) (arguing that the Refugee Convention is not well suited for environmentally displaced refugees). *See generally* Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection,* 94 IOWA L. REV. 1107, 1112 (2009) (noting that many people become environmentally displaced due to environmental problems).

responsibility to reduce emissions, they may or may not be accepting a greater responsibility for the consequences of global sea-level rise.

Without volunteers to accept new environmentally displaced citizens, there will be a great international debate on responsibility. Perhaps the nations that contributed the most to global climate change should bear the responsibility of accepting those citizens. On the other hand, perhaps an economic study should determine which countries are in the best position to accept new citizens at the least cost and impact. The displaced citizens will want to have a say in which countries they will assimilate into, but the international community as a whole must have the final word. A good solution may be similar to the carbon trading schemes that are in use to assist in emissions reductions. Countries that have contributed greatly to greenhouse gases may have the greatest responsibility to accept new citizens. However, if they do not want to accept them, they can pay less wealthy nations to accept the citizens for them. While this may lead to economically satisfied nations, it may be unethical to use people in trading schemes. Furthermore, the displaced citizens would not have a say in which country accepts them or enough advance notice for a major relocation. This issue must be dealt with before a problem occurs because there are many involved parties that have greatly differing interests.

VI. Proposed Recommendation

Because there is no comprehensive law on how to deal with the situation of submerged nations, any solution based on the principles of international law that protected the interests of the citizens would be better than the current state. However, different choices of international law may optimize solutions. Therefore, states should begin discussing and solving this problem before the danger is imminent. A solution will depend on the cooperation of nonsubmerged states either voluntarily or due to binding international law.

Aside from preventing sea-level rise, the international community should be concerned with two main interests when creating a solution: avoiding the violation of human rights of displaced citizens, including hazardous, unfit living conditions and statelessness; and preserving unique cultures and heritages. states with resources that are willing to accept displaced persons are the key to reaching these goals. Before any relocation is necessary, members of the UN should be willing to accept all citizens of potentially submerged nations. States willing to accept a certain number of displaced persons should be compensated on a per-person basis. The compensation could be based partially on the rights to EEZ for submerged nations. Another option would be in the form of carbon emissions credits. Under Kyoto, countries can purchase emissions credits from nations that better control pollution.[281] These credits can be used to produce more greenhouse gases. Because climate change and sea-level rise are directly related to emissions, states may accept the idea of gaining emissions credits for accepting new citizens.

Once many states are willing to accept displaced persons, there must be a process for determining which citizens will relocate to which states. Displaced persons should have a say in where they relocate and should be given preference to relocate to places that are similar in geography and culture or to places where they have personal ties. Relocations should be decided

281. *See generally* Kyoto Protocol, *supra* note 275 (establishing a legally binding agreement between 183 countries and a regional economic organization to reduce greenhouse gas emissions

well before a state of emergency so that citizens can move at a pace that does not cause panic or damage to the island and its citizens. Because citizens will relocate to nonsubmerged nations where they will be given citizenship, the sovereignty issue will become moot under this recommendation. However, loss of sovereignty should not mean loss of culture. The international community will be responsible for accepting and preserving the island cultures, but the government and state will no longer exist.

A plan of action that mitigates the problems discussed in this article is necessary before island nations submerge. Although it would be better if the international community could reverse the effects of climate change before sea levels rise, they cannot afford to wait and see what will happen before creating a plan. Sea-level rise and many other likely problems must be addressed with the same effort used to address the prevention of climate change. With so much at stake for the vanishing low-lying island nations, it is time for the industrial nations on higher ground to "take the higher ground."

Victor's Justice in War Crimes Tribunals: A Study of the International Criminal Tribunal in Rwanda

Carla De Ycaza*

Since World War II (WWII), war crimes, crimes against humanity, and genocide have been widespread.[1] What started out as a response to the atrocities of WWII with the Nuremberg and Tokyo trials eventually developed into a worldwide outcry against war crimes, crimes against humanity, and genocide, ranging from tribunals in the former Yugoslavia to Rwanda, Iraq, and Cambodia.[2] Although the tribunals have been an extremely important step forward in the development of international law regarding these most severe crimes, the critique of "victor's justice," or trials for criminals on the losing side, has been prevalent throughout the international criminal tribunals since Nuremberg.[3] How, then, are the "victorious protagonists" not held accountable for the atrocities they commit during wartime?[4] Why do we allow crimes committed by the victorious side of a conflict to go unpunished? Is this an effective method of maintaining peace within a region or just a way of pushing an agenda?

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1. *See* Symposium, *Rule of Law Symposium: Teaching the Rule of Law*, 18 MINN. J. INT'L L. 403, 411 (2009) (noting that war crimes and genocide are taking place in countries such as Kosovo, Rwanda, Sierra Leone, and East Timor).

2. *See* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005) (asserting that international criminal tribunals have recently been established to prosecute war crimes and crimes against humanity); *see also* Tom Dannenbaum, *Crime Beyond Punishment*, 15 U.C. DAVIS J. INT'L L. & POL'Y 189, 189 (2009) (explaining that the demand for retribution from war crimes led to institutional developments of special tribunals, the UN Security Council, and the inauguration of the International Criminal Court to try the perpetrators of these mass crimes).

3. *See* Aaron Fichtelberg, *Liberal Values in International Criminal Law: A Critique of Erdemovic*, 6 J. INT'L CRIM. JUST. 3, 19 (2008) (reasoning that because the Nuremberg and Tokyo tribunals were created with a political bias, the only way to cure the taint of victor's justice is to assure that criminals are granted basic human rights); *see also* Leslie H. Gelb & Justine A. Rosenthal, *The Rise of Ethics in Foreign Policy*, 82 FOREIGN AFFAIRS 2, at para.10 (2003) (recognizing that the precedents set by the Nuremberg trials are viewed more as victor's justice than as a universal symbol of morality).

4. *See* Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*. 4 J. HUM. RTS. 213, 215 (2005) (referring to Croatia and the Rwandan Patriotic Front as the victors of the conflicts in the Balkans and central Africa, respectively, and noting the preferential treatment of those parties).

* **Carla De Ycaza is a Ph.D. candidate in International Human Rights Law at the Irish Centre for Human Rights. Her thesis research focuses on traditional and modern methods of post-conflict transitional justice in Africa. She is a lecturer at NYU's Center for Global Affairs and serves as editor-in-chief of the INTERDISCIPLINARY JOURNAL OF HUMAN RIGHTS LAW. She is also a visiting scholar at Columbia University's Center for the Study of Human Rights.**

The International Criminal Tribunal for Rwanda was created under Chapter VII of the United Nations Charter, on November 8, 1994.[5] Chapter VII of the UN Charter sets forth the Security Council's power to take action against "threats to the peace, breaches of the peace, and acts of aggression."[6] The statute of the International Criminal Tribunal for Rwanda states (ICTR):

> As amended by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994 [hereinafter referred to as "The International Tribunal for Rwanda"] shall function in accordance with the provisions of the present Statute.[7]

That is, the ICTR is authorized to prosecute those responsible for genocide, war crimes, and crimes against humanity for crimes committed between January 1, 1994, and December 31, 1994, in Rwanda, and also Rwandan citizens responsible for such crimes in neighboring States during that period.[8] These dates show a clear bias in the court toward Hutu prosecutions, since violence between the two groups occurred long before (and after) this mandated period, where the killings of Hutus and Tutsis were reciprocal.[9] Based on evidence found by various commissions of inquiry, news sources, and human rights groups, the primarily Tutsi Rwandan Patriotic Front (RPF) had committed gross violations of human rights, including crimes against human-

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5. *See* S.C. Res. 955, ¶ 1, U.N. Doc. S/Res/955 (1994) [hereinafter RESOLUTION FOR RWANDAN INT'L CRIMINAL TRIBUNAL] (creating the International Criminal Tribunal for Rwanda); *see also* U.N. Charter arts. 39–51 (establishing what measures the Security Council may use to execute its decisions).

6. *See* U.N. Charter arts. 39–51 (defining the Security Council's scope of authority).

7. *See* RESOLUTION FOR RWANDAN INT'L CRIMINAL TRIBUNAL, *supra* note 5, at ¶ 1 (creating the ad hoc tribunal instituted by the United Nations to bring human rights offenders to justice in Rwanda); *see also* Michael P. Scharf, *Statute of the International Criminal Tribunal of Rwanda*, U.N. AUDIOVISUAL LIBRARY OF INT'L L., 2008, at *1 (stating that the ICTR is governed by its statute).

8. *See* Security Council Meeting 3453, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453, at 14–15 (Nov. 8, 1994) (memorializing then Rwandan Ambassador Manzi Bakuramutsa's argument that the limited temporal jurisdiction would prevent the ICTR from fully prosecuting the criminal activities that culminated in the genocide of 1994); *see also* Eric Husketh, Note, *Hastening Justice at UNICTR*, 3 NW. U.J. INT'L HUM. RTS. 8, at ¶ 1 (2009) (noting that the ICTR was established in 1994 to deal with crimes committed that year in Rwanda and by Rwandan nationals elsewhere).

9. *See* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 350 (1997) (explaining that the conflict can be traced all the way back to 1959 when persecution of the Tutsis began); *see also* Pernille Ironside, Note, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31, 39 (2002) (indicating that the majority of Rwandan prisoners are Hutus).

ity and possible war crimes.[10] The fact that the ICTR has not prosecuted these individuals indicates a prevalence of ethnic bias and "victor's justice" in present day international criminal tribunals, echoing the days of Nuremberg and Tokyo.[11] Perpetrators from the victims' side should be prosecuted just as perpetrators from the opposing side are, especially in the case of Rwanda, as there is no limitation in the statute establishing the tribunal against prosecuting members of the RPF.[12] If perpetrators of crimes against humanity and war crimes from the victims' side are not prosecuted, there is little hope for achieving reconciliation in a post-genocide society, or fulfilling the goals of the ICTR, of which reconciliation is a primary one.[13] The use of trials to achieve reconciliation in Rwanda will continue to be unsuccessful if prosecutions remain one-sided and favor the examination only of crimes committed by the losing side, and not of offenses carried out by the victors.

I. Rwanda

A. Background: Killings Committed by Rwandan Patriotic Front in Rwanda, 1990–1995

In the aftermath of the Rwandan genocide, the Central Organ of the Organization of African Unity's (now the African Union) Mechanism for Conflict Prevention in November of 1997 created an International Panel to investigate the 1994 genocide and surrounding events, starting from the 1993 Arusha Peace Agreement between the government of Rwanda and the

10. *See* Report of the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Sequi, Special Rapporteur of the Commission on Human Rights, U.N. ESCOR, COMM'N ON HUM. RTS., 51st Sess., ¶¶ 52–54, U.N. Doc. E/CN.4/1995/7 (1994) (listing various atrocities committed by the Rwandan Patriotic Front in violation of human rights and international humanitarian law); *see also* Payam Akhavan, *Current Developments: The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L. L. 501, 502 (1996) (describing the international community's recognition of and response to the genocidal and inhuman acts committed in Rwanda by the RPF).

11. *See* Durwood Riedel, *The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today?* 24 BERKELEY. J. INT'L L. 554, 554–57 (2006) (describing how the international military tribunals of Rwanda were reminiscent of those in Nuremberg and Tokyo as examples of "victor's justice"); *see also* Audrey I. Benison, Note, *War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court*, 88 GEO. L. J. 141, 146–47 (1999) (explaining that the Nuremberg and Tokyo trials, which have been criticized as examples of "victor's justice," influenced the development of the international tribunals of Rwanda).

12. *See* Shawn Smith, Note, *The International Criminal Tribunal for Rwandan* [*sic*]*: An Analysis on Jurisdiction*, 23 T. MARSHALL L. REV. 231, 246–47 (stressing the need for the Rwandan tribunal to investigate atrocities committed by both sides of the conflict to be fair and objective); *see also* Mariann Meier Wang, Article, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 197 (1995)(asserting that examination of the violent acts committed on both sides of a conflict is important to maintaining a fair and neutral criminal tribunal).

13. *See* RESOLUTION FOR RWANDAN INT'L CRIMINAL TRIBUNAL. *supra* note 5 (stating that the purpose of the International Criminal Tribunal for Rwanda is to assist in national reconciliation and peace in Rwanda); *see also* Kingsley Chiedu Moghalu, Legal Adviser, Special Assistant to the Registrar, Int'l Criminal Tribunal for Rwanda, AFRICAN DIALOGUE II CONFERENCE: PROMOTING JUSTICE AND RECONCILIATION IN AFRICA: CHALLENGES FOR HUMAN RIGHTS AND DEVELOPMENT 2 (2002), http://www.ictr.org/ENGLISH/africandialogue/papers/KingsleyICTR.pdf (explaining that the Tribunal was created in part to contribute to national reconciliation in Rwanda).

RPF to end the three-year civil war, up until the fall of Kinshasa in May of 1997.[14] According to the International Panel of Eminent Personalities' Report, accusations against the RPF for human rights violations can be traced back to the invasion of Rwanda in October of 1990 by Ugandan-based RPF troops, if not earlier.[15] Incidents of civilian massacres and other gross violations of human rights by the RPF, including crimes against humanity, occurred before, during, and after the 1994 genocide, up through the 1996 hunt for those involved in the genocide throughout central Africa.[16] The genocide occurred within the context of the civil war between the RPF and the Rwandan Hutu government from October 1, 1990 through August 4, 1993.[17] Many of the atrocities committed throughout the decade of the 1990s were part of an ongoing cycle of violence, where one act provoked retaliation by the opposite side.[18] Based on the 1994 Human Rights Watch World Report, RPF crimes against civilians prior to 1994 were evident in the findings of the commission:

> The international commission also found that during the same twenty-seven month period [between October 1990 and January 1993], the RPF had attacked civilian targets and killed and injured civilians who were clearly protected by the Geneva conventions. It reported that the RPF had also kid-

14. *See* Ernest Harsch, *OAU Sets Inquiry into Rwanda Genocide: A Determination to Search for Africa's Own Truth*, 12 AFRICAN RECOVERY 1, 4 (1998) (indicating that a panel was set up by the Organization of African Unity to investigate the Rwanda genocide of 1994); *see also* Sean D. Murphy, *OAU Report Regarding Rwandan Genocide*, 94 AM. J. INT'L L. 692, 692–93 (2000) (noting that an international panel was created by the Organization of African Unity to report the facts of how the genocide was conceived, planned, and executed).

15. *See* ORG. OF AFRICAN UNITY INT'L PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, RWANDA: THE PREVENTABLE GENOCIDE 10 [hereinafter RWANDA: THE PREVENTABLE GENOCIDE] (2000) (reporting that the Rwandan Patriotic Front committed serious human rights violations starting with the 1990 invasion of Rwanda); *see also* Luc Reydams, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, 3 J. INT'L CRIM. JUST. 977, 982 (2005) (stating that the Rwandan Patriotic Front has been guilty of human rights abuses beginning with the civil war that emerged after its 1990 invasion of Rwanda); *see also* Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice,* 79 TEMP. L. REV. 1, 27–29 (2005) (asserting that the invasion of Rwanda in 1990 by the Rwandan Patriotic Front sparked the genocide in that country).

16. *See* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 15, at 15 (stressing that many innocent Hutus were slaughtered by the Rwandan Patriotic Front); *see also* Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1273 (2000) (emphasizing that in the attempt to end genocide and establish control over the government, the Rwandan Patriotic Front murdered thousands of unarmed civilians); *see also* Waldorf, *supra* note 15, at 59–60 (announcing that the Rwandan Patriotic Front massacred between 25,000 and 40,000 Hutu civilians during and immediately following the genocide).

17. *See* RWANDA: THE PREVENTABLE GENOCIDE *supra* note 15 (declaring that the civil war began on October 1, 1990, when soldiers of the RPF invaded Rwanda); *see also* HUMAN RIGHTS WATCH, ARMING RWANDA—THE ARMS TRADE AND HUMAN RIGHTS ABUSES IN THE RWANDAN WAR, at *2 (1994) (noting that the Rwandan war began with the RPF invasion in October 1990 and ended with the signing of the Arushu Peace Agreement on August 4, 1993).

18. *See* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 15 (concluding that Rwandan Patriotic Front soldiers killed all Hutus that were in any way involved the killing of Tutsis); *see also* Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 558–59 (1998) (revealing that the Habyarimana government arrested and slaughtered tens of thousands of Tutsis in Rwanda after the RPF attempted to overthrow the government in 1990); *see also* Jason A. Dzubow, *The International Response to the Civil War In Rwanda*, 8 GEO. IMMIGR. L.J. 513, 516 (1994) (arguing that thousands of Hutus fled Rwanda after the Rwandan Patriotic Front gained control of the country out of fear that they would be killed in retaliation for the massacres of the Tutsis).

> napped Rwandans and forced them to go to Uganda and has [*sic*] looted and destroyed the property of civilians.[19]

The potential smoking gun for RPF prosecutions is thought to be the report of the Gersony mission, "the first convincing evidence of wide-spread, systematic killings by the RPF . . . gathered by a UNHCR team," which was suppressed by the UN.[20] Gersony and his team became convinced that the RPF had committed "clearly systematic murders and persecution of the Hutu population in certain parts of the country."[21] Gersony cited that "from April to August the RPF had killed between 25,000 and 45,000 persons, [or] between 5,000 and 10,000 persons each month from April through July and 5,000 for the month of August."[22] Human Rights Watch also points out the intentionality of these widespread and systematic attacks by the RPF:

> RPF soldiers engaged in two kinds of deliberate killings of civilians outside of combat situations: the indiscriminate massacre of individuals and groups, bearing no arms, and posing no threat to them and the execution of individuals, selected according to their reputations, political party allegiance, denunciations by others in the community, or after interrogation by RPF soldiers. . . . [M]en were sometimes separated from women, and victims were often tied before being killed and were slain by blows of a heavy instrument or a machete. These killings were wide-spread, systematic, and involved large numbers of participants and victims. They were too many and too much alike to have been unconnected crimes executed by individual soldiers or low-ranking officers. Given the disciplined nature of the RPF forces and the extent of communication up and down the hierarchy, com-

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19. *See* The Secretary-General, *Letter Dated 9 December 1994 From the Secretary-General Addressed to the President of the Security Council*, ¶ 5, *delivered to the Security Council*, U.N. Doc. S/1994/1405 (Dec. 9, 1994) (summarizing the findings of the Commission of Experts, including findings of nongenocidal war crimes committed by the Rwandan Patriotic Front); *see also* HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1994 35 (1994) (quoting the International Commission of Investigation on Human Rights in Rwanda as saying that the Rwandan Patriotic Front had attacked civilian targets and violated the Geneva Convention).

20. *See* ALISON DES FORGES ET AL., LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 726 (1999) (claiming that the UN chose to suppress the findings of the Gersony Mission out of fear that it would reflect badly on the UN and also weaken the new Rwandan government). *See generally* HUMAN RIGHTS WATCH WORLD REPORT 1994, *supra* note 19, at 35 (quoting the International Commission of Investigation on Human Rights in Rwanda as saying that the Rwandan Patriotic Front had attacked civilian targets or violated the Geneva Convention).

21. *See* RENE LAMARCHAND, THE DYNAMICS OF VIOLENCE IN CENTRAL AFRICA 96 (2009) (quoting the Gersony report's findings that the RPF had committed systematic murders); *see also* Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 ILSA J. INT'L L. 41, 80 n.280 (2005) (noting that Robert Gersony found that the Rwandan Patriotic Front had committed systematic killings of civilians).

22. *See* DES FORGES ET AL., *supra* note 20, at 728 (stating that Gersony reportedly estimated the number killed by the Rwandan Patriotic Front to be between 25,000 and 45,000); *see also* Drumbl, *supra* note 16, at 1222 n.1 (observing that the exact number of victims is hard to determine but that 800,000 is a common estimate).

> manders of this army must have known of and at least tolerated these practices.[23]

The amount of research and fact-finding done on the Gersony mission might have led to a conclusive, authoritative report on RPF crimes. However, in a briefing in Washington, U.S. Undersecretary of State for Global Affairs Timothy Wirth, along with Assistant Secretary of State George Moose, rejected the conclusion that RPF killings were "systematic," with Wirth suggesting that Gersony received erroneous information from biased informants.[24] This directly contradicts the previous evidence presented by the Gersony mission and Human Rights Watch. African Rights also contradicts Human Rights Watch and the Gersony mission's analyses, supporting the large-scale deliberate attacks by the RPF in their study, *Rwanda: Death, Despair, and Defiance*, in which African Rights minimizes the number of abuses and killings by the RPF, stating that as of September 1994, "no convincing evidence has yet been produced to show that the RPF has a policy of systematic violence against civilians."[25]

Another discrepancy regarding the magnitude and severity of RPF crimes can be found in Gerard Prunier's work, with his earlier and later revision of *The Rwanda Crisis*. In his earlier version, his number of RPF crimes was much lower than the number quoted by Human Rights Watch, but in his later revision, his research indicated that the numbers might be even greater, possibly reaching 100,000.[26]

The numbers and hard evidence prove conclusively and decidedly favor prosecution of the RPF for these widespread and systematic killings.[27] However, the discrepancies in opinions about the magnitude of the crimes have made it difficult to move forward with prosecutions of

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23. *See* DES FORGES ET AL., *supra* note 20, at 734 (noting that the Rwandan Patriotic Front has condemned the killings of civilians although few soldiers were ever brought to trial); *see also* Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda Andakayesu Cases*, 11 FLA. J. INT'L L. 517, 525 (1997) (asserting that in 1994 there were widespread systematic attacks launched by the Rwandan Patriotic Front against civilians in Rwanda).

24. *See* DES FORGES ET AL., *supra* note 20, at 732 (explaining why the U.S. Undersecretary for Global Affairs decided not to support Gersony's findings and how this decision affected the genocide); *see also* Alison DeForges, *Learning From Disaster: U.S. Human Rights Policy in Rwanda*, *in* IMPLEMENTING U.S. HUMAN RIGHTS POLICY 29, 39 (Debra Liang-Fenton ed., 2004) (noting that while Timothy Wirth was initially convinced by Gersony's reports, he later rejected the conclusion that RPF killings were widespread and systematic).

25. *See* AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR, AND DEFIANCE 1087 (1994) (arguing that the African Rights' report contradicted the Human Rights Watch in its description of the genocide numbers); *see also* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 15, at 10 (quoting the African Rights' study, which denied any systematic crimes by the Rwandan Patriotic Front).

26. *See* ORG. OF AFRICAN UNITY INT'L PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, RWANDA: THE PREVENTABLE GENOCIDE 10 (2000) (illustrating that Gerard Prunier had substantially underestimated the number of Rwandan Patriotic Front killings in the first edition of his book); *see, e.g.,* GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 356, 359 (1995) (indicating the discrepancies in the author's determination of the number of Rwandan Patriotic Front crimes that occurred during the genocide).

27. *See* Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L. 41, 41–42 (2007) (discussing the current process for convicting genocidal criminals); s*ee also* Melynda J. Price, *Balancing Lives: Individual Accountability and the Death Penalty as Punishment for Genocide*, 21 EMORY INT'L L. REV. 563, 567–68 (2007) (acknowledging the extent of the atrocities).

RPF members for the crimes they committed.[28] These opposing arguments made by Wirth and Moose, along with groups like African Rights, are presented with a certain agenda. The current RPF-dominated Rwandan government is often viewed as key to the region's security, and an examination of abuses committed by members of this stable government would likely anger many supporters of the government, which could in turn create problems for international security within Africa, specifically within the Great Lakes region. This would likely cause unwanted problems for African Rights and for the United States. For these reasons, prosecutions of RPF members will continue to be delayed, despite the conclusive evidence presented against the RPF for crimes committed before, during and after the genocide.

According to Human Rights Watch, the RPF also committed many other human rights abuses prior to April 1994, including abducting civilians, destroying property, attacking a hospital, and forcing civilians into displaced persons camps.[29] The report goes on to highlight the killings prior to April 1994, noting that RPF soldiers killed hundreds of civilians on the basis of their political party membership in February 1993 and allegedly killed civilians in two incidents in November 1993.[30]

In her extensive 1999 report for Human Rights Watch, Alison Des Forges describes the 1994 RPF war crimes and crimes against humanity that occurred concurrent with the Hutu genocide killings:

> As RPF soldiers sought to establish their control over the local population, they also killed civilians in numerous summary executions and in massacres. They may have slaughtered tens of thousands during the four months of combat from April to July [of 1994]. . . . Carried out by soldiers who were part of a highly disciplined military organization, these killings by the RPF rarely involved civilian participation, except to identify the persons to be slain.[31]

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28. *See* Susan Benesch, *Vile Crime or Inalienable Right?: Defending Incitement to Genocide*, 48 VA. J. INT'L L. 485, 515 (2008) (discussing what constitutes a crime of genocide); *see also* Okechukwu Oko*, The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L.J. 343, 384–85 (2008) (addressing the difficulty in prosecuting genocide).

29. *See* DES FORGES ET AL., *supra* note 20, at 701 (detailing the forced migration of Rwandans prior to genocide); see also Benesch, *supra* note 28, at 486–87 (discussing a politician's speech that incited genocide and led to the killing of 50,000 Tutsis).

30. *See* DES FORGES ET AL., *supra* note 20, at 701–02 (noting that UNAMIR investigated killings by the Rwandan Patriotic Front in 1993 but never issued a report); *see also* Crystal Faggart, *U.N. Peacekeeping After Rwanda: Lessons Learned or Mistakes Forgotten?*, 27 PENN ST. INT'L L. REV. 495, 500 (2008) (recounting how Rwandan Patriotic Front attacks against the Hutu escalated in 1993).

31. *See* ALISON DES FORGES ET AL., LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 726 (1999) (theorizing that the genocide was executed by soldiers who were part of a highly disciplined military organization).

That is to say, these killings were carried out by RPF military officers, not just a random civilian population.[32] She goes on to state that it is likely that the highest levels of command of the RPF knew and tolerated these abuses.[33]

As further evidence of the fact that the top officials of the RPF government were aware of the attacks, in an interview with a British journalist, RPF Minister of the Interior Seth Sendashonga spoke of a "deliberate policy of ethnic cleansing," an attempt at "social engineering on a vast, murderous scale."[34] The purpose was nothing less than "to even up the population figures. Look at the Rwandan equation. How can a minority tribe of one-plus million govern a country dominated by a tribe of enemies who outnumber them three to one? They want to make it Hutu 50 per cent, Tutsi 50 per cent. But to do that they will have to kill a lot of Hutu."[35] According to Amnesty International, due to his outcry against RPF crimes committed, Sendashonga was exiled and eventually assassinated:

> Sendashonga was among several prominent Rwandese who had provided testimonies to non-governmental organizations and some foreign governments about large-scale massacres of mostly unarmed civilians by members of the RPF since April 1994, but these received little international attention at that time. Sendashonga was appointed Minister of Interior in the new Rwandese Government, until August 1995 when he and several other ministers were dismissed or forced to leave their posts. While in government, Seth Sendashonga had repeatedly complained to the most senior authorities about persistent human rights abuses committed by the RPF since 1994. One of the main reasons for his resignation was disillusion in the face of the

32. *See* CARLA DEL PONTE & CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 178 (2009) (noting the classification of the RPF as a "well-disciplined force" comprised of soldiers); *see also* DES FORGES ET AL., *supra* note 31 at 692 (positing that those responsible for the killings were not civilians).

33. *See* DES FORGES ET AL., *supra* note 31, at 734–35 (proclaiming that the RPF permitted human rights abuses); *see also* Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 30 (2005) (stating that the Rwanda genocide was a state-initiated phenomenon whereby political elites used a hierarchal state structure to implement a genocide).

34. *See* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 26, at 10 (noting the accusations made by Rwandan Patriot Front Minister of the Interior that the genocide was deliberate); *see also* Oko, *supra* note 28, at n.285 (explaining that the genocide resulted from the intentional incitement of ethnic hatred); *see also* Jamie A. Williamson, *The Jurisprudence of the International Criminal Tribunal for Rwanda in War Crimes*, 12 NEW ENG. INT'L & COMP. L. ANN. 51, 61 (2005) (acknowledging that the genocide appeared to be a civil war between two well-organized armies).

35. *See* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 26, at 10 (stating that the government of Rwanda deliberately tried to reduce the Hutu population); *see also* Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 566 (1998) (claiming that the Tutsi government massacred large numbers of Hutus who had previously targeted Tutsis); *see also* Waldorf, *supra* note 33, at 60 (finding that the Tutsi government killed between 25,000 and 45,000 Hutus after 1994).

> government's lack of action to address the state of insecurity in Rwanda and continuing human rights violations by the Rwandese Patriotic Army (RPA), the new national army of Rwanda.[36]

Sendashonga was not the only high-ranking RPF government official aware of these killings. Interviewed along with Sendashonga was Sixbert Musangamfura, former director of civilian intelligence. Musangamfura claimed that "by the time he defected [from the post-genocide RPF-led government] in August 1995, he had compiled a confirmed list of 100,000 Hutu who had been killed beginning as soon as the new government had taken over; by the time of the interview in April 1996, he estimated the total had increased by another 200,000."[37]

From April through July 1994, "[i]n the course of combat, the RPF—as well as Rwandan government forces—killed and injured noncombatants, sometimes through attack by heavy weapons, sometimes in exchanges of small arms fire. . . . [H]undreds of unarmed civilians fell victim to weapons fire in the capital, in Byumba and in Gitarama."[38] One such instance of RPF civilian killings occurred on April 15, 1994, where the RPF killed all but three of a large group of unarmed civilians, who were accompanying the militia as they retreated toward the Tanzanian border after killing many Tutsi civilians.[39] Further evidence of RPF attacks on civilians is documented in the report:

> At Rutongo, north of Kigali, RPF soldiers reportedly went from house to house killing unarmed inhabitants and at Murambi in Byumba prefecture, they killed seventy-eight persons, of whom forty-six were listed as children, between April 13 and 15. In Gitwe, an RPF soldier shot an old man in the leg as he was hurrying towards his home. When RPF troops took the church center of Kabgayi where thousands of Tutsi were confined in camps they killed Hutu civilians in the area and left some of their bodies, with the arms bound, in the woods on the church property. Outside Butare, two teenagers and a woman and the baby on her back—all with identity cards showing they were Hutu—were found shot dead in a banana plantation immediately after RPF troops under Captain Théoneste Rurangwa moved into the area.

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36. *See* AMNESTY INTERNATIONAL REPORT, *Inquiry into Assassination of Rwandese Opposition Leader in Exile Urgently Needed*, May 18, 1998, AFR/47/19/98, at 2 (reporting that Sendashonga complained about human rights abuses and that he became discouraged by the government's lack of action).

37. *See* ORG. OF AFRICAN UNITY INT'L PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, RWANDA: THE PREVENTABLE GENOCIDE 10 (2000) (indicating that 100,000 people were killed when the new government took over); *see also* Marie Beatrice Umutesi, *Is Reconciliation Between Hutus and Tutsis Possible? The Difficult Road to Reconciliation*, 60 J. INT'L AFF. 1, 157 (Sept. 2006) (arguing that over 300,000 people were killed in a one-year period).

38. *See* DES FORGES ET AL., *supra* note 31, at 702–03 (asserting that the Rwandan Patriotic Front and the Rwandan government killed unarmed civilians); *see also* Human Rights Watch, *Lasting Wounds: Consequences of Genocide and War for Rwanda's Children* [hereinafter *Lasting Wounds*], 1, 12 (2003) (detailing the Rwandan Patriotic Front's attacks on unarmed civilians in Byumba and Gitarama).

39. *See* DES FORGES ET AL., *supra* note 31, at 704 (emphasizing the Rwandan Patriotic Front's indiscriminate killing of retreating militia and civilians); *see also* Rene Lemarchand, *Bearing Witness to Mass Murder*, 48 AFRICAN STUD. REV. 93, 93–94 (2005) (describing the Rwandan Patriotic Front's murder of refugees, including fleeing militia and civilians).

> According to several local and foreign witnesses, RPF soldiers killed civilians in the arboretum at the university and in the commune of Shyanda, at the home of Gatabazi, near Save. RPF forces also killed civilians in places where there had been little or no slaughter of Tutsi and where militia did not appear to threaten their advance. At Giti, for example, a commune known for its protection of Tutsi during the genocide, RPF soldiers "swept through like fire." In many battles RPF soldiers defeated enemy forces with ease, but they took few, if any, prisoners. Many of the defeated retreated rapidly, but others were shot by the RPF even after they had laid down their arms. In one incident filmed by a video journalist, RPF soldiers appeared with their weapons pointing at government soldiers who were wounded and on the ground. According to the journalist, the RPF shot the captured soldiers after he had shut off his camera.[40]

In addition to these documented massacres during combat, the RPF killed many civilians after combat had ended and government forces had left:

> On or about April 20, the RPF drove government soldiers from the small town of Byumba and then transferred the headquarters of its general staff there from Mulindi. Many civilians followed the retreating government soldiers, but hundreds of others sought safety in the stadium. RPF soldiers reportedly massacred 300 or more of these people.[41]

One of the only massacres by RPF forces that was documented in detail was reported by Human Rights Watch Africa in September 1994, based on an investigation conducted in late August.[42] In that case, RPF soldiers arrived on June 19, assembling local and displaced people in the Rugogwe sector in the commune of Mukingi, Gitarama prefecture.[43] They claimed that they wanted to talk about transporting people to another location.

> Without giving any reason, soldiers killed a woman named Sara and a man named Bihibindi. An hour and a half later, they opened fire on the crowd of

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40. *See* DES FORGES ET AL., *supra* note 31, at 704 (stressing the Rwandan Patriotic Front's merciless killing of civilians); *see also Lasting Wounds*, *supra* note 38, at 12 (reporting additional incidents of the Rwandan Patriotic Front's attacks on innocent men, women, and children).

41. *See* DES FORGES ET AL., *supra* note 31, at 704 (reporting that around April 20, the Rwandan Patriotic Front drove government soldiers from Byumba); *see also* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 37 (discussing an interview with Sixbert Musangamfura, a high-ranking defector, which revealed a list of 200,000 Hutus who had been killed).

42. *See* Raymond Bonner, *RPF Troops Accused of Village Massacre: Forces Loyal to Rwanda's New Government Have Now Been Implicated in an Atrocity*, THE GUARDIAN (London), Sept. 6, 1994, at 8 (explaining that General Kagame heard about the killings from Alison Des Forges, a Human Rights Watch official, and ordered an investigation); *see also* Interview with Alison Des Forges, Human Rights Activist, *Human Rights Watch Official Says She Has Evidence of RPF Killings*, HUMAN RIGHTS WATCH (Sept. 10, 1994) (explaining that Alison Des Forges investigated Rwanda for 10 days and discovered mass graves).

43. *See* UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION: YEARBOOK 1995 409 (Mary Kate Simmons ed., 1996) (reporting incidents of RPF killings in the Gitarama prefecture during June 1994); *see also Lasting Wounds*, *supra* note 38, at 12 (noting that on June 19, Rwandan Patriotic Front soldiers gathered local residents and displaced persons from Mukingi for a meeting and then open fired).

> hundreds of people. Some people fled down the road next to the field and were shot trying to escape by running through the woods on the adjacent hills. Others were caught and then killed with hammers, hoes, or other blunt instruments. The soldiers killed without regard to age, sex, or ethnic group. . . . After RPF soldiers offered local people the opportunity to move east to a zone fully controlled by the RPF, several dozen residents and displaced persons refused to leave. At Bigabiro's order, RPF soldiers killed thirty to forty of these people.[44]

Many other massacres and summary executions perpetrated by the RPF have been documented. One such incident was the Kibeho massacre, whose occurrence is less controversial and more recognized, perhaps because of the witnesses. The massacre occurred at an internally displaced persons (IDP) camp in the south of Rwanda in the French safe zone. Hundreds of thousands of Hutus fled here for protection from the advancing RPF forces. According to the IPEP report, "Some later moved on to eastern Zaire, but about 600,000 people were crammed into these camps at the end of 1994; included many [Hutus] who had participated in [the orchestration of] the genocide."[45] Unfortunately, the media and international community paid little or no attention to the situation in these camps. From April 18 to April 22, 1995, a massive slaughter occurred of approximately 4,000–8,000 people at the camp by RPF forces.[46] According to the IPEP report, "The commanding officer was tried, received a suspended sentence and later turned up as commander of the Kigali region."[47] This is one example of many where RPF crimes went without trial or punishment.

B. Legal Bias against Possible Prosecution of RPF Cases

1. Emphasis on Genocide and Biased Definition of Crimes Against Humanity in the ICTR Statute

The mandate of the ICTR makes explicit the court's focus on genocide above war crimes or crimes against humanity.[48] Security Council Resolution 955, establishing the ICTR, decides "to establish an international tribunal for the sole purpose of prosecuting persons responsible

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44. *See* ALISON DES FORGES ET AL., LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 544 (1999) (reporting the killings by Rwandan Patriotic Front soldiers).

45. *See* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 37 (indicating that many Hutus were forced to retreat to such camps); *see also* DES FORGES ET AL., *supra* note 44, at 544 (denoting that an interim government was erected in Murambi during the genocide).

46. *See* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 37 (stating that between 4,000 and 8,000 people were massacred between April 18 and April 22); *see also* Press Release, Int'l Criminal Tribunal for Rwanda, *Convictions of Pastor and Medical Doctor*, ICTR/INFO-9-2-335.EN (February 19, 2003) (explaining that a medical doctor was convicted of genocide and crimes against in humanity for his participation of mass killings at Gitwe, Rwanda).

47. *See* RWANDA: THE PREVENTABLE GENOCIDE, *supra* note 37 (noting that the commanding officer went unpunished for his involvement in the RPF's acts of genocide).

48. *See* Lieutenant Commander Gregory P. Noone & Douglas William Moore, *An Introduction to the International Criminal Court*, 46 NAVAL L. REV. 112, 117 (1999) (stating that the focus of the International Criminal Tribunal for Rwanda is genocide); *see also* Jessica Leinwand, Note, *Punishing Horrific Crime: Reconciling International Prosecution With National Sentencing Practices*, 40 COLUM. HUM. RTS. L. REV. 799, 823 (2009) (illustrating that the focal point of the International Criminal Tribunal for Rwanda is genocide).

for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda."[49] This can be compared to the ICTY statute, which reads: "[A]n international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[50] This accentuation of genocide in the ICTR statute filters out the underlying conflict between Tutsi and Hutu from the genocide of 1994, and emphasizes the Hutu crimes of genocide over the Tutsi war crimes and crimes against humanity. Including genocide in the charge of the ICTR effectively biases the court against the "lesser" crimes that appear subordinate to genocide, such as war crimes and crimes against humanity, committed to a great extent by the RPF. To the extent that genocide is the focus of the ICTR trials, RPF/RPA crimes remain excluded from trial and adjudication.

The ICTR Statute sets out definitions for genocide, crimes against humanity and war crimes. The statute defines crimes against humanity in Article 3:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.[51]

It is interesting to note the distinction between the definitions of the crime of genocide and crimes against humanity. The ICTR statute requires crimes against humanity to be based on national, political, ethnic, racial or religious grounds, which are five criteria (minus political grounds for Cold War reasons) required for an act to be considered genocidal, when combined

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49. *See* S.C. Res. 955, ¶ 1, U.N. Doc. S/Res/955 (1994) [hereinafter Resolution for Rwandan Int'l Criminal Tribunal] at 1601 (establishing the International Criminal Tribunal for Rwanda); *see also* Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases*, 3 J. App. Prac. & Process 589, 605 (2001) (stating that the Security Council Resolution 955 established the International Criminal Tribunal for Rwanda which prosecutes persons responsible for genocide and other violations of human rights).

50. *See* S.C. Res. 808, ¶ 1, U.N. Doc. S/25704 (1993) (establishing the International Criminal Tribunal for the former Yugoslavia); *see also* Christopher Hale, Note, *Does the Evolution of International Criminal Law End With the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law*, 35 DENV. J. INT'L L. & POL'Y 429, 456 (2007) (comparing the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia regarding their respective focuses on genocide).

51. *See* RESOLUTION FOR RWANDAN INT'L CRIMINAL TRIBUNAL, *supra* note 49, at 1602 (providing the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda with the power to prosecute for crimes against humanity); *see also* DOCUMENTS ON THE LAWS OF WAR 619 (Adam Roberts & Richard Guelff eds., 3d ed. 2002) (quoting Article 3 of the International Criminal Tribunal for Rwanda).

with intent to destroy.[52] These five criteria for crimes against humanity are not present in the ICTY statute.[53] Even crimes against humanity here are defined in a way to look very similar to genocide, effectively biasing the court against the prosecution of RPF crimes and favoring the accountability for Hutu genocide-related crimes.[54]

2. Bias of Prosecutorial Discretion Against Crimes Committed in Neighboring States

At the time that the ICTR statute was drafted, Zaire proposed a rule that would require national courts to refer cases to the tribunal "which revealed any link whatsoever with crimes committed in Rwanda."[55] This would allow for crimes committed in the Democratic Republic of the Congo (DRC) after the genocide in Rwanda to be included, since many Hutu genocidaires fled to the DRC after the genocide and were killed by members of the RPF.[56] However, according to William Schabas, professor of human rights law and author of UN International Criminal Tribunals text, "the only real condition for the exercise of primacy is that the prosecutor of the International Tribunal exercises his or her discretion to prosecute," provided the tri-

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52. *See* RESOLUTION FOR RWANDAN INT'L CRIMINAL TRIBUNAL, *supra* note 49, at 1602–03 (stating that prosecution of crimes against humanity include those acts based upon national, political, ethnic, racial, or religious motives and an intent to destroy these characteristics); *see also* Adam Day, Note, *Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got Belgium v. Congo Wrong*, 22 BERKELEY J. INT'L L. 489, 505 (2004) (noting the basis of attack requirement for genocide requires an intent to destroy while this same basis absent an intent to destroy defines crimes against humanity for the International Criminal Tribunal for Rwanda).

53. *See* S.C. Res. 827, arts. 4, 5, U.N. Doc. S/RES/827(1993) (noting that the criteria for crimes against humanity are noticeably lacking the basis of attack language present in the Statute of the International Criminal Tribunal for Rwanda); *see also* Darryl Robinson, *Developments in International Criminal Law: Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 46 (1999) (displaying the absence of the five criteria for crimes against humanity in the ICTY statute here marked by the debate at the Rome Conference over their inclusion or exclusion).

54. *See* Luc Reydams, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, 3 J. INT'L CRIM. JUST. 977, 977 (2005) (emphasizing the failure of the ICTR to prosecute violations of international humanitarian law committed in 1994 by the Rwandan Patriotic Front); *see also* Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT'L L. & POL'Y 125, 133 (2008) (noting that the Rwandan Patriotic Front has generally avoided prosecution despite killing an estimated 25,000 to 45,000 Hutu civilians during and after the genocide).

55. *See* Letter from the Charge d'affaires a.i. of the Permanent Mission of Zaire to the United Nations addressed to the President of the Security Council, ¶ 3, U.N. Doc. S/1994/1267 (Nov. 9, 1994) (stating that Zaire proposed a rule that would require national courts to refer to the International Criminal Tribunal any cases linked to crimes in Rwanda). *See generally* Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421, 432 (1994) (declaring that Article 28 of the Tribunal's statute requires states to cooperate with the ICTR regarding any request for assistance, arrest, detention or surrender of persons to the ICTR).

56. *See* Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 186 (2000) (reporting that in 1998 and 1999, the Rwandan Patriotic Army massacred civilians in the Democratic Republic of the Congo in order to break down the power structure of the exiled militias responsible for the 1994 genocide). *See generally* Chi Mgbako, Note, *Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda*, 18 HARV. HUM. RTS. J. 201, 205 (2005) (asserting that the Rwandan Patriotic Front's defeat prompted the flight of between one to two million Hutus to refugee camps in eastern Congo).

bunal has jurisdiction over both the offense and offender.[57] This becomes a relevant issue in analyzing why RPF Tutsis have not been prosecuted for war crimes relating to the 1994 conflict, since the provision is included in the charter for the trial of RPF crimes but has not be utilized by prosecutors.[58] According to both Schabas and Karhihlo, the "Neighbouring States" clause of the Statute was added to address the violence in refugee camps near Rwanda's borders in Zaire and other bordering countries on the part of the Rwandan Hutu refugees against civilians in the camps.[59] While this has been applied only against the Rwandan Hutus, it should apply equally to include the crimes committed by the RPF/RPA against the Hutus.

3. Bias of Temporal Jurisdiction of the ICTR Against RPF Crimes

A clear indication of the bias toward prosecution of Hutu crimes is further evinced by the temporal jurisdiction of the ICTR Statute, particularly when compared to the Statutes of the ICTY and the Sierra Leone Special Court (SLSC). The ICTR Statute is the only one of the three that states an end to its temporal jurisdiction (December 31, 1994).[60] Originally, the dispute over temporal jurisdiction focused on the starting date, since the Statute did not date back to the outbreak of civil war (October 1, 1990); however, the end date also proved to be problematic, since it did not extend to include the beginning of the conflict in the Democratic Republic of the Congo (formerly Zaire), during which many crimes were committed by Rwandan Tutsi RPF refugees.[61] By extending the end date through the fall of Kinshasa in May of 1997, the ICTR would be able to prosecute the crimes committed by the RPF against the Hutu who fled post-genocide Rwanda. By making the end date earlier, the court is effectively eliminating potential for prosecutions against the RPF for these crimes, focusing on the Hutu genocide-related crimes instead of both sides of this ongoing ethnic and political conflict.

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57. *See* WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE 130 (2006) (asserting that as long as the Tribunal has jurisdiction over the matter, the decision to bring an action rests solely with the prosecutors).

58. *See* Prosecutor v. Jean-Paul Akeyesu, Case No. ICTR-96-4-T, Judgment, ¶ 94 (June 1, 2001) (affirming the guilty judgment of Jean-Paul Akeyesu and rejecting the argument that the prosecutor was biased since the prosecutor had sole discretion to maintain an action); *see also* Reydams, *supra* note 54, at 985 (explaining the scope of prosecutorial discretion and the effect of partiality on the decisions not to pursue prosecutorial action for the crimes committed in Rwanda and its neighboring states).

59. *See* SCHABAS, *supra* note 57 (stating that the "Neighbouring States" clause was originally designed to apply to Zaire but has since been interpreted to include the Congo, Uganda, Tanzania, Burundi, and even Kenya); *see also* Jaana Karhihlo, *The Establishment of the International Tribunal for Rwanda*, 64 NORDIC J. INT'L L. 683, 698 (1995) (noting that due to the continued killings of civilians along Rwanda's borders to Zaire, Tanzania, and Burundi, territorial jurisdiction of the ICTR was extended).

60. *See* S.C. Res. 955, ¶ 1, U.N. Doc. S/Res/955(1994) [hereinafter RESOLUTION FOR RWANDAN INT'L CRIMINAL TRIBUNAL] 1601 (providing the statute that established the temporal jurisdiction of the International Criminal Tribunal for Rwanda); *see also* Ines Monica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT'L L. 1, 3 (2008) (recognizing that the International Criminal Tribunal for Rwanda has jurisdiction for crimes committed between January 1, 1994 and December 31, 1994).

61. *See* Security Council Meeting 3453, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453, at 15 (Nov. 8, 1994) (arguing that the International Criminal Tribunal for Rwanda would not aid Rwanda unless it included the events leading up to the genocide of April 1994); *see also* Carroll, *supra* note 56, at 185–86 (illustrating the International Criminal Tribunal for Rwanda's lack of power to prosecute crimes committed in the Democratic Republic of the Congo after December 31, 1994).

According to the UN Security Council final report of the Commission of Experts S/1994/1405 and the preceding letter from Secretary General Boutros Boutros-Ghali to the President of the Security Council, both sides of the Rwandan conflict committed crimes that should be prosecuted by the ICTR:

> Crimes against humanity and serious violations of international humanitarian law were committed by individuals of both sides of the conflict. . . . [T]he Commission recommended . . . that investigation of violations of international humanitarian law and of human rights law attributed to the Rwandese Patriotic Front be continued by the Prosecutor of the recently established International Tribunal for Rwanda.[62]

Even here, after being reluctant to admit the fact that genocide and crimes against humanity were occurring in Rwanda, the UN itself acknowledges that crimes were in fact committed by the RPF and should be prosecuted by the tribunal.[63] The Commission of Experts concluded that individuals on both sides of the armed conflict committed serious breaches of international humanitarian law, explicitly including crimes against humanity, from April 6 to July 15, 1994,[64] "in particular of obligations set forth in article 3 common to the four Geneva Conventions of 12 August 1949 and in Protocol II additional to the Geneva Conventions and relating to the protection of victims of non-international armed conflicts of 8 June 1977."[65] The Commission also recommended an "investigation of violations of international humanitarian law

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62. *See* The Secretary-General, *Letter Dated 9 December 1994 From the Secretary-General Addressed to the President of the Security Council*, ¶ 5, *delivered to the Security Council*, U.N. Doc. S/1994/1405 (Dec. 9, 1994) (explaining that the Commission of Experts concluded that crimes against humanity and serious violations of international humanitarian law were committed by both sides of the conflict and recommending that violations attributed to the Rwandan Patriotic Front should continue to be investigated by the Prosecutor of the International Tribunal for Rwanda).

63. *See* VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 166 (2008) (noting the importance of holding trial proceedings in a neutral territory because objectivity is required to prosecute individuals from both sides of the conflict); *see also* Stuart Beresford, *In Pursuit of International Justice: The First Four-Year Term of the International Criminal Tribunal for Rwanda*, 8 TULSA J. COMP. & INT'L L. 99, 105 (2000) (stating that the Commission of Experts determined that both sides of the conflict breached international humanitarian law and advised that responsible individuals be prosecuted by an independent international tribunal).

64. *See* Beresford, *supra* note 63, at 104 (noting that both sides of the Rwandan conflict violated international humanitarian law); *see also* Evan Wallach, *Extradition to the Rwandan War Crimes Tribunal: Is Another Treaty Required?*, 3 UCLA J. INT'L L. & FOREIGN AFF. 59, 63–64 (1998) (indicating that both sides of the Rwandan conflict breached international humanitarian law).

65. *See* U.N. Security Council, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, ¶ 181, U.N. Doc. S/1994/1405, (Dec. 9, 1994) (reporting that in the Rwandan conflict, both sides violated Article 3); *see also* Beresford, *supra* note 63, at 104 (illustrating that Additional Protocol II to the Geneva Conventions and obligations set forth in article 3 common to the Geneva Conventions were breached by both sides); *see also* Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda Andakayesu Cases*, 11 FLA. J. INT'L L. 517, 521–22 (1997) (recognizing that both sides in the Rwandan conflict violated Article 3, a provision common to both the Geneva Conventions and Additional Protocol II).

and of human rights law attributed to the Rwandese Patriotic Front be continued by the Prosecutor [of the ICTR]."[66]

In a 1998 letter from the UN Secretary General Kofi Annan to the President of the Security Council, an investigative team assembled to uncover facts about human rights violations in the DRC from 1993 through 1997 concluded their findings and was quoted:

> [T]he killings by AFDL and its allies, including elements of the Rwandan Patriotic Army, constitute crimes against humanity, as does the denial of humanitarian assistance to Rwandan Hutu refugees. The members of the Team believe that some of the killings may constitute genocide, depending on [the] intent [of the genocidaires], and call for further investigation of those crimes and of their motivation.[67]

The investigation revealed numerous atrocities, including systematic killing of young men, the rape of women, and the murder of individuals who refused to return to Rwanda.[68] The investigation further revealed that "fleeing refugees as well as ordinary Zairians in their path were also treated with unrestrained brutality by both the Zairian rebel and the Rwandan troops."[69] That is to say, there is documented evidence of RPF killings before, during, and after the Rwandan genocide, yet the temporal jurisdiction of the court allows only for the few crimes

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66. *See Letter from the Secretary-General*, *supra* note 62, at ¶ 5 (stating that further investigation is necessary to discover whether Tutsi militia committed crimes against humanity and violations of international humanitarian law with an intent to destroy the Hutu ethnic group); *see also* Press Release, International Criminal Tribunal for Rwanda, *Prosecutor Outlines Future Plans*, ICTR/INFO-9-2-254.EN (Dec. 13, 2000) (announcing that the ICTR prosecutor is investigating several Rwanda Patriotic Front soldiers who presumably have committed crimes within the Tribunal's jurisdiction); *see also* Luc Reydams, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, 3 J. INT'L CRIM. JUST. 977, 983 (2005) (stressing that an ICTR prosecutor's decision to initiate investigation is not subject to judicial review).

67. *See* The Secretary-General, *Letter Dated 29 June 1998 from the Secretary-General*, ¶ 8, *addressed to the President of the Security Council*, U.N. Doc. S/1998/581 (June 29, 1998) (announcing that during the investigation of the conflict in Zaire, the Investigative Team discovered potentially genocidal acts of the Rwandan Patriotic Army).

68. *See* ORG. OF AFRICAN UNITY INT'L PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, RWANDA: THE PREVENTABLE GENOCIDE 10 (2000) (investigating the conception, planning, and execution of the 1994 genocide in Rwanda and the surrounding events in the Great Lakes Region in hopes of preventing further conflicts in that region).

69. *See id*. (asserting that both Zairian rebels and Rwandan troops brutalized both Zairian citizens and Rwandan refugees).

committed during the official period of the Rwandan genocide to be tried.[70] Even within that narrow time frame, crimes of the RPF have not been tried.[71]

Without further investigation and prosecution of the RPF for these crimes, it is difficult to imagine any type of reconciliation within Rwanda or the Great Lakes, which is one of the aims of the ICTR: "[t]he purpose of this measure is to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region."[72] It is no secret, as the UN investigative team uncovered, that the Tutsi RPF was involved in crimes against humanity in the DRC in 1994.[73] Although the killings by the RPF were not as numerous as the genocidal killings by the Hutus, these criminals should nevertheless be held accountable for their actions.[74] According to Reydams, "The RPF/RPA is responsible for the violent death of tens of

70. *See* Security Council Meeting 3453, *supra* note 61, at 14–15 (discussing the International Criminal Tribunal for Rwanda's ability to prosecute the crimes of the Rwandan genocide for the year of 1994); *see also* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda,*7 DUKE J. COMP. & INT'L L. 349, 353 (1997) (stating that the International Criminal Tribunal for Rwanda had jurisdiction over only actual killings, rapes, and other acts constituting genocide, war crimes, and crimes against humanity if those acts were committed in 1994).

71. *See* ALISON DES FORGES ET AL., LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 726, 742–45 (1999) (warning that the failure to prosecute the RPF for war crimes may undermine the tribunal's purpose); *see also* Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Justice Hassan B. Jallow, Prosecutor, International Criminal Tribunal for Rwanda (May 26, 2009), http://www.hrw.org/en/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf-c (urging the ICTR prosecutor to stop ignoring the war crimes committed by the RPF and bring them to justice).

72. *See* S.C. Res. 955, ¶ 8, U.N. Doc. S/Res/955(1994) [hereinafter RESOLUTION FOR RWANDAN INT'L CRIMINAL TRIBUNAL] (declaring the purpose of the ICTR to be a process of reconciliation and maintenance of peace in the region); *see also* Jeremy Sarkin, *The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda*, 21 HUM. RTS. Q. 767, 771, 778 (1999) (illustrating the Commission's purpose of fostering reconciliation as part of the rebuilding process).

73. *See Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935*, ¶¶ 79–81, U.N. Doc. S/1994/1125 (Oct. 4, 1994) (finding grounds for allegations of human rights violations by the Rwandan Patriotic Front from various sources that attributed isolated Hutu murders to the RPF); *see also* Letter from Kenneth Roth, *supra* note 71 (citing to the findings of the UN Commission of Experts of 1994, namely those alleging that the Rwandan Patriotic Front violated humanitarian law and perpetrated crimes against humanity).

74. *See* Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 578–79 (noting that many attorneys thought the ICTR, in addition to prosecuting Hutus, should have also prosecuted the RPF for committing crimes against humanity); *see also* Mariann Meier Wang, Article, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 184 (1995) (stating that the number of deaths caused by the Rwandan Patriotic Front was small compared to the deaths attributed to the Hutus).

thousands of innocent civilians."[75] Why, then, hasn't the ICTR prosecuted any members of the RPF for these crimes committed?

4. ICTR Investigation of RPF Crimes Unable to Produce Indictments

Despite the lack of prosecutions, there have been investigations into the RPF crimes against humanity and war crimes committed during 1994.[76] Carla Del Ponte, the prosecutor for the ICTR from 1999 through 2003 ordered investigations into Tutsi atrocities in an effort to end impunity.[77] Up until this point, there had only been Hutu prosecutions at the ICTR (and one European collaborator), since there was strong opposition by the RPF-led government against investigating crimes committed by Tutsi RPF soldiers; however President Paul Kagame now authorized cooperation with ICTR prosecutors, according to Del Ponte.[78] Del Ponte said she and Kagame met privately to discuss investigations of RPF crimes opened the previous year, and that she was satisfied with the level of cooperation displayed in the meeting.[79]

Unfortunately, the Rwandan government in 2000 was not as cooperative as it promised to be.[80] In April 2002, Del Ponte released a statement that criticized the Rwandan government for its noncooperation and indicated that the first indictments against RPF officers would be issued by the end of the year.[81] This announcement may have been counterproductive, as it warned Rwandan officials of Del Ponte's plans, giving them ample time to interfere. In early June 2002, the Rwandan government instituted travel restrictions blocking Tutsi genocide sur-

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75. *See* DES FORGES ET AL., *supra* note 71, at 95 (stating that the unpublished Gersony report estimated that between 25,000 and 45,000 people were killed by Rwandan Patriotic Front forces); *see* also Reydams, *supra* note 66, at 981 (declaring that many reliable reports establish that "the RPF/RPA is responsible for the violent death of tens of thousands of innocent civilians").

76. *See* Letter from Kenneth Roth, *supra* note 71 (admonishing the ICTR for their failure to prosecute the Rwandan Patriotic Front for war crimes despite reliable reports documenting violations of human rights law). *See generally* AMNESTY INTERNATIONAL, *Rwanda: Reports of Killings and Abductions by the Rwandese Patriotic Army,* AFR 47/16/94, at *4 (Oct. 19, 1994) (reporting that the testimony of eyewitnesses and others described the massacre of many unarmed civilians by the Rwandan Patriotic Front).

77. *See generally* CARLA DEL PONTE & CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 178 (2009) (detailing the former prosecutor's experience with the ICTR and revealing intimate conversations regarding RPF investigations).

78. *See* Laura Bingham, *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 24 BERKELEY J. INT'L L. 687, 691–92 (2006) (asserting that many former RPF members still resist investigation and prosecution from the Tribunal).

79. *See* VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 208 (2008) (stating that Del Ponte met with Paul Kagame in closed-door meetings to negotiate with the Kigali regime); *see also* Eric Husketh, Note, *Hastening Justice at the UNICTR*, 3 NW. U. J. INT'L HUM. RTS. 8, 73 (2005) (discussing Del Ponte's meeting with Kigame as a way to begin quietly investigating and prosecuting Rwandan Patriotic Front members).

80. *See* NORWEGIAN HELSINKI COMMITTEE, PROSECUTING GENOCIDE IN RWANDA: THE GACACA SYSTEM AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA at *24 (2002) (purporting the lack of cooperation from the Kigali government in Rwanda during investigations).

81. *See* Peskin, *supra* note 79, at 224 (noting Carla Del Ponte's criticism of the Rwandan government); *see also UN War Crimes Prosecutor Says Countries Must Cooperate in Arresting Fugitives*, UN NEWS CENTER, Oct. 30, 2002 (affirming that Carla Del Ponte's statement tacitly reminded the Rwandan government of its obligation to cooperate in the indictments of not only RPF officers but also genocide fugitives).

vivors from testifying at two trials in Arusha.[82] The restrictions were responsible for the adjournment of trials due to lack of witnesses, and evinced the Rwandan government's strong opposition to the RPF investigations and possible indictments.[83]

Del Ponte was unable to hand down indictments of RPF officers by the end of 2002.[84] As a result, after extensive lobbying by the Rwandan government at the UN, securing the support of the U.S. and Britain, Del Ponte's bid to retain her job as chief prosecutor for another term was dismissed, as UN Secretary General Kofi Annan suggested that each tribunal have its own chief prosecutor.[85] According to Peskin, "Del Ponte initially fought back, accusing the Rwandan government of trying to block RPF indictments."[86] Del Ponte maintains that she was unable to issue indictments because the Rwandan government blocked her team of investigators from obtaining sufficient evidence.[87] Based on her unpopular efforts to secure RPF indictments in the ICTR, Del Ponte was not reappointed as chief prosecutor for the court, indicating strong opposition to RPF prosecutions by the government of Rwanda and by the ICTR.[88]

5. Reasons for Lack of RPF Prosecutions

Despite the provisions in the Statute for prosecutions on both sides of the conflict, the Rwandan government possessed the power to thwart such investigations into criminal acts committed by its RPF soldiers. The RPF-led Rwandan government clearly had many reasons for blocking investigations into RPF crimes by the ICTR. There was no political will on the part of the government to cooperate with investigations that could have led to indictments of its own members. Many of the highest leaders in the Rwandan government were complicit in the massacres committed by the RPF soldiers. Therefore, blocking such investigations was in the best interests of the government officials. The tribunals themselves possess no powers of

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82. *See* Peskin, *supra* note 79, at 225 (confirming that the Rwandan government actively hindered the efforts of the tribunal by preventing travel of many witnesses).

83. *See* SIRI GLOPPEN, ELIN SKAAR & ASTRI SUHRKE, ROADS TO RECONCILIATION 114 (2005) (maintaining that Rwanda's refusal to grant travel permits to witnesses was due to the announcement that Rwandan Patriotic Front members were being investigated and indictments were imminent); *see also* LARISSA J. VAN DER HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 64 (2005) (explaining that tensions arose between Carla Del Ponte and Rwanda due to her outspoken aim to prosecute Rwandan Patriotic Front leaders).

84. *See* YVES BEIGBEDER, INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES 97 (2005) (stating that Carla Del Ponte formally suspended her investigation into Rwandan Patriotic Front war crimes in September 2002); *see also* MARC I. SHERMAN & SAMUEL TOTTEN, GENOCIDE AT THE MILLENNIUM 218 (2005) (noting that the 2002 Rwandan Patriotic Front indictments remained unsealed due to Rwandan obstruction).

85. *See* Bruce Zagaris, *ICTY and Rwanda Tribunal Developments,*19 INT'L ENFORCEMENT L. REP. 11, 11 (2003) (acknowledging that the U.S.-backed decision of Kofi Annan to install a separate prosecutor occurred hours after Carla Del Ponte was dismissed); *see also* Husketh, *supra* note 79, at 66–73 (discussing how Rwanda and the UK sponsored Kofi Annan's dismissal of Carla Del Ponte in order to establish two separate prosecutors).

86. *See* Peskin*, supra* note 79, at 226 (detailing the Rwandan government's efforts to remove Del Ponte as prosecutor, and discussing Del Ponte's initial, but not active, attempt to retain her post as prosecutor).

87. *See* Peskin*, supra* note 79, at 227 (stating Del Ponte's allegations that her failure to dispense indictments was due to the Rwandan government's "blocking" her investigators from gathering evidence).

88. *See* Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony,* 34 CAL. W. INT'L L.J. 47, 58–59 (2003) (discussing how political pressure led to the removal of Del Ponte as prosecutor in Rwanda).

enforcement, giving the governments a greater role in obtaining evidence through investigation.[89] That is, governments can decide whether or not to comply with the tribunals' inquiries.[90] In this sense, the victor's governments can sabotage or control the court's agenda by withholding cooperation.[91] Therefore, without the compliance of the government and the blocking of investigations by the government into RPF crimes, trials of RPF members for their crimes would be unlikely.

International actors also had reasons for not complying with or supporting such investigations:

> American diplomats expressed concern that RPF indictments could weaken the Kagame regime and, in turn, potentially destabilize Rwanda. Moreover, both the United States and Britain had an interest in bolstering the Rwandan government and obtaining its cooperation on issues of more importance to Washington and London, such as Rwanda's withdrawal from the Congo where a regional war had raged since 1998.[92]

For these reasons, the international community did not strongly support Del Ponte's investigations and potential prosecutions of RPF crimes.

These issues that arise when confronted with the question of "victor's justice," or the trial only of the losing side, including state cooperation in the prosecution of war criminals on the winner's side, have been present in other tribunals as well, including the ICTY and the World War II tribunals.

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89. *See* Giulio M. Gallarotti & Arik Y. Preis, *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, 4 UCLA J. INT'L L. & FOREIGN AFF. 1, 29 (1999) (illustrating how the International Criminal Tribunal of Rwanda lacks enforcement powers); *see also* Theodor Meron, *Centennial Essay: Reflections on the Prosecution of War Crimes by International Tribunals,* 100 AM .J. INT'L. L. 551, 561 (2006) (acknowledging the weak powers of the ICTR to collect evidence).

90. *See* Mary Margaret Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court,* 38 TEX. INT'L L.J. 621, 628–29 (2003) (showing that there are no actual penalties for noncompliance with ICTR provisions); *see also* Christopher Hale, Note, *Does the Evolution of International Criminal Law End With the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law,* 35 DENV. J. INT'L L. & POL'Y 429, 457–58 (2007) (discussing multiple governments' failure to comply with ICTR requests).

91. *See* Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda.* 4 J. HUM. RTS. 213, 214 (2005) (emphasizing governmental control of tribunals through cooperation); *see also* Mary Margaret Penrose, Note, *Lest We Fail: The Importance of Enforcement in International Criminal Law,*15 AM. U. INT'L L. REV. 321, 349–53 (2000) (recognizing tribunals' lack of power and governments' failure to cooperate as the reason justice is not served); *see also* HUMAN RIGHTS WATCH, *Rwanda: Tribunal Risks Supporting "Victor's Justice,"* http://www.hrw.org/en/news/ 2009/06/01/ rwanda-tribunal-risks-supporting-victor-s-justice (addressing the ICTR's failure to provide justice against members of the Rwandan Patriotic Front).

92. *See* HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2005 150 (2005) (positing that the Rwandan government has not actively or effectively prosecuted its members who were responsible for war crimes); *see also* Peskin, *supra* note 91, at 225 (offering an explanation for international actors not supporting Rwandan Patriotic Front investigations and potential prosecutions).

II. Yugoslavia: ICTY Approach to Prosecutions

According to Peskin, "Although Serbia remained the chief villain in the West's eyes, Croatia was not immune from criticism of its wartime conduct."[93] This approach to the conflict in the Balkans is dramatically different from the approach to the conflict in the Great Lakes region in Africa. The ICTY began investigating Croatian crimes against Serbs as early as 1995, on the recommendation of Richard Goldstone, first chief prosecutor of the ICTY/ICTR.[94] This seemed to signal the tribunal's desire to hold victors accountable for their crimes in the war, in an effort to hold perpetrators from all sides of the Bosnian conflict accountable.[95] As in Rwanda, the tribunal met resistance to its investigation of Croatian crimes at the state level, with a lack of compliance from President Franjo Tudjman.[96] The investigation would have hampered Tudjman's legacy in Croatia's struggle for independence, and more importantly, could have led to the indictments of the highest military and political leaders, including Tudjman himself.[97] This can be compared to the efforts of Kagame and the RPF in Rwanda not to allow investigations of RPF crimes, since neither government wanted to taint its reputation or send its members to prison.

In August of 1999, the ICTY made a complaint to the Security Council against Croatia, criticizing the obstruction of investigations and its refusal to transfer two Bosnian Croats suspected in connection with the Bosnian massacres.[98] Tudjman eventually complied and handed

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93. *See* Peskin, *supra* note 91, at 216 (suggesting that the West found the conduct of both Serbia and Croatia blameworthy in the Balkan conflict).

94. *See* Sandra L. Jamison, Note, *A Permanent International Criminal Court: A Proposal That Overcomes Past Objects*, 23 DENV. J. INT'L L. & POL'Y 419, 428–29 (1995) (explaining trials for war atrocities committed in the former-Yugoslavia were scheduled to begin in 1995).

95. *See* Peskin, *supra* note 91, at 217–18 (addressing the Tribunal's desire to appear neutral by holding all sides of the conflict accountable); *see also* David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 36–37 (2006) (emphasizing the desire of the ICTY to hold accountable all parties committing war crimes accountable).

96. *See* Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 122–23 (2002) (noting the resistance of President Tudjman and his regime to the ICTY); *see also* Symposium, *Milosevic, Killing Fields, and "Kangaroo" Courts: Symposium on an Emerging International Criminal Justice System—What Lessons Can Be Learned from the Ad Hoc Criminal Tribunals?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 13, 13 (2002) (claiming that Tudjman and Croatia resisted cooperation with the ICTY).

97. *See* Milan Markovic, *In the Interests of Justice?: A Critique of the ICTY Trial Court's Decision to Assign Counsel to Slobodan Milosevic*, 18 GEO. J. LEGAL ETHICS 947, 955 (2005) (finding that Tudjman likely would have been indicted had he lived longer); *see also* Damjan Panovski, Comment, *Some War Crimes Are Not Better Than Others: The Failure of the International Criminal Tribunal For the Former Yugoslavia to Prosecute War Crimes in Macedonia*, 98 NW. U. L. REV. 623, 637–38 (2004) (recognizing that while indictments mentioned President Tudjman, an indictment for Tudjman himself was never issued).

98. *See* Peskin, supra note 91, at 219 (discussing the ICTY's strategy to retrieve the Bosnian suspects); *see also* Symposium, *Prosecuting Massive Crimes With Primitive Tools: Three Difficulties Encountered By Prosecutors in International Criminal Proceedings*, 2 J. INT'L CRIM. JUST. 403, 417, n.43 (2004) (stating that ICTY's president complained to the Security Council about Croatia's noncompliance).

over the suspects.[99] This brings into question both the practice of state sovereignty, which both the Croatian government and the Rwandan government used as a shield for their own criminal actions, and the way to allow for the successful coexistence of sovereignty and international criminal prosecutions.

Once Tudjman died in 1999, the situation advanced with the promise of new government leader, Prime Minister Ivica Racan, to adhere to and comply with the ICTY's investigations.[100] However, the government remained hesitant to produce suspected war criminals to The Hague for prosecution.[101] Racan promised to arrest and produce war crimes suspects, but found ways to avoid doing so.[102] Del Ponte's attempted indictments in 2001 against the first two Croatian generals, Ademi and Gotovina, sparked additional political backlash against the ICTY.[103] These indictments were pursued shortly after the arrest of Milosevic in June 2001, indicating Del Ponte's desire to prosecute criminals on both sides of the conflict, not only those on the losing side. While Del Ponte's approach was a step away from the notion of victor's justice, the difficulty Del Ponte faced with the indictments reflects a retreat toward a more one-sided tribunal. Despite his pledge to arrest Ademi and Gotovina, Racan did not follow through.[104] Ademi surrendered to the ICTY in July 2001, and Gotovina remained a fugitive through 2005, when he was captured and indicted.[105]

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99. *See* VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 117 (2008), (explaining that Tudjman transferred the suspects); *see also* Maury D. Shenk, Carrie A. Rhoads & Amy Howe, *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 34 INT'L LAW. 683, 685 (1999) (declaring that Croatia released suspects in response to an ICTY report).

100. *See* Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 J. INT'L COMP. L. 353, 362 (2001) (describing Ivica Racan's role in Croatia's cooperation with the ICTY).

101. *See* Peskin, *supra* note 91, at 219 (discussing Prime Minister Racan's noncooperation with the arrest and transfer of indicted war crimes suspects to The Hague); *see also Croatia's Fight to Face Its Past*, CHI. TRIB., July 13, 2001, at 18 (stating that Prime Minister Racan made the decision to comply with The Hague's call to extradite war criminals although it might cause a national backlash against Racan's government).

102. *See* Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda.* 4 J. HUM. RTS. 213, 220 (2005) (arguing that Racan promised to arrest and transfer the war criminals to The Hague but avoided doing so); *see also* Gareth Harding, *Croatia's Rocky Road to Europe*, UNITED PRESS INT'L, Oct. 14, 2003 (stating that The Hague's Chief Prosecutor has accused Croatian authorities of sheltering the most wanted war criminal in the Balkans).

103. *See* Victor Peskin & Mieczyslaw P. Boduszynski, *International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia,* 55 EUR-ASIA STUDIES 1117, 1128 (2003) (stating that the Ademi and Gotovina indictments threatened the Croatian state's survival and the ruling coalition's hold on power).

104. *See Croatian Opposition Criticizes Government's Treatment of Gen Bobetko Case*, BBC Monitoring Europe, Nov. 15, 2002 (explaining the Croatian government's commitment to The Hague's tribunal processes).

105. *See* Peskin, *supra* note 102, at 220 (2005) (describing Ademi's surrender).

In 2002, Del Ponte indicted Janko Bobetko, former army chief of staff and highest-ranking Croatian suspect of the ICTY.[106] The Croatian government filed two appeals with the ICTY, which were then dismissed.[107] Bobetko died in 2003.[108] He was never brought to trial due to his deteriorating health.[109]

In 2003, Racan was defeated in the election by Ivo Sanader.[110] With Sanader's rule, cooperation increased dramatically.[111] In March 2004, Del Ponte charged Mladen Markac and Ivak Cermak, two high-ranking officials, with crimes against Serbian civilians.[112] In April, Del Ponte indicted six Bosnian Croats for 1993 atrocities committed in Bosnia.[113] In May, Del

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106. *See* PIERRE HAZAN, JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 180 (James Thomas Snyder trans., 2004) (describing the charges brought against former Croatian army Chief of Staff Janko Bobetko); *see also* INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Nov. 29, 2002, 42 I.L.M. 121 (stating the facts surrounding the indictment).

107. *See* Prosecutor v. Bobetko, Case No. IT-02-62, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, ¶ 16 (Nov. 29, 2002) (rejecting Croatia's appeals because they were premature); *see also* Daryl A. Mundis, *Current Developments at the Ad Hoc Criminal Tribunal*, 1 J. INT'L CRIM. JUST. 520, 528 (2003) (analyzing the rights of the accused before the ICTY).

108. *See* Mundis, *supra* note 107, at 528 n. 57 (2003) (noting Bobetko's death in Croatia in April 2003); *see also Janko Bobetko, 84, Is Dead; Fought to Free Croatians*, N.Y. TIMES, Apr. 30, 2003, at A25 (reporting on Bobetko's death); *see also* Gabriel Partos, *Obituary: General Janko Bobetko Croatian Army Chief Charged with War Crimes*, INDEPENDENT (London), Apr. 30, 2003, at 18 (noting Bobetko's unrepentant attitude before his death).

109. *See* Prosecutor v. Bobetko, Case No. IT-02-62, Decision on Motion of the Prosecutor to Schedule a Fitness Hearing and to Take Related Measures (Mar. 19, 2003) (suspending Bobetko's arrest warrant in light of health problems).

110. *See* Brad K. Blitz, *Refugee Returns, Civic Differentiation, and Minority Rights in Croatia, 1991–2004*, 18 J. REFUGEE STUD. 362, 369 (2005) (commenting on the election of Ivo Sanader as Prime Minister of Croatia in 2003); *see also* Jeffrey T. Kuhner, *Croatia at the Crossroads*, WASH. TIMES, Dec. 8, 2003 at A20 (explaining Prime Minister Ivaca Racan's election loss to Ivo Sanader); *see also* Gabriel Partos, *Ivaca Racan; Reforming Prime Minister of Croatia Who Helped Steer His Country Toward a Democratic Future*, INDEPENDENT (London), Apr. 30, 2007 (explaining Ivaca Racan's major contributions to reform Croatia's political future).

111. *See* Nicholas Watt, *Milosevic Allies Go on Trial in Hague for "Ethnic Cleansing" in Kosovo: Former Serbian President Charged Over 1999 Conflict: Defendants Accused of Helping Deport Albanians*, GUARDIAN (LONDON), July 11, 2006, at 14 (discussing the trial of Milan Milutinovic, former president of Serbia); *see also Zagreb, Beijing to Boost Their Economic Ties*, NEWEUROPE, May 26, 2008 (explaining that China and Croatia agreed to joins hands to further cooperation in such fields as trade, economy, culture, science, technology, science, and tourism).

112. *See generally* VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 117 (2008), (outlining the story of how the UN International Criminal Tribunals for the former Yugoslavia and Rwanda encourage states implicated in atrocities to hand over their own leaders for trial).

113. *See* Lawrence G. Albrecht et al., *International Legal Developments in Review: 2004 Public International Law,* 39 INT'L LAW. 517, 523 (2005) (describing the appearance of the six Bosnian Croats indicted by Carla Del Ponte); *see* Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda.* 4 J. HUM. RTS. 213, 221 (2005) (describing the indictments by Carla Del Ponte of the six Bosnian Croats who participated in atrocities and war crimes in the former Yugoslavia).

Ponte indicted former Croatian general Mirko Norac.[114] Although this seems to indicate a shift away from victor's justice, Sanader's compliance with the ICTY can be attributed to his desire to obtain a bid for Croatia in the EU, a bid that would have been hampered by noncompliance with ICTY investigations. As it turned out, in early 2005, the EU halted membership talks with Croatia in an effort by the international community to produce Gotovina.[115] Gotovina was captured on December 7, 2005, by Spanish police at a luxury hotel in the Canary Islands and was subsequently indicted.[116]

In 2002, Del Ponte indicted Janko Bobetko, former army chief of staff and highest-ranking Croatian suspect of the ICTY. The Croatian government filed two appeals in protest with the ICTY, which were then dismissed. Eventually, Bobetko died in 2003. He was never brought to trial due to his deteriorating condition and poor health.

In 2003, Racan was defeated in the election by Ivo Sanader. With Sanader's rule, cooperation increased dramatically. In March 2004, Del Ponte charged Mladen Markac and Ivak Cermak, two high-ranking officials, with crimes against Serbian civilians. In April, Del Ponte indicted six Bosnian Croats for 1993 atrocities committed in Bosnia. In May, Del Ponte indicted former Croatian general Mirko Norac. This seems to indicate a shift away from victor's justice, however. Sanader's compliance with the ICTY can be attributed to his desire to obtain a bid for Croatia in the EU, a bid that would have been hampered by noncompliance with ICTY investigations and arrests. As it turned out, in early 2005, the EU halted membership talks with Croatia in an effort by the international community to produce Gotovina. Gotovina was then captured on December 7, 2005, by Spanish police at a luxury hotel in the Canary Islands and indicted.

Also relevant to the notion of victor's justice in war crimes tribunals is the idea of the *tu quoque* defense.[117] The *tu quoque* defense suggests that if one side isn't being held accountable, then neither should the other side be, even though the proper course of action would be to

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114. *See* Danielle Tarin, Note, *Prosecuting Sadaam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 468 n. 4 (2005) (citing the 2004 indictment of Mirko Norac as an example of developing enforcement of international law and prosecution of those who violate it); *see also* Luis Zemborain, *Analysis: Croatian EU Future Linked to General*, U.P.I. PERSPECTIVES, Mar. 2, 2005, at 2 (describing the indictment of Mirco Norac by Carla Del Ponte in May 2004); *see also Ex General Back in Croatia After Pleading Not Guilty Before U.N. Court*, GLOBAL NEWS WIRE, July 9, 2004, at 1 (describing a 12 year sentence imposed by a local court on Norac for orchestrating war crimes against Serbs in the former Yugoslavia).

115. *See* Mariam Ahmedani et al., *Updates from the International Criminal Courts,* 13 HUM. RTS. BR. 41, 41 (2006) (describing Croatia's cooperation with the Tribunal regarding Gotovina in order to gain entry into the European Union); *see also* Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way To Promote Peace and Stability—The Role of International War Crimes Tribunals,* 2 J. NAT'L SECURITY L. & POL'Y 111, 146 (2005) (noting that Croatia yielded to political pressure to produce Gotovina).

116. *See* The Organization for Security & Co-operation in Europe, *Reaction in Croatia to the Arrest of Ante Gotovina* (Dec. 13, 2005) at *3, http://www.osce.org/documents/mc/2005/12/17488_en.pdf (discussing the civil unrest in Zadar region of Croatia following Gotovina's arrest in Spain on December 7, 2005).

117. *See* Peter Malcontent, *Human Rights and Peace: Two Sides of the Same Coin*, *in* FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 4 (Ramesh Thakur & Peter Malcontent eds. 2004) (claiming that the impromptu nature of criminal tribunals creates the perception that they are tools of victor's justice); *see also* Andreas L. Paulus, Symposium, *Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE L. REV. 1, 13 (2004) (suggesting that when an international criminal tribunal is perceived to be an act of victor's justice, defendants are likely to assert the *tu quoque* defense).

hold both sides accountable.[118] It provides a smoke screen for nationalists and others to deny their own criminal actions. This defense is rejected in the *Kupreskic et al.* Trial Chambers ICTY decision: "[*Tu quoque*] has been 'universally rejected' and 'flawed in principle'" since "[i]t envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations."[119] Rather, "the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity."[120] That is to say, everyone should be held to these standards, and both sides should be prosecuted.

III. World War II: Allied War Crimes

This problem of one-sided prosecutions and a culture of impunity for the victors of war dates back to World War II with the trials at Nuremberg and Tokyo. These tribunals have long been criticized for the lack of prosecution of Allied war crimes that occurred during WWII against civilians and Axis armed forces.[121] However, the ICTR/ICTY Statutes differ greatly from the London Charter in that the London Charter explicitly stated that the tribunal was meant to prosecute only one side of the war.[122] According to the London Charter, "there shall be established an International Military Tribunal [hereinafter called "the Tribunal"] for the just

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118. *See* Cecile E.M. Meijer & Amardeep Singh, *News from the International Criminal Tribunals*, 8 HUM. RTS. BR. 20, 20–21 (2001) (explaining that the ICTY rejected the *tu quoque* defense as a breach of international law because the obligations of international law are not dependent on the other party's conduct); *see also* Michael P. Scharf & Ahran Kang, Symposium, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSLI*, 38 CORNELL INT'L L.J. 911, 935 (2005) (stating that a defendant claiming the *tu quoque* defense is in essence refusing to accept blame simply because the other side refuses to accept blame for similar behavior).

119. *See* Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 517 (Jan. 14, 2000) (asserting that the *tu quoque* defense bases guilt on the conduct of the other party, not the party itself).

120. *See id.* (rejecting the *tu quoque* defense that imagines a humanitarian law consisting of narrow bilateral exchanges because it does not acknowledge that the body of law is not in fact based on reciprocity); *see also* HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 230 (2004) (stating that the Trial Chamber rejected Kupreskic's *tu quoque* argument because it is based on an interpretation of humanitarian law that is contradictory to what the body of law actually sets forth).

121. *See* Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 371 (1999) (explaining that the Nuremberg and Tokyo trials have been criticized as victor's justice because they condemned only the Axis leaders for atrocities that the Allied forces also committed); *see also* Timothy L.H. McCormack, *Conceptualizing Violence: Present and Future Developments in International Law,* 60 ALB. L. REV. 681, 718–20 (1997) (discussing that the Allied approach to the establishment of the Nuremberg and Tokyo Tribunals was problematic because it legitimized the Allies' conduct in the war by comparing it to those atrocities committed by the Axis Powers).

122. *See* S.C. Res. 955, ¶ 1, U.N. Doc. S/Res/955(1994) [hereinafter RESOLUTION FOR RWANDAN INT'L CRIMINAL TRIBUNAL] 1602 (declaring the International Tribunal's target for prosecution, the time period it must consider, and the provisional standard it must meet); *see also* The Secretary-General, *Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. Doc. S/25704, art. 1 (May 3, 1993) (granting the International Tribunal the power to prosecute persons who have seriously violated international humanitarian law in the former Yugoslavia since 1991).

and prompt trial and punishment of the major war criminals of the European Axis," otherwise known as the Nuremberg Trials.[123] Both Nuremberg and Tokyo were clear examples of trials for the losing side and not for the victors, as these trials prosecuted the losing side's criminals, but not Allied criminals for crimes committed against the Germans or Japanese.[124] That is not to say that the scale of the crimes committed by the Nazi regime was comparable to those crimes committed by the Allied Powers, but rather that, in order to achieve full justice, both sides should be tried for the crimes they committed and held accountable for their actions.

Many war crimes were committed by the Allied Powers during WWII.[125] During the Battle of Monte Cassino to capture Rome, soldiers reportedly raped women near Cassino.[126] Mass rape and other war crimes were committed by Soviet troops during the occupation of East Prussia, parts of Danzig, and Silesia, as well as during the Battle of Berlin and the Battle of Budapest.[127] The United States committed several war crimes, including the killing of unarmed Italian civilians in the Canicattì slaughter, the killing of unarmed German and Italian prisoners of war in the Biscari massacre in 1943, the killing of captured concentration camp guards in the Dachau massacre by American soldiers and camp inmates, and potentially the bombings at Hiroshima and Nagasaki.[128] In a 1963 Japanese judicial review of the bombings,

123. *See* Charter of the International Military Tribunal-Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, art. 1, Aug. 8, 1945, T.I.A.S. No. 1589 (stating that the purpose of the International Military Tribunal was to try and punish major war criminals of the European Axis).

124. *See* Davis S. Bloch & Elon Weinstein, *Velvet Glove and Iron Fist: A New Paradigm for the Permanent War Crimes Court*, 22 HASTINGS INT'L & COMP. L. REV. 1, 16 (1998) (noting that the Allies were accused of "victor's justice" after the Nuremburg trials because they only prosecuted Axis war criminals); *see also* James Blount Griffin, Note, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 441 (2001) (recognizing that the United States, Britain, France, and Russia agreed to prosecute only Axis war criminals).

125. *See* Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 805–06 (1997) (discussing the defenses put forth at the Nuremburg trials that the Allies were guilty of war crimes); *see also* Yael Weitz, Note, *Rwandan Genocide: Taking Notes from the Holocaust Reparations Movement*, 15 CARDOZO J. L. & GENDER 357, 364 (2009) (arguing that Allied soldiers perpetrated war crimes by committing rape during World War II).

126. *See* Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women,"* 14 TEX. J. WOMEN & L. 121, 140 (2004) (asserting that the rape of civilian women was considered acceptable and a natural part of war by the Allies); *see also* Weitz, *supra* note 125, at 364 (explaining that soldiers from the Allied and Axis countries routinely raped civilians, and such occurrences were common among both sides during World War II).

127. *See* Tamara L. Tomkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845, 848 (1995) (observing that the Russian military used rape as a retaliatory measure during World War II); *see also* Amanda Beltz, Comment, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance the Victim's Rights with the Due Process Rights of the Accused*, 23 ST. JOHN'S J. LEGAL COMMENT. 167, 175 (2008) (noting numerous examples of rape committed by Soviet troops as they advanced into Germany).

128. *See* M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541, 555 (2006) (assessing that the Allies had implemented a "victor's justice" when war crimes, such as the bombing of Dresden resulting in the deaths of 35,000 German civilians, were not prosecuted); *see also* Allison Marsten Danner, *Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 VA. J. INT'L L. 83, 94 (2005) (stressing that civilian deaths from the use of nuclear bombs in Japan, as well as other internationally unacceptable acts of aggression by Western nations undermined the legitimacy of the Tokyo Tribunal in prosecuting war crimes by Japanese soldiers); *see also* Stephen E. White, Comment, *Brave New World: Neurowarfare and the Limits of International Humanitarian Law*, 41 CORNELL INT'L L.J. 177, 192 (2008) (critiquing the international community's failure to recognize the civilian casualties resulting from the aerial bombardment of Dresden and Tokyo by the Allied Powers).

the court found that "the attacks upon Hiroshima and Nagasaki caused such severe and indiscriminate suffering that they did violate the most basic legal principles governing the conduct of war."[129] Yugoslavians committed war crimes in the Foibe massacres, in which mass killings of Italians took place in 1945.[130] Norway, France, and the U.S. all were involved in incidents of prisoner of war brutality.[131]

One of the most striking examples of Allied war crimes gone unpunished is the Katyn Forest massacre, a mass execution of Polish prisoners of war and prisoners ordered by Soviet forces in 1940.[132] The German Nazis claimed the Soviets committed the crimes, but the Soviets claimed the Nazis were responsible.[133] In 1946, the chief Soviet prosecutor at the Nuremberg Trials indicted Germany for the Katyn killings, stating that "one of the most important criminal acts for which the major war criminals are responsible was the mass execution of Polish prisoners of war, shot in the Katyn Forest near Smolensk by the German fascist invaders."[134] This matter was eventually dropped after the United States and United Kingdom refused to support it, and no confirmation of guilt could be found based on the documents and evidence presented.[135] Obviously this issue of the Katyn Forest massacre illustrates the concept of true victor's justice, since the Soviet Union committed the atrocities, but was able to seemingly turn the situation on the Germans, since they were the losers and the Soviets were the winners of the

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129. *See* Shimoda v. State, 355 HANREI JIHŌ 17 (Tokyo D. Ct., Dec. 7, 1963) (highlighting that the bombings of Hiroshima and Nagasaki had a devastating effect on the Japanese people); s*ee also* Roger Clark, *Nuclear Weapons and the World Court*, 14 EMORY INT'L L. REV. 199, 203–04 (2000) (book review) (illustrating that there was a judicial review by the District Court of Tokyo in 1963 of the Hiroshima and Nagasaki bombings); s*ee also* Winston P. Nagan, *International Lawyers, and the Challenge of the Millennium*, 24 YALE J. INT'L L. 485, 487 (1999) (discussing the District Court of Tokyo's review of the Hiroshima and Nagasaki bombings).

130. *See* DISASTRO!: DISASTERS IN ITALY SINCE 1860 CULTURE, POLITICS, SOCIETY 38 (John Dickie et al. eds., 2002) (describing the massacres in 1945 of almost 5,000 Italians, led by Josip Broz Tito, former president of Yugoslavia); *see also* Nathaniel Vinton, *Croatia by Bicycle: Sea, Sun, Truffles*, N.Y. TIMES, May 6, 2007 (stating that thousands of ethnic Italians were killed by Yugoslavians in the Foibe massacres); *see also* Sophie Arie, *Italians Mark War Massacre*, GUARDIAN (London), February 11, 2005 (proclaiming that the Foibe massacres resulting in roughly 15,000 Italian men, women, and children being murdered by Yugoslavian communists).

131. *See* JOHN W. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 68–69 (1987) (stating that the expectations of Japanese prisoners of war, that they would be tortured and killed by Allied powers during World War II, were not unfounded).

132. *See* Suzy Littell, *Critical Perspectives on the Nuremberg Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 499–500 (1996) (stating that Polish prisoners of war were killed during the Katyn Forest massacre); *see also* Allan A. Ryan, *Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals*, 30 B.C. INT'L & COMP. L. REV. 55, 88 (2007) (identifying the Katyn Forest massacre as the killing of Polish officers in Poland in 1942).

133. *See* M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy,* 36 CASE W. RES. J. INT'L L. 299, 304–05 (2005) (indicating how the Soviets improperly placed the blame for the Katyn Forest massacre on the Germans by distorting the record); *see also* Michael P. Scharf, *The International Trial of Slobodan Milosevic: Real Justice or Realpolitik?*, 8 ILSA J. INT'L & COMP. L. 389, 391–92 (2002) (asserting that the Soviets, not the Germans, were responsible for the Katyn Forest massacre).

134. *See* Ruth Wedgwood, *Global or Local Justice: Who Should Try Ousted Leaders?*, 38 CORNELL INT'L L.J. 779, 785 (2005) (stating that the Soviets offered proof at the Nuremberg Trials that Germany was responsible for the Katyn massacre).

135. *See* Fergal Gaynor & Mark B. Harmon, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 700 (2007) (noting that Mikhail Gorbachev confirmed in 1990 that the Soviet Union was responsible for the Katyn Massacre); *see also* Wedgwood, *supra* note 134, at 785 (explaining that the charges against Germany for the Katyn Massacre were eventually withdrawn).

conflict. It is an issue of fairness, morality and justice, offering a critique of the culture of impunity prevalent in international criminal tribunals from the time of Nuremberg through today in Rwanda.

IV. Analysis and Conclusions

It is difficult to draw any definitive conclusions regarding war crimes tribunals and the concept of victor's justice (the adjudication of members of the victorious side of a conflict who committed crimes), since international case law is still developing in Rwanda and the former Yugoslavia. However, this critique of the culture of impunity prevalent throughout the international justice system is essential to the development of international criminal law, in the ICTR/ICTY and in the International Criminal Court. If history proves that the victorious side of a conflict is able to hide behind its status from prosecutions, or that a victorious state can preclude criminal prosecutions at the international level, how can we achieve justice in a postconflict society at the international level? According to Peskin, having trials for members of both sides of the conflict who committed crimes is a positive act for the tribunals: "Providing a semblance of balance in prosecutions is also crucial for the tribunal to realize its goal or providing an accurate historical record of the causes and consequences of ethnic conflict."[136] It is still too early to tell definitively whether these tribunals are victor's courts. In the ICTY, steps have been taken to prosecute criminals from both sides of the conflict. Although unsuccessful, steps were also taken at the ICTR. Both, however, have been confronted with many obstacles in their pursuit of justice for both sides of the conflict.

Although the concept of justice only for the victorious side by trying the losing party to the conflict has prevailed throughout international criminal tribunals since World War II, the critique that such tribunals should prosecute crimes from both sides of the conflict is also highly problematic. The fact that RPF crimes against the Hutu occurred is documented in several reports, as was shown previously; however many reports cite contradictory evidence. Numbers of victims vary from source to source, and the extent of the crimes reported ranges from denial of crimes to merely looting to possible acts of genocide. The special rapporteur for Rwanda named by the UN Commission on Human Rights stated in a report issued on June 28, 1995, that in areas controlled by the RPF, "the cases of massacres reported are rather rare, indeed virtually non-existent," but he added that this assessment might reflect lack of information rather than absence of killing."[137] That is to say, is the lack of prosecution of members of the RPF due to the non-existence of conclusive evidence of such crimes, or is it because the crimes were rare?

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136. *See* Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda.* 4 J. HUM. RTS. 213, 228 (2005) (explaining the positive aspects of providing a balance in prosecutions).

137. *See* U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Situation of Human Rights in Rwanda: Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, With Particular Reference to Colonial and Other Dependent Countries and Territories*, ¶¶ 6, 22, U.N. Doc. E/CN.4/1995/7 (June 28, 1995) (*submitted by* R. Degni-Ségui) (concluding that while massacre cases are rarely reported, his report is not exhaustive).

In addition to the problems presented by varying accounts (or lack thereof) of RPF crimes, the prosecution of RPF crimes against humanity and war crimes is also problematic due to the fact that the ICTR statute covers only a short amount of time in 1994, whereas many of these crimes occurred either before or after this period.[138] The problem of the definition of crimes against humanity is also difficult to reconcile, since many of the RPF killings were not committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds, as the Statute requires for crimes against humanity, but were committed "without regard to age, sex, or ethnic group."[139] The additional issue of lack of political will on the part of the RPF-led government of Rwanda to comply with investigations or bring RPF suspects to the court is also another obstacle in obtaining justice for crimes committed against the Hutu surrounding the genocide.

The truth of the matter is that many countries, such as the U.S., do not want to rock the boat, so to speak, and upset the fragile government and internal structure of the rebuilding nation of Rwanda by pointing fingers and prosecuting some of the top officials in the RPF-led government today for crimes that many believe to be retaliation against the Hutu genocide. By examining the overwhelming evidence presented depicting the RPF-led killings in the 1990s, in addition to the legal bias of the court against prosecuting crimes committed by the RPF, one can conclude that the lack of indictments of the RPF provides evidence of a victor's justice approach to the tribunal. While the need for stability is a valid concern, feeding the culture of impunity cannot foster peace and reconciliation in post-genocide Rwanda since the conflict is an ongoing one, the causes of which need to be addressed on both sides, with both sides held accountable for their crimes. Although prosecuting only the losing side of the conflict may have worked at Nuremberg, it is unlikely to bring peace to the African conflict. If anything, this notion of one-sided victor's justice at the level of the ICTR might only fuel the ongoing conflict between Hutu and Tutsi in the Great Lakes region.

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138. *See* S.C. Res. 955, ¶ 1, U.N. Doc. S/Res/955(1994) at 1601 (establishing the International Criminal Tribunal for Rwanda to prosecute human rights violations committed between January 1 and December 31, 1994); *see also* Mariann Meier Wang, Article, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 197 (1998) (criticizing the temporal limitation of prosecutions under the ICTR to the period of Jan. 1, 1994 through Dec. 31, 1994 as too short).

139. *See* ORG. OF AFRICAN UNITY INT'L PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, RWANDA: THE PREVENTABLE GENOCIDE 10 (2000), (denying that major human rights abuses were perpetrated by the Rwandan Patriotic Front as a whole and accepting only that a few soldiers broke the law); *see also* ALISON DES FORGES ET AL., LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 708–09 (1999) (1999) (discussing how massacres and other killings by the Rwandan Patriotic Front were carried out arbitrarily).

The World Trade Organization Dispute Settlement System: China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights

Hwan Kim*

I. Introduction

When China became a member of the World Trade Organization in 2001, it assumed responsibility to enforce the Organization's rules on intellectual property.[1] China's failure to enforce the intellectual property provisions of the Marrakesh Agreement has caused tension with other nations, including the United States.[2] China has taken a laissez-faire approach to enforcing violations of trademark and copyright laws; the criminal procedures and penalties are inadequate or even nonexistent.[3] On April 10, 2007, the United States requested consultations with China concerning the protection and enforcement of intellectual property rights in China.[4]

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1. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement] (requiring that World Trade Organization members comply with the intellectual property requirements of the Marrakesh Agreement); *see also* Press Release, World Trade Organization Ministerial Conference, *WTO Ministerial Conference Approves China's Accession*, WT/Press/252 (November 10, 2001) (acknowledging that the Ministerial Conference approved China's accession into the World Trade Organization in 2001).

2. *See* World Trade Organization Panel Report, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter WTO Report: China and Intellectual Property Rights] (reporting that the United States filed a complaint with the World Trade Organization alleging that China has violated numerous provisions of the Marrakesh Agreement, including enforcement regarding counterfeiting and piracy); *see also* Daniel Gervais, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT'L L. 549, 549 (2009) (stating that the United States filed a complaint against China for its law and practice).

3. *See* WTO Report: China and Intellectual Property Rights, *supra* note 2 (claiming that China has violated the intellectual property provisions of the Marrakesh Agreement by failing to develop and enforce laws regarding copyright and trademark violations); *see also* Donald P. Harris, *The Honeymoon Is Over: The U.S.—China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L. J. 96, 102–03 (2008) (acknowledging the piracy and counterfeiting practices of China).

4. *See* Requests for Consultations by the United States, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 10, 2007) (stating that the United States requested meetings with China regarding its criminal penalties and procedures for trademark counterfeiting and copyright violations); *see also* Robert H. Hu, *International Legal Protection of Trademarks in China*, 13 MARQ. INTELL. PROP. L. REV. 69, 105–06 (2009) (asserting that the United States has continuously pressured China to enforce copyright violations).

* **Hawn Hee Kim graduated cum laude with a B.A. from Mount Holyoke College in 2006. She attends the University of Richmond, T.C. Williams School of Law and is an editor of the RICHMOND JOURNAL OF LAW AND TECHNOLOGY.**

This article is composed of four parts. The first part introduces the historical background and the development of the World Trade Organization as an internationally recognized organization, and discusses its origins, functions, organizational structure, and underlying principles. The second part discusses the dispute settlement system of the World Trade Organization and provides a brief overview of the trade-related aspects of the Intellectual Property Rights Agreement to give context to the current dispute between the United States and China. The third part details the United States' claim against China and its supporting rationale. The article concludes with a personal opinion on the potential outcome of the case.

II. Development of the WTO

A. Origins of the WTO

The World Trade Organization (WTO) officially began its operations on January 1, 1995;[5] its origins, however, can be traced back to the General Agreement on Tariffs and Trade (GATT), as well as to the proposed International Trade Organization (ITO).[6]

In December 1945, the United Nations initiated negotiations between fifteen countries to reduce and bind customs tariffs that culminated in a successful multilateral agreement.[7] The year prior, the International Monetary Fund and the International Bank for Reconstruction and Development (the World Bank) had been established.[8] Unfortunately, trade problems remained unaddressed.[9] Determined and eager to create a more efficient system, the United

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5. *See* Marrakesh Agreement Establishing the World Trade Organization, art. I, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter Marrakesh Agreement] (denoting the creation of the World Trade Organization); *see also* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 77 (2005) (noting that the World Trade Organization was officially established on January 1, 1995).

6. *See* BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS 1–13 (2007) (illustrating the positive effects that the GATT had on the shaping of dispute settlements in the WTO); *see also* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 16 (4th ed. 2008) (discussing how the ITO died when the Havana Charter was not ratified, leaving the GATT as the only instrument governing international trade until the WTO was established).

7. *See* General Agreement on Tariffs and Trade, 55 U.N.T.S. 194 [hereinafter GATT] (acknowledging an agreement reached by 23 nations that was part of a larger proposed international trade arrangement); *see also* UNDERSTANDING THE WTO, *supra* note 6, at 15 (reporting that the foundational document of the General Agreement on Tariffs and Trade was signed on October 30, 1947); *see also* VAN DEN BOSSCHE, *supra* note 5, at 78–81 (postulating that the creation of a standard multilateral agreement would bring stability and fairness to international trade).

8. *See* UNDERSTANDING THE WTO, *supra* note 6, at 15 (explaining that the International Monetary Fund and the International Bank for Reconstruction and Development were established in 1944).

9. See *id.* (asserting that the problems concerning trade had not been taken up at the Bretton Woods Conference); see also Matthew E. Fischer, *Is the WTO Appellate Body a "Constitutional Court"? The Interaction of the WTO Dispute Settlement System With Regional and National Actors*, 40 GEO. J. INT'L 291, 291-92 (2008) (stating that the International Trade Organization never came into existence).

Nations intended to enjoin the International Monetary Fund and the World Bank and form a third institution that would oversee the trade aspects of international economic cooperation.[10]

More than fifty countries participated in negotiations to create the International Trade Organization (ITO) as a "special agency" to the United Nations, which resulted in a very ambitious first draft of the ITO Charter.[11] The draft Charter attempted to "extend beyond world trade disciplines, including rules on employment, commodity agreements, restrictive business practices, international investment, and services."[12] The ITO Charter, also known as the Havana Charter, was completed in March 1948 in Havana and provided for the establishment of the ITO.[13] Unfortunately, the ITO Charter never entered into full force, in large part due to the failure of the United States' Congress to approve the charter, despite multiple submissions.[14] Other countries were not interested in forming an international organization for trade without the United States as a member because of its status as one of the world's leading nations in economy and trade; thus, the ITO never came into existence.[15]

While the negotiations surrounding the ITO Charter were ongoing, a final agreement on the GATT was reached in October 1947.[16] Through the Protocol of Provisional Application,

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10. *See id.* (describing the intent of the United Nations when creating the International Trade Organization); *see also* United Nations Conference on Trade and Employment, Nov. 21, 1947–March 24, 1948, *Havana Charter for an International Trade Organization*, art. 1 ¶ 6, U.N. Doc E/Conf. 2/78, *available at* http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (explaining that the International Trade Organization was established with the goal of promoting mutual understanding and cooperation to solve the problems of international trade).

11. *See* UNDERSTANDING THE WTO, *supra* note 6, at 16 (discussing international involvement and the difficulties that arose in drafting the International Trade Organization Charter); *see also* George Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089, 1090 (1949) (noting that 53 countries gathered in Havana, Cuba to write an ambitions draft of the International Trade Organization Charter).

12. *See* UNDERSTANDING THE WTO, *supra* note 6, at 15 (describing the International Trade Organization Charter's goals for international trade and cooperation).

13. *See* VAN DEN BOSSCHE, *supra* note 5, at 77–82 (describing the negotiations and the necessary cooperation among nations that led to the creation of the International Trade Organization); *see also* Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization 1947-1948*, 25 INT'L HIST. REV. 282, 301 (2005) (historicizing the signing of the final act of the International Trade Organization on March 24, 1948 by 53 countries).

14. *See* VAN DEN BOSSCHE *supra* note 5, at 77 (stating that when the ITO Charter was completed in Havana, Cuba and submitted to the U.S. Congress for approval, it languished in the House until 1951 when it became clear that it would not gain final approval and ratification); *see also* Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L. J. 699, 705 (1994) (explaining that, despite the completion in 1948 of the ITO Charter, it never came into existence because of Congress' failure to approve it).

15. *See* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 77-82 (2005) (postulating that the refusal of the United States to join the International Trade Organization resulted in the demise of the organization); *see also* Christopher B. Conley, Comment, *Parallel Imports: The Tired Debate of the Exhaustion of Intellectual Property Rights and Why the WTO Should Harmonize the Haphazard Laws of the International Community,* 16 TUL. J. INT'L & COMP. L. 189, 193 (2007) (noting that the ITO never came into existence due to lack of support from the U.S.).

16. *See* GATT, *supra* note 7, at art. XXVI (stating that the final agreement was reached in October 1947); *see also* VAN DEN BOSSCHE, *supra* note 15, at 78-81 (outlining briefly the GATT and ITO negotiations during the end of 1947).

the provisions of the GATT came into full force on January 1, 1948.[17] With the failure of the ITO formation, the GATT became the sole multilateral instrument governing international trade, making the GATT an unofficial, *de facto* international organization.[18] It remained the sole international trade organization until the World Trade Organization came into being in 1995.[19]

B. The Uruguay Round

Despite its limited peripheral action, the GATT achieved great success in "promoting and securing the liberalization" of various aspects of world trade.[20] However, the GATT underwent several series of trade negotiations, known as the GATT Rounds, which did not always result in success.[21] The eighth and final Uruguay Round ran from 1986 to 1994 and was the most extensive of the GATT Rounds.[22] It was the Uruguay Round that ultimately led to the creation of the World Trade Organization and a new set of trade agreements.[23]

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17. *See* General Agreement on Tariffs and Trade, 55 U.N.T.S. 194 [hereinafter GATT], at Annex I (proclaiming that the document takes effect January 1, 1948); *see also* VAN DEN BOSSCHE, *supra* note 15, at 78–81(clarifying that, under the 1945 extension, the GATT did not have to be approved by the U.S. Congress, allowing it to go in effect quickly).

18. *See id.* (stating that although the GATT did not go into full force it was used as the *de facto* document in mediating trade disputes); *see also* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 9 (4th ed. 2008) (providing general background information on the evolution of the organization).

19. *See* Marrakesh Agreement Establishing the World Trade Organization, art. I, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter Marrakesh Agreement] (entering into effect the World Trade Organization); *see also* UNDERSTANDING THE WTO, *supra* note 18, at 15 (maintaining that the WTO's January 1, 1995 creation established the largest post–World War II international trade reform).

20. *See* UNDERSTANDING THE WTO, *supra* note 18, at 15 (alleging that the GATT's worldwide success in trade liberalization is incontrovertible); *see also* Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 298, WT/DS176/AB/R, (Jan. 2, 2002) (attributing success in global trade to Article I of the GATT).

21. *See* UNDERSTANDING THE WTO, *supra* note 18, at 16 (asserting that the GATT rounds of negotiations achieved greater successes in some areas than others); *see also* Henricus A. Strating, *The GATT Agriculture Dispute: A European Perspective*, 18 N.C. J. INT'L L & COM. REG. 305, 331 (1993) (highlighting that unsuccessful trade negotiations led to the Uruguay rounds of the GATT).

22. *See* UNDERSTANDING THE WTO, *supra* note 18, at 16 (explaining that the Uruguay Round was the final and most extensive round of GATT negotiations); *see also* Rafael Leal-Arcas, *Polycephalous Anatomy of the EC in the WTO: An Analysis of Law and Practice*, FLA. J. INT'L L. 569, 595 (2007) (illustrating the length and import of the Uruguay Round).

23. *See* UNDERSTANDING THE WTO, *supra* note 18, at 16 (explaining that the Uruguay Round led to the creation of the World Trade Organization and a new set of trade agreements); *see also* Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, U. PA. J. INT'L L. 1133, 1138 (2009) (providing that the governments participating in the Uruguay Round negotiations were responsible for the creation of the WTO).

By the beginning stages of the Uruguay Round in 1986, the GATT experienced many serious problems, mainly because of the Agreement's increasing irrelevance to the realities of world trade more than forty years after its initial enforcement in 1945.[24] The GATT faced major issues, including the globalization of the world economy; the increasing role of trade in services, especially the merchandise trade that was not covered by the GATT rules; the expansion of international investment; and its dispute settlement system.[25] As a result, the Uruguay Round was launched in September 1986.[26]

The Uruguay Round was ultimately successful in adopting a new set of rules that covered practically all aspects of trade policy issues, expanding the trading system into several new areas including trade in services and intellectual property.[27] All of the original GATT provisions, including its dispute settlement system, were open for review, and the ministers were given ample time to evaluate.[28] The final act of the negotiations was signed in Marrakesh in April 1994 as the Agreement Establishing the World Trade Organization (WTO Agreement), which entered into force on January 1, 1995, and established the new institution the same day.[29]

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24. *See* PETER-TOBIAS STOLL & FRANK SCHORKOPF, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW 11–14 (2006) (indicating that the GATT experienced problems in early 1986 because of existing problems concerning the General Agreement); *see also* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 193 (1996) (explaining that in 1986 the GATT contracting parties sought to deal with some of the problems of existing dispute settlement rules).

25. *See* UNDERSTANDING THE WTO, *supra* note 18 at 15, 17 (noting that the GATT was no longer able to cope with new world issues like globalization, trade in new services, and expansion of international investment); *see also* John H. Jackson, *Interdisciplinary Approaches to International Economic Law: International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 AM. U. J. INT'L L. & POL'Y 595, 600 (1995) (citing more apparent GATT "birth defects" as international relationships grew increasingly complex).

26. *See* UNDERSTANDING THE WTO, *supra* note 18, at 18 (recognizing that calls for reform were made at the ministerial meeting in November 1982 and that four years were spent working out the details before the Uruguay Round began).

27. *See* GATT Secretariat, *Trade Negotiations Committee: Thirty-sixth Meeting:15 December 1993*, MTN.TNC/40 (Dec. 21, 1993) (reporting that the Uruguay Rounds went further than any previous negotiations in extending international trade laws to previously lacking areas); *see also* UNDERSTANDING THE WTO, *supra* note 18, at 18 (asserting that new trade issues were covered in the Uruguay Round negotiations).

28. *See* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 18 (4th ed. 2008) (noting the monumental nature of the Uruguay Round and the lengthy review process in place for it); *see also* THE PRINCETON ENCYCLOPEDIA OF THE WORLD ECONOMY 1155 (2009) (stating that ministers at the Uruguay Round had four months to compromise on the issues).

29. *See* STOLL & SCHORKOPF, *supra* note 24, at 13–14 (indicating that the final act contained no less than 46 agreements and 24 resolutions); *see also* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 85 (2005) (affirming that the Agreement establishing the World Trade Organization was signed in Marrakesh in April 1994 and entered into force in January 1995); *see also* UNDERSTANDING THE WTO, *supra* note 28, at 19 (noting that the Agreement was signed by a majority of the 123 government ministers).

C. The Creation of the World Trade Organization

1. The Organizational Structure of the WTO

The WTO is composed of three main administering bodies, as clearly indicated in the WTO Agreement: the Ministerial Conference, the General Council, and the Secretariat.[30] First, the Ministerial Conference functions as the representative body.[31] As the supreme and principal figure of the organization, it meets at a minimum of once every two years to review and evaluate its performance and establish new policies as needed; it is also open to all members of the WTO.[32] The Ministerial Conference possesses the decision-making authority on all matters of the WTO, and within all multilateral WTO trade agreements.[33]

In addition to this broad power, the Ministerial Conference also has specialized powers, though such authority may be subject to particular procedures and majority requirements.[34] The Ministerial Conference also has the authority to appoint the Director General of the WTO, adopt staff regulations, set up various committees, interpret and amend trade agreements, accept new members to the WTO, and decide on the negotiation and regulation of new subjects.[35]

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30. *See* Marrakesh Agreement Establishing the World Trade Organization, arts. IV-VI, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter Marrakesh Agreement] (establishing the organizational structure of the World Trade Organization as consisting of three administrative bodies); *see also* STOLL & SCHORKOPF, *supra* note 24 at 16 (reiterating the subdivided structure of the WTO into the Ministerial Conference, General Council and the Secretariat).

31. *See* Marrakesh Agreement, *supra* note 30, at art. IV (stating that the Ministerial Conference is to be made up of representatives from the members of the World Trade Organization, and will convene biennially); *see also* Mary Jane Alves, *Reflections on the Current State of Play: Have U.S. Courts Finally Decided to Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?*, 17 TUL. J. INT'L & COMP. L. 299, 323 (2009) (citing the World Trade Organization's Ministerial Conference as one of two representative bodies).

32. *See* DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 13–15 (2d ed. 2004) (explaining that the Ministerial Conference meets once every two years in order to assess the World Trade Organization's performance and establish and integrate its policies); *see also* STOLL & SCHORKOPF, *supra* note 24, at 16 (describing the Ministerial Conference as the principal organ of the WTO that meets every two years to make decisions relating to multilateral trade agreements).

33. *See* Marrakesh Agreement, *supra* note 30, at art. IV (establishing that the Ministerial Conference has primary authority over matters under the World Trade Organization's multilateral trade agreements); *see also* VAN DEN BOSSCHE, *supra* note 29, at 123–24 (asserting that the Ministerial Conference is vested with decision-making powers over all issues dealing with the World Trade Organization's multilateral agreements).

34. *See* PETER-TOBIAS STOLL & FRANK SCHORKOPF, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW 16–17 (2006) (recognizing that some of the Ministerial Conference's power is subject to special procedures and majority requirements); *see also* Jiaxiang Hu, *The Role of International Law in the Development of WTO Law*, 7 J. INT'L ECON. L. 143, 162–63 (2004) (discussing the majority required for certain Ministerial Conference decisions).

35. *See* Marrakesh Agreement, *supra* note 30, at arts. IV, VI, XII (establishing the specialized authority of the Ministerial Council such as the authority to appoint the Director-General, create committees, adopt staff regulations, interpret and amend trade agreements, and accept and regulate new members); *see also* STOLL & SCHORKOPF, *supra* note 34, at 16–17 (pointing to certain specialized authority the WTO grants to the Ministerial Conference).

Second, the General Council serves as the executive element of the WTO.[36] In contrast to the Ministerial Conference, all WTO members are ensured representation in the General Council through an elected Chairperson.[37] This body handles the everyday management of the WTO, serving as the executive instrument to the Ministerial Conference by performing and effectuating the Ministerial Conference's decisions, in addition to its own responsibilities.[38] The General Council carries the right to establish its own rules of procedure and to approve the respective rules of procedure of the various committees working in harmony with the General Council.[39]

One of the most important functions assigned to the General Council is the responsibility of reviewing matters regarding dispute settlement and trade policy.[40] As the internal functional body, when the General Council administers the WTO dispute settlement system and the WTO trade policy review mechanisms, it convenes and acts with its Dispute Settlement Body (DSB) and the Trade Police Review Body (TPRB), respectively.[41] Under the General Council,

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36. *See* Marrakesh Agreement, *supra* note 30, at art. IV (stating in part that "The General Council shall…carry out the functions assigned to it by this Agreement"); *see also* Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 363 (1995) (stating that certain executive authorities of the WTO rest with the General Council).

37. *See* Mary E. Footer, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 48, 170 (2006) (stating that all WTO members are represented in the General Council by a Chairperson who is elected from among the membership); *see also* VAN DEN BOSSCHE, *supra* note 29, at 124 (establishing that the General Council consists of all members of the WTO and elects the council Chairperson from the members).

38. *See* STOLL & SCHORKOPF, *supra* note 34, at 17 (noting that, in addition to its own responsibilities, the General Council also carries out the functions of the Ministerial Conference); s*ee also* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 533 (2000) (explaining that, although the Ministerial Conference meets infrequently, the everyday responsibilities of the WTO are carried out by the General Council).

39. *See* FOOTER, *supra* note 37, at 53 (establishing that the General Council creates its own rules of procedure and approves the rules of procedures of "certain 'horizontal' committees"); *see also* STOLL & SCHORKOPF, *supra* note 34, at 17–18 (indicating that the General Council is authorized to establish its own rules of procedure and approve the rules of procedure of other committees).

40. *See* Marrakesh Agreement Establishing the World Trade Organization, art. IV, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter Marrakesh Agreement] (discussing the responsibility it assigned to the General Council concerning trade policy and dispute resolution); *see also* STOLL & SCHORKOPF, *supra* note 34, at 17–18 (maintaining that trade policy and dispute settlement are among the responsibilities allocated to the General Council); *see also* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 124–26 (2005) (discussing the responsibilities assigned to the General Council such as dispute resolution and trade policy review).

41. *See* VAN DEN BOSSCHE, *supra* note 40, at 124–26 (proclaiming that the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB) are used to review trade policy and for dispute resolution). *See generally* AUTAR KRISHEN KOUL, GUIDE TO THE WTO AND GATT: ECONOMICS, LAW, AND POLITICS 33–34 (2005) (explaining that the Dispute Settlement Body (DSB) and Trade Policy Review Body (TPRB) are effectuated through the General Council).

there are other specialized councils, committees, and working parties that focus on particular trade-related areas: Council for Trade in Goods, Council for Trade in Services, and Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS).[42] These specialized councils assist the General Council and the Ministerial Conference in effectuating WTO decisions.[43]

Lastly, the Secretariat supervises the administrative affairs under the guidance of a Ministerial Conference-appointed Director-General.[44] In addition to providing technical and professional aids to the various WTO bodies, major tasks of the Secretariat include advising the countries that desire to become parties to a WTO agreement and providing legal expertise to developing countries in dispute settlements.[45] Other primary duties include providing technical assistance to developing country members, monitoring and analyzing developments in world trade, and providing information to the public.[46]

The primary objectives of the WTO are described in the Preamble to the WTO Agreement.[47] Summarily, the Preamble recognizes the following ultimate objectives of the WTO: improve standards of living, attain full employment; growth of real income and effective demand; and the expansion of production and trade of goods and services.[48]

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42. *See* DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 87 (2d ed. 2004) (illustrating that there are different committees under the General Council within the WTO for specific fields); *see also* VAN DEN BOSSCHE, *supra* note 40, at 127 (stating that other councils are designated for particular trade-related areas).

43. *See* Marrakesh Agreement, *supra* note 40, at art. IV (announcing that the three specialized councils shall carry out functions of the General Council); *see also* VAN DEN BOSSCHE, *supra* note 40 at 127 (stating that the specialized councils not only oversee the implementation of the trade agreements but also assist the General Council and the Ministerial Conference in exercising their powers).

44. *See* Marrakesh Agreement, *supra* note 40, art. VI (establishing the Secretariat of the WTO presided over by a Director-General); *see also* John Linarelli, *The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute*, 31 LAW & POL'Y INT'L BUS. 263, 357 (2000) (explaining that, even though the WTO lacks typical constitutional separation of powers, the Secretariat implements coordinating and administrative duties).

45. *See* PETER-TOBIAS STOLL & FRANK SCHORKOPF, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW 18–19 (2006) (noting that the Secretariat provides advisory opinions on acceptance to the WTO, and legal expertise on trade disputes); *see also* William J. Davey, *Japan, WTO Dispute Settlement, and the Millennium Round*, *in* ISSUES AND OPTIONS FOR U.S.-JAPAN TRADE POLICIES 129, 137 (Robert Mitchell Stern ed., 2002) (remarking that the WTO Secretariat must provide legal assistance to developing countries).

46. *See* VAN DEN BOSSCHE, *supra* note 40, at 137–39 (stating that the Secretariat's main duties are: to provide technical and professional support to the various WTO bodies, to provide technical assistance to developing-country members, to monitor and analyze developments in world trade, to advise governments of countries wishing to become members of the WTO, and to provide information to the public and the media); *see also* Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*, 23 WIS. INT'L L. J. 643, 662 (2005) (discussing the Secretariat's duties of technical assistance).

47. *See* Marrakesh Agreement, *supra* note 40, at art. VI (establishing the scope, role, and activities of the World Trade Organization); *see also* VAN DEN BOSSCHE, *supra* note 40, at 137–39 (detailing the objectives of the Preamble of the WTO Agreement and the roles of those meant to help accomplish these objectives).

48. *See* PALMETER & MARVOIDIS, *supra* note 42, at 14 (establishing that the duties of the WTO Councils are to establish and govern trade agreements, negotiations, telecommunications, financial services, and goods and services agreements); *see also* VAN DEN BOSSCHE, *supra* note 40, at 86 (citing that the objectives of the World Trade Organization include the increase of standards of living, the attainment of full employment, the growth of real income and effective demand and the expansion of production of, and trade in, goods and services).

2. Principles of the WTO Trading System

The WTO's trading system is based on five fundamental principles, providing a firm foundation for the multilateral trading system.[49] First and foremost, the WTO highly promotes trade without discrimination, through its Most-Favored-Nation (MFN) principle, which provides that countries cannot discriminate between their trading partners.[50] As the first article of the GATT governing trade in goods, MFN treatment is considered the highest priority.[51] The non-discrimination treatment also extends to trading within the country, where equal treatment applies to both foreign and domestic products, services or nationals, and intellectual property.[52] This latter concept is the principle of "national treatment," which gives others the same treatment as one's own nationals.[53]

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49. *See* Kyle Bagwell & Robert W. Staiger, *Will Preferential Agreements Undermine the Multilateral Trading System?*, 108 ECON. J. 1162, 1162–65 (1998) (explaining what the multilateral trading system is and how it is comprised); *see also* Elaine Hartwick & Richard Peet, *Neoliberalism and Nature: The Case of the WTO*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 188, 190–91 (2003) (enumerating the five principles that the WTO trading system is based on).

50. *See* Chad P. Brown, *Trade Policy Under the GATT/WTO: Empirical Evidence of the Equal Treatment Rule*, 37 CANADIAN J. ECON. 678, 678–79 (2004) (analyzing how the Most Favored Nation principle encourages countries to refrain from discrimination in trading); *see also* Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 125 (2007) (discussing the purpose of the Most-Favored Nation designation).

51. *See* Marrakesh Agreement Establishing the World Trade Organization, art. I, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter Marrakesh Agreement] (illustrating the importance of the Most Favored Nation principle as related to the GATT); *see also* William F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 INT'L REV. L. & ECON. 27, 27 (1996) (describing the "Most-Favored Nation" clause to be the "cornerstone" obligation of the GATT).

52. *See* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 12 (4th ed. 2008) (articulating the WTO trading principle that foreign imports, goods, services, and copyrights should be afforded the same competitive opportunity as local equivalents). *See generally* MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES 95 (2003) (stating that the obligation of one WTO member to another, in the realm of imported goods, is to treat foreign services in the local market no less favorably than its own).

53. *See* UNDERSTANDING THE WTO, *supra* note 52, at 12 (describing the concept of national treatment as effectively treating foreign goods and services, within the local market, the same as local goods and services). *See generally* General Agreement on Tariffs and Trade, 55 U.N.T.S. 194, at art. III [hereinafter GATT] (codifying the concept of national treatment as treating foreign contracting parties' products as "no less favorable" than products of a national origin).

The second principle of the trading system is "freer trade."[54] Under this principle, the WTO encourages gradually eliminating the trade barriers among nations through negotiations.[55] The third principle is predictability through binding and transparency.[56] By making promises regarding certain trade barriers, the WTO may provide predictability of future opportunities, thus creating stability in trade.[57] Another principle is the promotion of fair competition, which includes discouraging unfair practices, a concept that is related to the first principle of non-discrimination.[58] However, the issues arising under this principle may be extremely complex, as the rules do not concretely define "fair" or "unfair" practices in trade.[59]

Lastly, the WTO encourages development and economic reform by providing greater benefits for less developed countries.[60] This type of heightened treatment is necessary due to the developing countries' need for flexibility in adopting and implementing the agreements under

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54. *See* Christopher Findlay & Tony Warren, *International Trade in Telecommunications and Transportation Services*, *in* THE WORLD TRADE ORGANIZATION MILLENNIUM ROUND: FREER TRADE IN THE TWENTY-FIRST CENTURY 107, 112 (Klaus Günter Deutsch & Bernhard Speyer eds., 2001) (suggesting that the General Agreement on Trade in Services is instrumental in pushing maritime transport services toward freer trade); *see also* Debra P. Steger, *The Boundaries of the WTO: Afterword: The "Trade and…" Conundrum—A Commentary*, 96 AM. J. INT'L L. 135, 139 (2002) (stating that the WTO's mandate is the promotion of freer trade among its member states through non-discrimination tactics).

55. *See* GATT, *supra* note 53, at art. XXVIII (declaring that negotiations for reductions in tariffs on a mutually advantageous basis contribute positively to international trade); s*ee also* JEFFREY S. THOMAS & MICHAEL A. MEYER, THE NEW RULES OF GLOBAL TRADE: A GUIDE TO THE WORLD TRADE ORGANIZATION 59 (1997) (commenting that the 1994 General Agreement on Tariffs and Trade proposes the removal of tariffs through negotiation).

56. *See* UNDERSTANDING THE WTO, *supra* note 52, at 12 (noting that the predictability principle of the trading system can be achieved through clear and committed business practices); *see also* Jessica Karbowski, Note, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT'L L. 727, 755–56 (2009) (asserting that one of the main principles of compromise under the GATT is transparency, which promotes predictability).

57. *See* UNDERSTANDING THE WTO, *supra* note 52, at 12 (reasoning that clarity and predictability in global trade are fostered when nations agree to certain trade practices and disclose those trade policies)*; see also* RICHARD SCHAFFER, BEVERLEY EARLE & FILIBERTO AGUSTI, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 289 (5th ed. 2006) (stating that stability of the trading systems is promoted when nations commit to tariff rates and importers and exporters are made aware of them).

58. *See* The Secretary-General, *Preliminary Report of the Secretary-General, Globalization and Its Impact on the Full Enjoyment of All Human Rights*, ¶ 16, delivered to the 55th Session of the General Assembly, U.N. Doc. A/55/342 (Aug. 31, 2000) (discussing in tandem the related principles of fair competition and non-discrimination in trade law as being parallel to equality and non-discrimination in human rights law); *see also* UNDERSTANDING THE WTO, *supra* note 52, at 12 (explaining how the rules on non-discrimination, dumping and subsidies are to promote fair trade).

59. *See* UNDERSTANDING THE WTO, *supra* note 52, at 12 (surmising that the rules only try to establish definitions of fair and unfair practices without anything more definite); *see also* Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 686 (1997) (commenting that because there are problems defining "unfair competition," some countries objected to a U.S. proposed amendment on international trade laws).

60. *See* UNDERSTANDING THE WTO*, supra* note 52, at 11–12 (stating that one of the goals of the World Trade Organization is to create a trading system that is more beneficial to less-developed countries by including increased flexibility and broader privileges); *see also* Gillian Moon, *Trade and Equality: A Relationship to Discover*, 12 J. INT'L ECON. L. 617, 618 (2009) (noting that there are 150 provisions in WTO law especially favorable to developing countries).

the WTO system.[61] Thus, the WTO and the more developed trading nations tend to be more lenient toward less developed countries.

3. Roles and Functions of the WTO

The roles and functions of the WTO can be categorized into three parts.[62] First, it provides a common forum for negotiation.[63] Put simply, the WTO is a location where the member governments may attempt to settle trade disputes that arise among the countries.[64] As a method of settling disputes among countries, the WTO highly encourages settlement negotiations as one of the most efficient methods in resolving any trade disputes.[65]

In dealing with negotiations, the matters may concern subject areas already visited in the WTO agreements, but the matters may also concern subjects not yet addressed in the WTO law.[66] In the latter case, the WTO may serve as a permanent forum for "further negotiations," providing general authorization for cooperation with other international organizations, in par-

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61. *See* UNDERSTANDING THE WTO, *supra* note 52, at 12 (asserting that developing countries need flexibility in applying the WTO agreements); *see also* CONSTANTINE MICHALOPOULOS, DEVELOPING COUNTRIES IN THE WTO, 35–37 (2001) (noting that the justification for the differential treatment the WTO has toward developing countries is due to the disadvantages they face).

62. *See* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 12 (4th ed. 2008) (breaking down the WTO's functions into a negotiating forum, a set of international commercial rules and a dispute settlement body for member nations). *Cf.* THE WTO AS AN INTERNATIONAL ORGANIZATION 46 (Anne O'Krueger & Chonira Aturupane eds., 1998) (pointing to five outlined functions which are included in the WTO agreement).

63. *See* UNDERSTANDING THE WTO, *supra* note 62, at 12 (affirming that the WTO sets up a fair forum for negotiation); *see also* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS VOL. I 991 (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., 2005) (noting that the WTO provides an appropriate forum for negotiation).

64. *See* UNDERSTANDING THE WTO, *supra* note 62, at 12 (noting that the WTO sets up a system to settle trade disputes on the international stage); *see also* Nicholas Gertler & Elliott Milhollin, *Public Participation and Access to Justice in the World Trade Organization*, *in* THE NEW "PUBLIC": THE GLOBALIZATION OF PARTICIPATION 193 (Carl Bruch ed., 2002) (describing the WTO's dispute settlement role in acting as a forum for dispute settlement among member states).

65. *See* UNDERSTANDING THE WTO, *supra* note 62, at 12 (acknowledging that the WTO is the only organization focusing primarily on trade regulation and business among countries through the use of negotiated agreements); *see also* Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 CORNELL INT'L L.J. 1, 2 (2009) (describing the WTO dispute settlement process).

66. *See* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 122–24 (2005) (stating that the WTO may address matters that are not provided for in WTO law); *see also* Pablo M. Bentes et al., *International Trade*, 43 INT'L LAW. 335, 335 (2009) (reasoning that the WTO routinely decides issues that are not governed by its current practices).

ticular the International Monetary Fund and the World Bank.[67] The primary goal is to provide a more systematic and stable form of world economy, and policies surrounding globalization.[68]

Second, the WTO provides a firm set of rules for negotiations in the form of legal rules for international commerce agreed to by the majority of countries party to the WTO.[69] These rules function as binding contracts among the parties to keep their trade policies within the acceded boundaries.[70] The primary goal is to assist the trading nations to have commerce transactions that are as "free flowing" as possible, thus promoting overall economic development and well-being.[71]

With the firm underlying rules, the central role of the WTO is to facilitate the implementation and the application of the WTO Agreement, the multilateral trading system, and the plurilateral agreement.[72] The multilateral trading system is the most commonly utilized trading system in the WTO, with a majority of the major trading nations as active members.[73] The plurilateral agreement applies only to the few WTO members that are parties to the Agreement

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67. *See* Marrakesh Agreement Establishing the World Trade Organization, art. III, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter Marrakesh Agreement] (informing that the WTO provides a forum for negotiations among its members regarding multilateral trade agreements); *see also* PETER-TOBIAS STOLL & FRANK SCHORKOPF, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW 15 (2006) (noting that the WTO serves it members as a forum for negotiations).

68. *See* Marrakesh Agreement, *supra* note 67, at art. III (authorizing WTO cooperation with the International Monetary Fund and World Bank in order to harmonize the creation of international economic policies); *see also* STOLL & SCHORKOPF, *supra* note 67, at 15 (explaining that WTO cooperation with international organizations in certain negotiations is meant to synchronize global economic policy).

69. *See* UNDERSTANDING THE WTO, *supra* note 62, at 11 (stating that the WTO Agreement created the legal rules regulating international commerce); *see also* Mike Moore, *The World Trade Organization, Globalization, and the Future of International Trade Essay: The WTO, Looking Ahead,* 24 FORDHAM INT'L L.J. 1, 3 (2000) (declaring that the WTO Agreement brought the rules and procedures governing international trade under the rule of law).

70. *See* UNDERSTANDING THE WTO, *supra* note 62, at 11 (arguing that the legal rules of the WTO are contractual in nature and require signatories to obey all trading limitations); *see also* Sanford E. Gaines, *Lex & the Lorax: Enforcing Environmental Norms under International Law: The Problem of Enforcing Environmental Norms in the WTO and What To Do About It,* 26 HASTINGS INT'L & COMP. L. REV. 321, 322–23 (2003) (acknowledging that WTO membership requires obedience to the rules enumerated in the WTO Agreements).

71. *See* UNDERSTANDING THE WTO, *supra* note 62, at 10 (emphasizing that the main role of the World Trade Organization is to ease international trade); *see also* Phillip Countryman, *International Trade and World Health Policy: Helping People Reach Their Full Potential*, 21 PACE INT'L L. REV. 241, 267 (2009) (asserting that the WTO's main purpose is to encourage international trade).

72. *See* VAN DEN BOSSCHE, *supra* note 66, at 89–90 (noting that the functions of the WTO include facilitating the implementation, administration and operation of WTO agreements as well as plurilateral and multilateral agreements); *see also* Janelle M. Diller & David A. Levy, Note, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 696 n.127 (1997) (illustrating the difference between multilateral and plurilateral agreements within the World Trade Organization).

73. *See* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 10 (4th ed. 2008) (establishing the multilateral trading system as the system used by most members of the World Trade Organization); *see also* Jessica L. Greenbaum, Comment, *Trips and Public Health: Solutions for Ensuring Global Access to Essential AIDS Medication in the Wake of the Paragraph 6 Waiver*, 25 J. CONTEMP. HEALTH L. & POL'Y 142, 145 (2008) (stating that a majority of the WTO member states abide by the multilateral trading system).

on Government Procurement, availing them of the rights and obligations under that Agreement.[74]

Third, the WTO provides assistance to settle various trade disputes throughout the world.[75] The assistance presents in several forms, including trade policies review and cooperation with other organizations.[76] But notably, the most frequent form of assisting conflicting interests is the interpretation of legal matters, where the WTO's dispute settlement system plays a significant role in settling the various differences through neutral procedures.[77]

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74. *See* Plurilateral Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4B, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) (indicating how plurilateral agreements on government procurement only apply to those states that sign on to the agreement); *see also* Jean Heilman Grier, *Japan's Implementation of the WTO Agreement on Government Procurement,* 17 U. PA. J. INT'L ECON. L. 605, 606–07 (1996) (noting that the terms of the plurilateral agreement on government procurement only apply to members of the WTO who agree to it); *see also* Cathy L Wittmeyer, Comment, *A Public Procurement Paradox: The Unintended Consequences of Forest Product Eco-Labels in the Global Marketplace*, 23 J. L. & COM. 69, 94 (2003) (discussing how plurilateral agreements only apply to those states agreeing to them).

75. *See* VAN DEN BOSSCHE, *supra* note 66, at 88–99 (examining the functions of the WTO); *see also* Jeffrey Andrew Hartwick, *Non-Governmental Organizations at United Nations-Sponsored World Conferences: A Framework for Participation Reform*, 26 LOY. L.A. INT'L & COMP. L. REV. 217, 266 (2003) (stating that one of the functions of the WTO is dispute resolution).

76. *See* Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 127 (discussing the functions of the WTO); *see also* Richard Skeen, Note, *Will the WTO Turn Green? The Implications of Injecting Environmental Issues into the Multilateral Trading System*, 17 GEO. INT'L ENVTL. L. REV. 161, 166–67 (2004) (explaining that the WTO is responsible for a variety of different functions including trade policy review and cooperation with other organizations).

77. *See* UNDERSTANDING THE WTO, *supra* note 73, at 10 (providing an overview of the WTO's dispute settlement system); *see also* Rafael Leal-Arcas, *Polycephalous Anatomy of the EC in the WTO: An Analysis of Law and Practice*, FLA. J. INT'L L. 594–595 (2007) (noting that the WTO settles disputes through a neutral procedure).

III. The World Trade Organization Dispute Settlement System

A. Origin and Objectives

The dispute settlement system currently in force originated from a part of the WTO Agreement created during the Uruguay Round, and has been in operation since the inception of the WTO in January 1995.[78] The details of the system's procedures and rules are described in the Understanding on Rules and Procedures Governing the Settlement of Disputes, more commonly known as the Dispute Settlement Understanding (DSU), which was added as Annex 2 of the WTO Agreement.[79] The Dispute Settlement Body (DSB) carries out the practical functions of the system, and consists of representatives of every WTO member.[80] The sole purpose of its creation was to resolve disputes, through three main objectives.[81]

First, the primary goal of the WTO dispute settlement system is to use diverse means to settle disputes between individual member countries.[82] For example, prior consultations

78. *See* WORLD TRADE ORGANIZATION SECRETARIAT, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM [hereinafter Handbook on the WTO Dispute Settlement System] 1–2 (2004) (describing the history of the WTO's dispute settlement system); *see also* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 174 (2005) (providing that the WTO dispute settlement system has been in operation since January 1, 1995); *see also* Cesare P. R. Romano, *Can You Hear Me Now? The Case for Extending the International Judicial Network*, 10 CHI. J. INT'L L. 233, 246 (2009) (noting that the WTO's dispute settlement system dates from 1995).

79. *See* VAN DEN BOSSCHE, *supra* note 78, at 180–82 (stating that the Dispute Settlement Understanding provides for the dispute settlement system which was created during the Uruguay Round negotiations); *see also* Paul Rothstein, Note, *Moving All-In with the World Trade Organization: Ignoring Adverse Rulings and Gambling with the Future of the WTO*, 37 GA. J. INT'L & COMP. L. 151, 154–55 (2007) (explaining that the rules and procedures of the dispute settlement system are contained in Annex 2 of the WTO agreement).

80. *See* DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 15–16 (2d ed. 2004) (stating that the Dispute Settlement Body has a representative from every WTO member and carries out the functions of the Dispute Settlement Understanding); *see also* William E. Scanlan, Comment, *A Test Case for the New World Trade Organization's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute*, 45 U. KAN. L. REV. 591, 598–599 (1997) (noting that each WTO member has a representative on the Dispute Settlement Body, which carries out dispute settlement functions).

81. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. III, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter Governing the Settlement of Disputes] (indicating that the sole purpose of the Dispute Settlement Body is to resolve disputes in conformity with three broad objectives); *see also* PALMETER & MARVOIDIS, *supra* note 80 at 15–16 (recognizing that the Dispute Settlement Body was created to resolve disputes).

82. *See* PETER-TOBIAS STOLL & FRANK SCHORKOPF, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW 74–75 (2006) (citing the three goals of WTO Dispute settlement as: settling disputes between members, protecting the reciprocal rights and obligations of members, and clarifying existing provisions in conjunction with customary international law and the interpretation of treaties); *see also* VAN DEN BOSSCHE, *supra* note 78 at 182–87 (describing the prime objective of the WTO dispute settlement system as the prompt settlement of disputes among WTO members).

between the countries in a dispute are a mandatory requirement for dispute settlement.[83] Only if the dispute is not resolved through consultation does the DSB intervene to reach settlement.[84] However, even after DSB's intervention, settlement through consultation is highly encouraged during every point of the settlement process.[85] Other means of resolving disputes, though not mandatory, are also advocated, such as the settlement of disputes through multilateral procedures, as opposed to unilateral actions.[86] The DSB also promotes application of good faith engagement in dispute settlement with the "genuine intention to see the dispute resolved."[87] In addition, the DSB provides various methods of dispute settlement, including adjudication by panels and the Appellate Body, arbitration, and mediation.[88]

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83. *See* STOLL & SCHORKOPF, *supra* note 82, at 74 (noting that prior consultations must be conducted between member states before resorting to dispute settlement); *see also* Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement,* 24 HASTINGS COMM. & ENT. L.J. 273, 295 (2002) (stating that WTO member countries must enter into consultations before seeking the help of the Dispute Settlement Body).

84. *See* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 56 (4th ed. 2008) (describing the WTO's dispute settlement process). *See, e.g., WTO Appellate Body Issues Reports in Dispute Over China's Discriminatory Taxation of Imported Auto Parts, Largely Affirming Panel Report That Such Taxation Infringes Provisions of WTO Regulations and Policies,* INTERNATIONAL LAW UPDATE, Dec. 2008 (acknowledging that failed consultations led to the establishment of a dispute settlement body panel to resolve the matter).

85. *See* UNDERSTANDING THE WTO, *supra* note 84, at 56 (explaining that consultation between disputing parties is always an option); *see also* David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1050 (1999) (listing alternatives to solving a dispute during the dispute settlement process); *see also* Patrick Specht, *The Dispute Settlement Systems of WTO and NAFTA—Analysis and Comparison*, 27 GA. J. INT'L & COMP. L. 57, 82 (1998) (recognizing that parties in a WTO dispute settlement can solve the conflicts themselves).

86. *See* Governing the Settlement of Disputes, *supra* note 81, at art. XXIII (addressing the obligations of strengthening of the multilateral system in resolving disputes); *see also* VAN DEN BOSSCHE, *supra* note 78, at 13 (discussing the purpose of the dispute settlement system which pertains to settling disputes through multilateral procedures); *see also* Catherine Brown & Christine Manolakas, *Trade in Technology Within the Free Trade Zone: The Impact of the WTO Agreement, NAFTA, and Tax Treaties on the Nafta Signatories*, 25 NW. J. INT'L & BUS. 71, 79 (2000) (explaining that dispute settlement procedures are effective under TRIPS as signatories commit to multilateral procedures instead of national solutions for resolving disputes).

87. *See* Appellate Body Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, at * 237, WT/DS321/AB/R (Oct. 16, 2008) (stating that Article XVI of the WTO Agreement provides for "good faith compliance" to the multilateral dispute settlement system); *see also* VAN DEN BOSSCHE, *supra* note 5, at 185 (explaining that members of the Dispute Settlement Understanding engage in disputes with the genuine intent to see the dispute resolved).

88. *See* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 186 (2005) (explaining that there are various methods to settle disputes among WTO members such as consultations, adjudication by panels, arbitration and mediation); *see also* Phillip Countryman, *International Trade and World Health Policy: Helping People Reach Their Full Potential,* 21 PACE INT'L REV. 241, 271–72 (2009) (stating that the World Trade Organization encourages the use of alternate procedures such as negotiations for settling disputes); *see also* Bruce Zagaris, *Interpol Holds Meeting on International Police Cooperation in the Context of Public International Law,* INT'L ENFORCEMENT L. REP., May 2008, at 24 (discussing Professor Eric David's findings that political, diplomatic and judicial methods are used to settle disputes in tribunals such as the Dispute Settlement Body).

Another key feature of the WTO's dispute settlement system is its protection and preservation of the rights and obligations of WTO members.[89] Disputes often arise because one member adopts a specific trade policy measure, and the other does not.[90] When the parties fail to reach an agreement, the complainant is guaranteed a procedure based on legal rules, where the complaint(s) will be reviewed by an independent body – the panels or the Appellate Body.[91] Although the evaluation will be viewed in favor of the complainant, the forum provides the respondent an opportunity to defend itself against the claims raised.[92] This manner of settlement protects and preserves the rights and obligations of both parties involved in the dispute, helping to reach a settlement.[93]

The third objective of the WTO dispute settlement system is to provide clarification of rights and obligations through interpretation of existing provisions.[94] Because the language of

89. *See* Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) (recognizing that the goal of the WTO's dispute process is to ensure the preservation of rights of its members); *see also* STOLL & SCHORKOPF, *supra* note 82, at 75 (providing that the Dispute Settlement Body neither adds nor diminishes the rights and obligations of its members); *see also* Kim Rubenstein & Jenny Schultz, *Bringing Law And Order to International Trade: Administrative Law Principles and the GATT/WTO,* 11 ST. JOHN'S J. LEGAL COMMENT. 271, 287–88 (1996) (explaining the process for election of panel members used to ensure the rights of members).

90. *See* WORLD TRADE ORGANIZATION SECRETARIAT, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM [hereinafter HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM] 2–3 (2004) (attributing the typical dispute among WTO members to an inconsistency with obligations set out in the agreement); *see also* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 531 (2000) (explaining that disputes often arise because of the nature of protectionist groups); *see also* Terence P. Stewart & Mara M. Burr, *The WTO's First Two and a Half Years of Dispute Resolution*, 23 N.C.J. INT'L L. & COM. REG. 481, 492, 538–41, 547–51 (1998) (describing the appellate process and offering several examples where states disagreed leading to their use of the appellate process).

91. *See* HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 90, at 2–3 (establishing the process used by disputing members); *see also* Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L. L. 349, 373-79, 885 (1995) (expressing the procedures for the appellate body's review of complaints); *see also* McGinnis & Movsesian, *supra* note 90, at 535, 590–92 (2000) (revealing examples of the appellate process).

92. *See* HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 90, at 2–3 (introducing the World Trade Organization's settlement process and objectives); *see also* John J. Barceló III, *Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement*, 42 CORNELL INT'L L.J. 23, 35–39 (2009) (providing procedural background for Appellate Board hearings).

93. *See* HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 90, at 2–3 (asserting that the dispute settlement system preserves and clarifies members' rights); *see also* Alberto Alvarez-Jimenez, *The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?*, 12 J. INT'L ECON. L. 289, 289–92 (2009) (lauding the Appellate Board's timeliness, unanimity and coherence when settling disputes). *But see* Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383, 385–98 (2009) (arguing that the World Trade Organization's dispute settlement system is unfairly biased toward complainants).

94. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. III, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter Governing the Settlement of Disputes] (declaring that dispute settlement cannot add to or diminish member's rights); *see also* PETER-TOBIAS STOLL & FRANK SCHORKOPF, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW 74–75 (2006) (emphasizing that the process should only clarify and not interpret rights).

the legal provisions in the WTO Agreement is often broad and general, so that it may be applicable in multiple areas, conflicts arise in interpreting the precise definition of the WTO law.[95] In such cases, the DSB acts as the intermediary in providing a clear interpretation of the applicable WTO law in the specific context, guided mainly by the "customary rules of interpretation of public international law" under Article 3.2 of the DSU.[96]

1. Description and Process

Due to the importance of settling disputes in a timely and structured manner, general guidelines for the panel process and an approximate timeline are in place.[97] Although the timeline for the procedure may be somewhat flexible, the DSB seeks strict regulation.[98]

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95. *See* HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 90, at 3–4 (noting that the dispute settlement system is intended to clarify the provisions of the WTO agreement). *See, e.g.,* Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and…,"* 96 AM. J. INT'L L. 77, 89 (2002) (explaining that the conflict between the Montreal Protocol and the GATT could be addressed by means of WTO dispute settlement); *see also* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints,* 98 AM. J. INT'L L. 247, 253 (2004) (providing an example of a conflict between interpreting the World Trade Organization law and the General Agreement on Tariffs and Trade practice).

96. *See* HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 90, at 3–4 (explaining the Dispute Settlement Body's references to the Dispute Settlement Understanding as well as to the general rule of interpretation under Article 31 of the Vienna Convention on the Law of Treaties); *see also* Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution,* 40 AM. BUS. L.J. 511, 525 (2003) (exploring the present international regulatory structure affecting dispute resolution under the World Trade Organization and analyzing its efficiency, equity and impact on the relations among states).

97. *See* HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 90, at 1–2 (describing the importance of the Dispute Settlement System and the understanding of rules and procedures governing the settlement of disputes); *see also* Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience,* 26 FORDHAM INT'L L.J. 1505, 1512 (2003) (explaining the fundamental importance of the WTO dispute settlement system).

98. *See* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 204–05 (2005) (describing accelerated procedures for both the Dispute Settlement Body panel and appellate review proceedings); *see also* Daniel Wuger, *The Never-Ending Story: The Implementation Phase in the Dispute Between the EC and the United States on Hormone Treated Beef,* L. & POL'Y INT'L BUS. 777, 814–15 (2002) (noting that the dispute settlement mechanism of the Dispute Settlement Body encourages speedy compliance with already strict procedures).

In all cases, the dispute settlement begins with consultations between the disputing parties; parties are allowed up to sixty days to reach a mutual agreement.[99] During this process, the WTO Director-General, upon request, may intervene and mediate or give other assistance in reaching settlement.[100] If consultations fail, however, a panel is established by the DSB upon the parties' request.[101] The DSB is allotted up to 45 days to appoint a panel.[102]

Once established, the panel has up to six months to examine the case, draft a descriptive report of its review, send the report to the parties for comments, hold a review meeting with experts and the parties, and issue a second report to the parties.[103] The time limit for this process may be reduced to three months, but only if a settlement is urgent.[104] The panel is given up to nine months from the panel formation to issue a final report to the DSB, which is then processed through an appellate review, after which the DSB has sixty days to make any necessary corrections to the report.[105] When the DSB adopts the report, the report becomes a rec-

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99. *See* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 56 (4th ed. 2008) (providing that the Dispute Settlement Body gives the disputing parties 60 days to reach a mutual agreement before taking any other actions); *see also* Xin Zhang, *Implementation of the WTO Agreements: Framework and Reform,* 23 NW. J. INT'L L. & BUS. 383, 413 (2003) (noting that, if consultations fail after 60 days, a party may request a panel).

100. *See* Governing the Settlement of Disputes, *supra* note 94, at art. IV (explaining that if consultations fail within the first 60 days, the complaining party can seek the establishment of a panel); *see also* UNDERSTANDING THE WTO, *supra* note 99, at 56 (providing that the Director-General can intervene within 60 days of the commencement of settlements to help resolve a dispute); *see, e.g.,* Dukgeun Ahn, *Korea in the GATT/WTO Dispute Settlement System: Legal Battle for Economic Development,* 6 J. INT'L ECON. L 597, 597, 618 (2003) (noting that the Director General established a panel to resolve a dispute between Korea and the United States in 1999).

101. *See* Governing the Settlement of Disputes, *supra* note 94, at art. VI (specifying the procedures of establishing a panel, which may be established at the request of a complaining party); *see also* WILLIAM MOLLE, GLOBAL ECONOMIC INSTITUTIONS 153 (2003) (explaining that a typical panel consists of independent international experts in trade matters).

102. *See* UNDERSTANDING THE WTO, *supra* note 99, at 55 (stating that a panel must be appointed within 45 days); *see also* Anne Hiaring, *Fish or Fowl: The Nature of WTO Dispute Resolution Under TRIPS*, 12 ANN. SURV. INT'L & COMP. L 269, 273 (2006) (detailing the timeline for the creation of a Dispute Settlement Body panel).

103. *See* Governing the Settlement of Disputes, art. XII, *supra* note 94, at art. XII (specifying the maximum amount of time a Dispute Settlement Body panel may take to review a case and issue a report to the parties); s*ee also* VAN DEN BOSSCHE, *supra* note 98, at 205 (charting the WTO dispute settlement process from the consultation phase to Dispute Settlement Body authorized retaliation); *see also* Petko D. Kantchevski, Comment, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute*, 3 BYU INT'L L. & MGMT. REV. 79, 135 (2006) (explaining that Article 12 of the Dispute Settlement Body provides that the time frame for establishing a panel may not exceed six months).

104. *See* VAN DEN BOSSCHE, *supra* note 98, at 205 (describing that the time frame given for panel examinations is shorter under urgent circumstances); *see also* Genc Trnavci, *The Virtues and Vices of the World Trade Organization and Proposals for Its Reform,* 18 EMORY INT'L L. REV. 421, 427 (2004) (stating that the generally accepted time period in which a panel must complete its work is six months, or three months in cases of urgency); *see also* Kantchevski, *supra* note 103, at 135 (explaining that the time frame in which a panel must conduct its examination should not exceed six months unless there are urgent circumstances which will reduce it to three months).

105. *See* VAN DEN BOSSCHE, *supra* note 98, at 205 (explaining that that a panel has nine months to issue a final report and, if it undergoes appellate review, the Dispute Settlement Body has 60 days to make its revisions); *see also* Roberts, *supra* note 96, at 522 (clarifying that panel reports must be submitted within nine months of panel formation and reiterating the time periods for panel report adoption); *see also* Michael P. Ryan, *Knowledge, Legitimacy, Efficiency and the Institutionalization of Dispute Settlement Procedures at the World Trade Organization and the World Intellectual Property Organization*, 22 NW. J. INT'L L. & BUS. 389, 402 (2002) (discussing the appellate review process and the two months allotted for rendering a decision on the panel report).

ommendation or a ruling within sixty days, unless rejected by a consensus.[106] If the parties accept the report, they are given a "reasonable period of time" to implement the new rules.[107] However, if the report is unsatisfactory, both parties to the dispute may appeal the report, a process which usually lasts sixty days, but with an absolute maximum time limit of ninety days.[108]

The appeals must be based on points of law (i.e., legal interpretation), and not on re-examination of existing evidence, neither must they contain new issues.[109] Once a party (or parties) to the dispute appeal a panel's ruling, the DSB must accept or reject the appeals report

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106. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. III, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter Governing the Settlement of Disputes] (establishing that a panel report shall be adopted at a Dispute Settlement Body meeting with 60 days after the date of circulation of a panel report to the Members, unless appealed or rejected by consensus); *see also* UNDERSTANDING THE WTO, *supra* note 99, at 57 (stating that the panel report becomes a ruling within 60 days unless rejected unanimously).

107. *See* Governing the Settlement of Disputes, *supra* note 106, at art. XXI, 83(specifying that a member state will have a reasonable period of time to comply with a ruling); *see also* John M. Ryan, *Interplay of WTO and U.S. Judicial Review: When the Same U.S. Administrative Determinations Are Appealed Under the WTO Agreements and under U.S. Law, Do the Respective Decisions and Available Remedies Coexist or Collide?*, 17 TUL. J. INT'L & COMP. L. 353, 361 (2000) (demonstrating that the WTO prescribes a reasonable period of time for a member state to comply with a report); *see also* Joost Pauwelyn, Note, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' is Cooking*, 9 J. INT'L ECON. L. 197, 204 (2006) (noting that the parties agree on a reasonable period of time to comply or it is determined in separate arbitration).

108. *See* Governing the Settlement of Disputes, *supra* note 106, at art. XVII (stating that the appeal process shall last between 60 and 90 days); *see also* John Shijian Mo, *Settlement of Trade Disputes Between Mainland China and the Separate Customs Territory of Taiwan Within the WTO*, 2 CHINESE J. INT'L L. 145, 156 (2003) (explaining that the normal 60-day period for an appeal may be extended up to 30 days for a maximum period of 90 days); *see also* Karim Sarhan, *The ABCs of WTO Dispute Settlement*, 60 DISP. RESOL. J. 70, 73 (2006) (illustrating that an appeal usually takes place within 60 days, but cannot last longer than 90 days after the initial decision).

109. *See* Governing the Settlement of Disputes, *supra* note 106, at art. XVII (asserting that an appeal must be based only on issues of law that were covered in the panel report); *see also* James Bacchus, *Table Talk: Around the Table of the Appellate Body of the World Trade Organization*, 35 VAND. J. TRANSNAT'L L. 1021, 1026 (2002) (explicating that a judgment on an appeal is based only on the issues of law, and is not a political judgment); *see also* Karim Sarhan, *supra* note 108, at 73 (remarking that the appellate review board cannot re-examine evidence or tackle new issues in the appeal).

by a consensus and within thirty days.[110] Once the case has been decided, the parties comply with the decision.[111] However, if a party continues to break an agreement, a trade sanction is imposed upon the party as a penalty.[112]

B. TRIPS

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was negotiated during the Uruguay Round and introduced the international intellectual property rules to the WTO's multilateral trading system.[113] Although various protections for intellectual property rights have been provided for in the international arena through special conventions administered by the World Intellectual Property Organization, the WTO established detailed rules of its own through TRIPS, which apply to both trade in goods and trade in

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110. *See* Governing the Settlement of Disputes, *supra* note 106, at art. XVII (establishing that a report issued by the Appellate Body is binding upon the parties unless the Dispute Settlement Body rejects it by consensus); *see also* David A. Gantz, *Prevention and Settlement of Economic Disputes Between Japan and the United States: Part II: Application of Framework to Specific Sectors and Issues: Lessons from the United States-Japan Semiconductor Dispute*, 16 ARIZ. J. INT'L & COMP. L. 91, 111 (1999) (noting that the Dispute Settlement Body is allowed to reject the decision of the Appellate Body by consensus); *see also* Erin N. Palmer, Comment, *The World Trade Organization Slips Up: A Critique of the World Trade Organization's Dispute Settlement Understanding Through the European Union Banana Dispute*, 69 TENN. L. REV. 443, 470 (2002) (reporting that the Dispute Settlement Body can unanimously reject the report of the Appellate Body).

111. *See* John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 123 (2004) (arguing that the WTO charter suggests that resolutions reached by the Dispute Settlement Body are intended to be binding upon the parties); *see also* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 488 (2000) (indicating that under the current dispute resolution procedures decisions reached by the Dispute Settlement Body are binding upon the parties).

112. *See* Governing the Settlement of Disputes, *supra* note 106, at art. XXII (announcing that if a party fails to comply with the decision of the Dispute Settlement Body or provide satisfactory compensation, an aggrieved party may request suspension of any concessions or other obligations of the defaulting party); *see also* Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 792–93 (2001) (clarifying that a suspension of concessions or other obligations covered under the agreements is effectively a sanction upon the non-complying party).

113. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement] (stating that parties to the Agreement would protect intellectual property rights); *see also* WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 39 (4th ed. 2008) (discussing how the Uruguay Round of the WTO achieved the goal of encompassing intellectual property rule under international law); *see also* Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333, 334 (2000) (explaining that the World Trade Organization's agreement on intellectual property is referred to as Trade Related Aspects of Intellectual Property Rights, or "TRIPS"); *see also* Gabriel L. Slater, Note, *The Suspension of Intellectual Property Obligations Under TRIPS: A Proposal for Retaliating Against Technology-Exporting Countries in the World Trade Organization*, 97 GEO. L.J. 1365, 1366 (2009) (discussing the United States' push for adoption of intellectual property protection during the Uruguay Round of the WTO).

services.[114] The primary purpose of the TRIPS agreement is "to narrow the gaps in the way these [intellectual property] rights are protected around the world and to bring them under common international rules" by establishing minimum protection levels that each nation must provide the intellectual property of other WTO member nations.[115]

TRIPS embraces five broad areas of issues: basic principles of the trading system and the application of other international intellectual property agreements, adequate protection of intellectual property rights, the enforcement of such internationally recognized intellectual property rights in a country's own territories, settlement of disputes over intellectual property between WTO members, and special transition arrangements during the period when the new system is being introduced.[116]

IV. China: Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Dispute DS362)

A. Initial Complaint by the United States

On April 10, 2007, the United States requested consultations with China on the matter of certain measures related to the protection and enforcement of intellectual property rights in

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114. *See* PETER-TOBIAS STOLL & FRANK SCHORKOPF, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW 208–09 (illustrating that special conferences convened by the WTO have established rules that apply to both trade in goods and services); *see also* Frederick M. Abbott & Jerome H. Reichman, *The DOHA Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 J. INT'L ECON. L. 921, 924 (2007) (highlighting that the World Trade Organization's rules under TRIPS apply to the trade of both goods and services).

115. *See* UNDERSTANDING THE WTO, *supra* note 113, at 39 (acknowledging that the internationally accepted rules for protecting intellectual property in the TRIPS Agreement have created uniformity); *see also* Brad L. Bacon, *The People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma*, 9 MINN. J. GLOBAL TRADE 369, 399 (2000) (emphasizing that the standard set by the TRIPS Agreement is a floor, not a ceiling, for intellectual property rights); *see also* Karol A. Kepchar, *Protecting Trademarks: Common Law, Statutes and Treaties*, SL082 A.L.I-A.B.I 39, 46 (2006) (reiterating that the TRIPS Agreement implemented minimum protection levels that members of the WTO must maintain toward the intellectual property of other members).

116. *See* UNDERSTANDING THE WTO, *supra* note 113, at 39 (stating that the TRIPS Agreement covers five issues to protect intellectual property rights); *see also* Thomas C. Pearson, Note, *Proposed International Legal Reforms for Reducing Transfer Pricing Manipulation of Intellectual Property*, 40 N.Y.U. J. INT'L L. & POL. 541, 553 (2008) (outlining four areas covered by the TRIPS Agreement). *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. III, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter Governing the Settlement of Disputes] (containing the provisions of the TRIPS Agreement).

China.[117] Subsequently, Argentina, Australia, Brazil, Canada, European Communities, India, Japan, Korea, Mexico, Chinese Taipei, Thailand, and Turkey joined the United States in its request for consultations.[118] The consultations were requested on four specific matters:

> [T]he thresholds that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties; goods that infringe intellectual property rights that are confiscated by Chinese custom authorities, in particular the disposal of such goods following removal of their infringing features; the scope of coverage of criminal procedures and penalties for unauthorized reproduction or unauthorized distribution of copyrighted works; and the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings and performances that have not been authorized for publication or distribution within China.[119]

B. The United States' Basis for Complaint

The United States made numerous arguments to support its claims that China's conduct was inconsistent with the TRIPS agreement. First, the United States argued that "the lack of criminal procedures and penalties for commercial scale counterfeiting and piracy in China as a result of the thresholds appears to be inconsistent with China's obligations under Articles 41.1 and 61 of the TRIPS Agreement."[120]

Article 41.1 states that the members must ensure that the enforcement procedures under the TRIPS agreement must also be available under the member country's laws "so as to permit effective action against any act of infringement of intellectual property rights covered by this

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117. *See* Requests for Consultations by the United States, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1, at *1 (Apr. 10, 2007) (stating that the United States requested consultations with China on April 10, 2007 regarding alleged TRIPS violations); *see also* First Submission of the United States of America, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362, at *4 (Jan. 30, 2008) (establishing that the United States requested consultations with China on April 10, 2007 to discuss several measures relating to the enforcement and protection of intellectual property rights in China).

118. *See* Acceptance by China of the Requests to Join Consultations, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/6, at *1 (May 25, 2007) (stating that China consented to numerous other countries joining the United States in consultations with China); *see also* Constitution of the Panel Established at the Request of the United States, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/8, at *1 (December 13, 2007) (listing the third party participants).

119. *See* Request for Consultations by the United States, *supra* note 117, at *1–6 (identifying the four issues for which the United States requested consultations with China). *See generally* First Submission of the United States of America, *supra* note 117 (explaining in detail the four claims raised by the United States against China).

120. *See* Request for Consultations by the United States, *supra* note 117, at *2 (asserting that China's policies are inconsistent with the TRIPS Agreement); *see also* Konstantina K. Athanasakou, *China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Question to the WTO Under TRIPS*, 39 GEO. J. INT'L L. 217, 231 (2007) (reporting the types of claims the United States brought against China regarding intellectual property rights).

Agreement."[121] Article 61 specifically provides that WTO members "shall" provide for criminal procedures and penalties to be applied "at least in cases of wilful [*sic*] trademark counterfeiting or copyright piracy on a commercial scale," and that the WTO members "may" provide for criminal procedures and penalties to be applied in "other cases of infringement of intellectual property rights, in particular where they are committed wilfully [*sic*] and on a commercial scale."[122] China's lack of criminal procedures and penalties for violations of trademark and copyright infringements, and the willful trademark counterfeiting and copyright piracy are in direct conflict with these rules. Despite China's obligation to ensure that the enforcement procedures under the TRIPS agreement are available under its own laws through effective criminal procedures and penalties for violations, China failed to fulfill its duties as a WTO member.

Second, the United States asserts that the requirement that infringing goods be "released into the channels of commerce under the circumstances set forth in the measures at issue are inconsistent with China's obligations" under Articles 46 and 59 of the TRIPS agreement.[123] Under Article 46 and Article 59, the judicial authorities are granted power to destroy or remove any infringing goods, without any compensation, unless such acts would be "contrary to existing constitutional requirements."[124] Despite such requirements, the complaining parties argue that China has failed to use the grants of power under Articles 46 and 59 to restrict the release

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121. *See* TRIPS Agreement, *supra* note 113, at art. XLI (stating that enforcement procedures under the TRIPS must also be available under a member country's domestic laws); *see also* Athanasakou, *supra* note 120, at 236 (explaining that some WTO members believe China is in violation of its TRIPS obligations since its laws do not sufficiently protect intellectually property).

122. *See* TRIPS Agreement, *supra* note 113, at art. LXI (noting that member countries of the World Trade Organization must have criminal procedures available in their domestic laws for trademark violations); *see also* Doris E. Long, *Messages from the Front: Hard Earned Lessons on Information Security from the IP Wars*, 16 MICH. ST. J. INT'L L. 71, 104 (2007) (stating that the TRIPS Agreement requires members to effectively enforce intellectual property rights).

123. *See* Request for Consultations by the United States, *supra* note 117, at *3 (noting the United States' argument that China's actions are in violation of its TRIPS obligations); *see also* Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 2–3 (1996) (noting the general perception that China does not effectively enforce its intellectual property laws).

124. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement], at art. XLVI (stating that judicial authorities are authorized, without diverging from existing constitutional requirements, to destroy or dispose of infringing goods without compensation); *see also* Roberto Garza Barbosa, *International Copyright Law and Litigation: A Mechanism for Improvement*, 11 MARQ. INTELL. PROP. L. REV. 77, 82–83 (2007) (noting that "the constitutional requirements of most countries" were considered when drafting the TRIPS Agreement).

of infringing goods into commercial channels, which has allowed the free flow of counterfeit trademark goods specifically prohibited under Article 59.[125]

Third, the complainant asserts that China's scope of coverage for criminal procedures and penalties for unauthorized reproduction or distribution of copyrighted works is inadequate.[126] Specifically, the claim addresses the inconsistencies with China's obligations under Article 9.1, which provides that WTO members must comply with Articles 1 through 21 of the Berne Convention and its appendices.[127] The United States claims that the authors of the works whose publication or distribution has not been authorized do not enjoy the "minimum standards of protection specially granted by the Berne Convention."[128]

Article 14 of the TRIPS agreement provides that performances and reproductions of copyrighted works may be prevented when undertaken without the author's authorization.[129] The claim asserts that the Copyright Law is inconsistent with China's obligations under Article 14, because the Copyright Law denies protection of "related rights to performers and producers of sound recordings during the period of any pre-publication or pre-distribution."[130]

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125. *See* Request for Consultations by the United States, *supra* note 117, at *3 (purporting that China's policies regarding infringing goods are ineffective and violate Articles 46 and 59).

126. *See* Request for Consultations by the United States, *supra* note 117, at *5–6 (claiming that the thresholds China has set for criminalizing acts of counterfeiting and piracy are inconsistent with articles 41.1 and 61 of the TRIPS Agreement); *see also* Yoshifumi Fukunaga, *Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements*, 23 BERKELEY TECH. L.J. 867, 914–15 (2008) (arguing that the Chinese government has failed to deter commercial sale counterfeiting because of "ambiguity in statutory language" and high criminal thresholds).

127. *See* TRIPS Agreement, *supra* note 124, at art. IX (establishing that compliance with the Berne Convention and its appendices is required for all members of the World Trade Organization); *see also* Sue Ann Mota, *Trips—Five Years of Disputes at the WTO*, 17 ARIZ. J. INT'L & COMP. LAW 533, 535 (2000) (explaining that WTO members must comply with the copyright provisions of the Berne Convention, which is incorporated in the TRIPS Agreement).

128. *See* Requests for Consultations by the United States, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1, *5–6 (Apr. 10, 2007) (stating that authors of works in China do not enjoy the Berne Convention's minimum standards of protection when their works are published or distributed without authorization); *see also* Susan Tiefenbrun, *A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention*, 17 WIS. INT'L L.J. 1, 11 (1999) (emphasizing that China's acceptance of copying and "preference for imitation" conflicts with the standards of the Berne Convention).

129. *See* TRIPS Agreement, *supra* note 124, at art. XIV (requiring members to obtain artist authorization before unfixed performances can be fixed in a medium and reproduced); *see also* Kimberly Hancock, *Canadian Copyright Act Revisions*, 13 BERKELEY TECH. L.J. 517, 531 (1998) (noting that Article 14 of the TRIPS Agreement allows performers to authorize or prohibit fixation of their performances).

130. *See* Request for Consultations by the United States, *supra* note 128, at *5 (asserting that the copyright law of China is not in accordance with Article 14 of the TRIPS Agreement); *see also* First Submission of the United States of America, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362, at *59–60 (Jan. 30, 2008) (arguing that Article 4 of China's Copyright Law does not protect performances and sound recordings, which is in violation of Article 14 of the TRIPS Agreement).

The claim also asserts that the measures of protection and enforcement of copyright, or related rights, implemented on pre-distribution and pre-authorization review processes are unfairly favorable towards Chinese nationals' works over works by foreign nationals also available in China.[131] Such practice is inconsistent with China's obligations under Article 3.1, which specifically states that "each member shall accord to the nationals of other members treatment no less favourable [*sic*] than that it accords to its own nationals with regard to the protection of intellectual property."[132]

In addition, the current Chinese measures for preventing the release of works by foreign authors whose publication or distribution has not been authorized are inadequate in comparison to the intellectual property rights granted to Chinese authors and, consequently, are inconsistent with China's obligations under Article 9.1.[133] The claim specifies that China has obligations to comply with Articles 5(1) and 5(2) of the Berne Convention, which state that the authors have the right to enjoy, in countries other than their country of origin, the exercise of such rights as "independent of the existence of protection in the country of origin of the work"; the protection of such rights is "governed exclusively by the laws of the country where protection is claimed."[134]

Furthermore, since Article 4 of China's Copyright Law makes it practically impossible for individuals to protect the copyrights of their work, unauthorized performances and sound recordings are readily available in commerce for both publication and distribution, a result that is inconsistent with China's obligations under Article 41.1 of the TRIPS Agreement.[135] Article 41.1 provides that WTO members must ensure that enforcement procedures under the TRIPS

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131. *See* Request for Consultations by the United States, *supra* note 128, at *5–6 (asserting that China's preferential treatment in protecting the review processes of Chinese nationals' copyright works is inconsistent with China's obligations under the TRIPS Agreement); *see also* Press Release, Office of the U.S. Trade Representative, United States Files WTO Cases Against China Over Deficiencies in China's Intellectual Property Rights Laws and Market Access Barriers to Copyright-Based Industries (Apr. 9, 2007) (on file with author) (discussing that Chinese rules unfairly prohibit the distribution of publications and products of foreign companies); *see also Trade Delivers*, Real Results (Office of the U.S. Trade Rep., Washington, D.C.), Apr. 2007 (explaining that China's copyright law requires pre-distribution review only for foreign works, but not Chinese works).

132. *See* TRIPS Agreement, *supra* note 124, at art. III (establishing that members must treat the nationals of other members the same as it would treat its own nationals with regard to the safety of intellectual property).

133. *See* Request for Consultations by the United States, *supra* note 128, at *5 (stating the U.S. position that China's Copyright Law Article 4 contradicts its obligations under the TRIPS Agreement); *see also* Press Release, Office of the United States Trade Representative, WTO Case Challenging Weaknesses in China's Legal Regime for Protection and Enforcement of Copyrights and Trademarks (Apr. 2007) (on file with author) (explaining that China's copyright law requires pre-distribution review only for foreign works but not Chinese works).

134. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 5, *as last revised at Paris* July 24, 1971, 1161 U.N.T.S. 30 (stating that authors are to be afforded the same protections in their own nations as they are in other nations).

135. *See* Request for Consultations by the United States, *supra* note 128, at *5 (noting the United States' position that Article 4 of China's Copyright Law violates China's obligations under the TRIPS Agreement); *see also* TIMOTHY P. TRAINER AND VICKI E. ALLUMS, PROTECTING IP RIGHTS ACROSS BORDERS, Appendix 6D (2006) (explaining that Article 41 of the TRIPS Agreement militates against "unreasonable time limits or unwarranted delay").

are available under the member country's own laws, "so as to permit effective action against any act of infringement of intellectual property rights."[136] In this sense, China's conduct of releasing foreign works unauthorized for publication or distribution is in direct conflict with the TRIPS agreement.[137]

Lastly, the United States questions the prohibition of intellectual property protection for works not authorized for distribution in China.[138] The claim asserts that China's willful copyright piracy on a commercial scale consisting of such unauthorized reproduction is not subject to criminal procedures and penalties under Chinese laws, which is clearly inconsistent with China's obligations under Article 41.1 and Article 61 of the TRIPS agreement.[139]

C. Current Status of Dispute DS362

The United States' initial attempt to settle disputes with China through consultations failed, and on August 13, 2007, the United States requested that the WTO establish a panel to resolve this matter.[140] Subsequently, the Dispute Settlement Body at its meeting on September

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136. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement], at art. XLI (establishing the minimum standards for the protection of intellectual property rights); *see also* Kim F. Natividad, Note, *Stepping It Up and Taking It to the Streets: Changing Civil & Criminal Copyright Enforcement Tactics*, 23 BERKELEY TECH. L.J. 469, 488 (2008) (explaining that member countries must enact domestic laws against copyright infringement to be enforced in their courts).

137. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, 2009 SPECIAL 301 REPORT 14 (2009) (noting that in 2008 losses due to piracy in China were approximately $3.5 billion for the music recording and business software industries alone); *see also* U.S. Customs and Border Protection, Dep't of Homeland Sec., 2008 Top Trading Partners for IPR Seizures, at *3 (2008), http://www.cbp.gov/linkhandler/cgov/ trade/priority_trade/ ipr/seizure/trading/fy08_ipr _se izures.ctt/fy08_ipr_seizures.pdf (finding that 81 percent of infringing products seized came from China).

138. *See* Requests for Consultations by the United States, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1, at *5 (Apr. 10, 2007) (outlining the United States' request for consultations with China over deficiencies in China's legal regime for protecting and enforcing intellectual property rights); *see also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, 2007 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE at *9 (2007) (noting that China's distribution restrictions contradict its commitments to protecting intellectual property rights).

139. *See* First Submission of the United States of America, *supra* note 130, at 45–46 (asserting that China has not established criminal penalties for willful copyright and trademark infringements that have met commercial standards).

140. *See* Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7, at *1–6 (Aug. 21, 2007) (explaining how the United States' failed attempt to resolve intellectual property infringement issues with China led to its request for the establishment of a WTO panel to solve the matter).

25, 2007 established a panel.[141] The Panel was created in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[142] The purpose of the Panel was to examine the numerous relevant citations provided by the United States for reference to the DSB regarding the claimed issues, which will assist the DSB in "making the recommendations or in giving the rulings provided for in those agreements."[143]

On December 3, 2007, the United States requested the Director-General of the Secretariat to compose the Panel under paragraph 7 of Article 8 of the DSU.[144] Paragraph 7 provides that

> [If] there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date of the Chairman receives such a request.[145]

Following this announcement, on December 13, 2007, the Director-General composed the Panel, which consisted of a Chairperson and two members.[146]

The records made available to the public in the World Trade Organization database show that China has accepted the third-party requests by Canada, the European Communities,

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141. *See* Constitution of the Panel Established at the Request of the United States, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/8, at *1 (December 13, 2007) (acknowledging the creation of a panel on September 25, 2007 by the Dispute Settlement Body at the United States' request).

142. *See id*. (indicating that the panel's creation was in accordance with Article 6 of the Dispute Settlement Understanding); *see also* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. VI, Apr. 15, 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299 (1994) [hereinafter Governing the Settlement of Disputes] (providing a method, via a panel, for an aggrieved to settle a trade dispute).

143. *See* Constitution of the Panel Established at the Request of the United States, *supra* note 141 at *9 (clarifying that the panel's goal was to review the United States' claims and cited agreements and provide a determination to the Dispute Settlement Body). *See generally* Request for the Establishment of a Panel by the United States, *supra* note 140, at (explaining how the United States requested a panel to examine the issues and agreements set forth therein regarding its dispute with China).

144. *See* Constitution of the Panel Established at the Request of the United States, *supra* note 141 (stating that a panel was created pursuant to a request by the United States).

145. *See id*. (delineating the requirements of paragraph 7 of article 8 of the DSU).

146. *See id.* (explaining that Adrian Macey would be the chairperson of the Panel with Marino Porzio and Sivakant Tiwari serving as members).

Japan, and Mexico.[147] The World Trade Organization's description of this specific case, however, indicates additional countries as third parties to the case, listing a total of twelve countries.[148] It is assumed that the unmentioned nations in the records have not requested to join consultations, but are merely interested third parties to the case.

The nature of this case has resulted in the issuance of an extension beyond the six month period. On July 16, 2008, the Chairman of the panel made a written announcement, addressed to the Chairman of the Dispute Settlement Body, that "due to the complexity of the issues presented in this case, the Panel will not be able to complete its work within six months from the date of the Panel's composition," a decision period generally suggested under Article 12.8 of the DSU.[149] The Chairman of the panel also reasoned that Article 12.9 of the DSU supports the Panel's request for an extension, based on its provision that "when a panel considers that it cannot issue its report within six months, it shall inform the Dispute Settlement Body in writing of the reasons for the delay, together with an estimate of the period within which it will issue its report." [150] The Panel's issuing of the final report to the parties to the dispute was expected by November 2008.[151]

V. Conclusion

Unfortunately, despite the fact that the Dispute Settlement Body's panel for this case had announced in July of 2008 that a final report concerning the complaints raised by the United States would be presented in November 2008, no final report has been issued.[152] Once a decision is rendered, it is likely, if any factual evidence demonstrates China's alleged conduct and failure to establish strict criminal procedures and penalties for violations of international intellectual property laws, that the Panel will recommend, or even require, China's prompt compliance with the WTO's TRIPS Agreement. The WTO may even go further and exercise its power to provide remedial measures to the United States and the third parties, whose nations had suffered in various realms of intellectual property due to China's wrongdoing, by imposing

147. *See* Acceptance by China of the Requests to Join Consultations, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/6, at *1 (May 25, 2007) (recording China's acceptance of requests for consultation).

148. *See* World Trade Organization Panel Report, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, at 3–4 (Jan. 26, 2009) [hereinafter WTO Report: China and Intellectual Property Rights] (providing the procedural history and background of the U.S. – China conflict and listing interested third parties); *see also* Constitution of the Panel Established at the Request of the United States, *supra* note 141 (listing the 12 third-party nations).

149. *See* Communication from the Chairman of the Panel, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/9 (July 18, 2008) (asserting that while Article 12.8 of the DSU provides that a final report will be issued by a panel within six months of its composition, the panel in the dispute between the United States and China would need until November to complete its report).

150. *See id.* (maintaining that if a panel cannot issue its report within six months it shall inform the DSB in writing of the reason for the delay); *see also* C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System,* 30 VAND. J. TRANSNAT'L L. 209, 253 n.215 (1997) (stating that if a panel finds that it needs more time to complete its task it must ask the Dispute Settlement Body for such an extension).

151. *See* Communication from the Chairman of the Panel*, supra* note 149 (announcing that the panel expected to issue its final report in November, 2008).

152. *See id.* (promising that a decision would be issued by November 2008).

penalties against China for the misconduct already committed, in the forms of sanctions or other payable fines.

It must be reiterated that China, as a WTO member, is already under specific obligations to comply with all WTO laws, including the TRIPS Agreement.[153] If the DSB were to expressly demand China's compliance with the TRIPS agreement in fulfilling its obligations in the final report, China would have to immediately implement appropriate intellectual property laws, as well as criminal procedures and penalties for any infringement or violation of those laws.[154] Particularly, the imposed laws would have to comport with the laws of the WTO, so that the disputes in the present case could be satisfactorily resolved.[155]

The anticipated outcome of this case is eagerly awaited, as China is most likely not the only country in which intellectual property laws are being violated. In today's intellectual property era, the ultimate outcome of this case is certain to play a vital role in determining the future commerce of not only the trading markets, but also the ever-expanding electronic market and its Internet citizens.

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153. *See* Chad P. Brown, *U.S. – China Trade Conflicts and the Future of the WTO*, 33 FLETCHER F. WORLD AFF. 27, 32 (2009) (providing the historical background behind China's accession to the WTO).

154. *See* Thomas E. Volper, Note, *TRIPS Enforcement in China: A Case for Judicial Transparency,* 33 BROOK. J. INT'L L. 309, 333–34 (2007) (arguing that China must exercise enforcement procedures, such as criminal proceedings, in order to satisfy its obligations under TRIPS).

155. The four matters on which the United States initially requested consultations with China were:

> [T]he thresholds that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties; goods that infringe intellectual property rights that are confiscated by Chinese customs authorities, in particular the disposal of such goods following removal of their infringing features; the scope of coverage of criminal procedures and penalties for unauthorized reproduction or unauthorized distribution of copyrighted works; and the denial of copyright and related rights protections and enforcement to creative works of authorship, sound recordings and performances that have not been authorized for publication or distribution within China

See WTO Panel Report, *supra* note 148, at 134 (finding that Article 4 of China's copyright law is inconsistent with China's obligations under the Berne Convention and articles of the TRIPS Agreement); *see also* Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 339, 423 (2002) (explaining that China's failure to comply with the laws of the WTO may make dispute resolution impossible).

Ehrenfeld v. Bin Mahfouz

9 N.Y.3d 501, 851 N.Y.S.2d 381 (2007)

The New York State Court of Appeals held that N.Y. CPLR 302(a)(1) would not confer personal jurisdiction over a foreign defendant where defendant's contacts with New York arose solely from defendant seeking to enforce his rights under a pre-existing defamation suit brought in a non-U.S. jurisdiction.

I. Holding

In *Ehrenfeld v. Bin Mahfouz*,[1] the New York Court of Appeals was asked by the United States Court of Appeals for the Second Circuit[2] to decide[3] whether New York's long-arm statute, CPLR 302,[4] conferred personal jurisdiction over the defendant, who was a foreign citizen,[5] and whose only contacts with this state[6] were born from his attempts at furthering litigation in a foreign jurisdiction.[7] In its response, the court relied heavily on the fact that defendant's contacts with New York were almost entirely in the form of communications directed at Dr. Rachel Ehrenfeld,[8] the author he later sued in the United Kingdom. Concluding that those communications did not qualify as a "transacting of business" within the meaning of CPLR 302(a)(1), the court held that the New York statute did not confer personal jurisdiction over defendant for the purposes of plaintiff's lawsuit.[9]

II. Background and Facts

The core controversy in *Ehrenfeld* originated from a defamation claim, previously brought in the courts of England. Since it was those proceedings that led directly Dr. Ehrenfeld's lawsuit, a brief discussion of that case is warranted.

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1. Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501, 881 N.E. 2d 830 (2007) (hereinafter *Ehrenfeld*).
2. Ehrenfeld v. Bin Mahfouz, 489 F.3d 542 (2d Cir. 2007); *see* Sara Cross, Recent Decision, *Ehrenfeld v. Bin Mahfouz*, 21 N.Y. INT'L L. REV. 127, 127, 130–131 (2008).
3. *See Ehrenfeld*, at 501 (clarifying that the court's decision here was in response to a certified question presented to it by the United States Court of Appeals for the Second Circuit).
4. N.Y. Civil Practice Law and Rules 302 (2008) (CPLR).
5. *See* Nathan Vardi, *Sins of the Father?*, FORBES MAGAZINE, Mar. 18, 2002, *available at* http://www.forbes.com/global/2002/0318/047.html (discussing Khalid bin Mahfouz's background as a Saudi Arabian businessman and how he came to control the National Commercial Bank of Saudi Arabia in 1980).
6. *See infra* note 34.
7. *See generally* Bin Mahfouz v. Ehrenfeld (2005) E.W.H.C. 1156m 2005 WL 1586238 (QB) (the original defamation suit brought by defendant in the U.K.).
8. *See Ehrenfeld,* at 513.
9. *Id.* at 509.

A. The Underlying Defamation Action

In 2003, Dr. Rachel Ehrenfeld, an American citizen and New York resident, published a book entitled *Funding Evil: How Terrorism Is Financed—and How to Stop It.*[10] Therein, Ehrenfeld claimed that Khalid bin Mahfouz[11] and his sons had provided financial support to several terrorist organizations, including al-Qaeda.[12] Although Ehrenfeld's book was published in the United States, twenty-three copies were purchased in the United Kingdom and portions of the book were available there via the Internet.[13]

On January 23, 2004, Bin Mahfouz's English counsel wrote Ehrenfeld, making several demands and threatening to bring a defamation suit if she failed to accommodate.[14] When Ehrenfeld did not respond, Bin Mahfouz brought his complaint to the High Court of Justice, Queen's Bench Division, London, alleging that Ehrenfeld had violated the English Defamation Act of 1996.[15] Thereafter, Bin Mahfouz's agent served papers on Ehrenfeld at her New York City residence on four separate occasions.[16] Additional communications regarding the lawsuit were made to Ehrenfeld via post and e-mail.[17] Despite these communications, Ehrenfeld refused to appear.[18]

On December 7, 2004, the English court entered a default judgment in favor of Bin Mahfouz, awarding him damages and enjoining Ehrenfeld from making further defamatory statements directed at him.[19] The substance of the default judgment was later posted on Bin Mahfouz's personal Web site.[20]

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10. *Id.* at 504; *see* Cross, *supra* note 2, at 128.

11. *See Ehrenfeld*, at 504 (describing Bin Mahfouz as a successful Saudi Arabian businessman and former head of the National Commercial Bank of Saudi Arabia); *see also* Sara Cross, Recent Decision, *Ehrenfeld v. Bin Mahfouz*, 21 N.Y. INT'L L. REV. 127, 128 (2008).

12. *Ehrenfeld*, at 504.

13. *Id*.

14. *See id.* at 504–05 (demanding that Ehrenfeld (i) promise the High Court of England that she would refrain from making any further allegations, (ii) destroy or turn over all copies of her book, (iii) write a letter of apology, (iv) make a charitable donation, and (v) pay Bin Mahfouz's legal expenses).

15. *Id*.; *see* Cross, *supra* note 11, at 128.

16. *Ehrenfeld*, at 504–05 (listing the dates as follows: October 22, 2004; December 30, 2004; March 3, 2005, and May 19, 2005).

17. *Id.* (listing those dates as follows: September 22, 2004; December 9, 2004; April 26, 2005; April 27, 2005; May 2, 2005, and May 9, 2005).

18. *Id.* (explaining Ehrenfeld's reasons for not appearing in the English suit). The opinion of the court notes that, in addition to the sheer cost of litigating overseas, the procedural laws in England generally disfavor libel defendants, and describes England as a "claimant-friendly libel jurisdiction." *Id.* at 505–06; *see* Cross, *supra* note 11, at 128.

19. *Ehrenfeld,* at 506. The English court's order of December 7, 2004, was supplemented by a second order, on May 3, 2005, fixing damages payable to Bin Mahfouz and his sons and continuing the injunction against Ehrenfeld "in full force and effect" in England and Wales. *Id.*

20. *Id.* (giving the URL address for Bin Mahfouz Information, www.binmahfouz.info).

B. The Present Action and Procedural Posture

Plaintiff, Dr. Rachel Ehrenfeld, filed suit in the United States District Court for the Southern District of New York, seeking a declaratory injunction against defendant, Khalid bin Mahfouz.[21] Specifically, plaintiff sought a declaration of the court barring defendant both from re-litigating his libel action in the United States and from enforcing his foreign judgment here.[22]

Upon motion by defendant, the district court dismissed plaintiff's action for want of personal jurisdiction over the English defendant.[23] The district court ruled that defendant had not transacted sufficient business in New York by operation of his Web site, by serving plaintiff with papers at her home address, or by contacting plaintiff via post and e-mail.[24] Additionally, the district court held irrelevant plaintiff's reliance on the Ninth Circuit's holding in *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*,[25] describing it as "misplaced"[26] under the circumstances.

On appeal, the Second Circuit asked defendant whether he would consider waiving any right he might have to enforce his foreign judgment in the United States.[27] Defendant refused and, on June 8, 2007, the Second Circuit certified its question to the New York Court of Appeals.[28]

III. The Issue of Personal Jurisdiction

The court first considered plaintiff's claim that defendant transacted business in New York, and thereby established sufficient contacts to justify personal jurisdiction, where he initiated and pursued the suit aimed at "chilling" plaintiff's speech. According to the court, availment to New York law requires a "sustained and substantial transaction of business" in this state.[29] CPLR 302(a)(1) reads, in relevant part, "a court may exercise personal jurisdiction over any non-domiciliary…who in person or through an agent transacts any business in the state or contracts anywhere to supply goods or services in the state…."[30] Citing a variety of sources, the court defined a "transaction of business" as any act(s) by which a defendant "purposefully avails himself of the privilege of conducting business in New York"[31] and thereby "invokes the bene-

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21. *Id.*; *see see also* Sara Cross, Recent Decision, *Ehrenfeld v. Bin Mahfouz*, 21 N.Y. INT'L L. REV. 127, 128 (2008).
22. *Ehrenfeld* at 506; *see* Cross, *supra* note 21, at 128.
23. *Ehrenfeld*, at 506; see Cross, *supra* note 21, at 128.
24. *See Ehrenfeld*, at 506; *see* Cross, *supra* note 21, at 128.
25. 433 F.3d 1199 (9th Cir. 2006) (hereinafter *Yahoo!*).
26. *See Ehrenfeld,* at 507.
27. *Id.*
28. *Id.*
29. *Id*. at 508 (citing Fischbarg v. Doucet, 9 N.Y.3d 375, 382 (2007)).
30. *See* CPLR 302(a)(1) (2008); *see also* Cross, *supra* note 21, at 130.
31. *See* McKee Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 382 (1967) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)); *see also* Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 7 N.Y.3d 65, 71 (2006).

fits and protections of its laws."[32] The court concluded that none of the activities alleged by plaintiff qualified as active invocation of state law,[33] expressly because those activities were strictly limited to defendant's communication to plaintiff and were aimed solely at compelling her into the foreign litigation.[34]

The court then turned its focus to plaintiff's claim that, by refusing to surrender any right to enforce his foreign judgment here, defendant created a threat of "future New York contact"[35] that chilled her speech and caused substantial harm to her work.[36] The court rejected this argument, on the grounds that the hardships suffered by plaintiff were merely the coincidental actions of third parties reacting to defendant's activities in another jurisdiction.[37] Although plaintiff's speech was thwarted in very much the way defendant wanted, the court held that such coincidental effects were not evidence that defendant purposefully availed himself of the state's laws.[38]

Lastly, plaintiff argued that, under the Ninth Circuit precedent, *Yahoo! v. LICRA*,[39] personal jurisdiction over a foreign defendant could be appropriate where plaintiff's claim stems from a prior suit, brought by defendant against plaintiff, in a foreign jurisdiction.[40] Although the facts were nearly analogous, the court found a critical distinction that made the Ninth Circuit case inapplicable. The court noted that, unlike the New York long-arm statute,[41] the California statute was "coextensive with federal due process requirements," making jurisdictional analysis the same for both California and federal due process.[42] Whereas the California statute

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32. *See* George Reiner & Co. v. Schwartz, 41 N.Y.2d 648, 652 (1977); *see also In re* Sayeh R., 91 N.Y.2d 306, 319 (1997).

33. *See Ehrenfeld,* at 509.

34. *Id.* In actuality, defendant had previously owned two condominiums in New York, and was also involved in several ongoing civil actions connected to the September 11 terrorist attacks, all brought in the United States District Court for the Southern District of New York. However, these contacts were dismissed as irrelevant to the court's analysis. *Id.* at note 6.

35. *Id*. at 510.

36. *Id*. at 510–11 (alleging that the threat of future prosecution in New York frightened plaintiff into altering her work to conform with English libel law standards, and that plaintiff's publishers began to shy away from working with her, also fearing legal entanglement).

37. *Id.* at 511 (citing Ferrante Equip. Co. v. Lasker-Goldman Corp., 26 N.Y.2d 280 [1970] [holding that jurisdiction over a nonresident was improper where the nonresident benefited as the coincidental result of a contract enacted by other parties in New York]).

38. *Ehrenfeld*, at 511.

39. 433 F.3d 1199 (2006). The facts of the two cases are nearly identical. In *Yahoo!*, two French civil rights groups sued Yahoo!, seeking to prevent its French users from accessing Nazi-related materials through its service. The French groups served process on Yahoo!, and contacted them by other means as well, on several occasions. The French groups obtained a judgment in their favor in France. In response, Yahoo! sought an injunction against the French groups, declaring the French judgment as unenforceable in the United States. Jurisdiction over the groups was upheld on the grounds that they had purposefully availed themselves of the laws of California where they intentionally took action, directed at a party within the state, knowing that it might have substantial effect thereon. *See generally id.*

40. *See Ehrenfeld*, at 511 (2007).

41. *See generally* CPLR 302 (2008) (enumerating the specific scenarios in which CPLR 302 grants jurisdiction over non-domiciliaries).

42. *See Yahoo!*, at 1205.

allowed jurisdiction in all circumstances not inconsistent with federal due process, the New York statute explicitly specified the only circumstances under which jurisdiction over a foreigner may be appropriate.[43] Because there was no provision in CPLR 302 describing plaintiff's claim, this argument, too, was rejected.[44] The court concluded that if the current situation was meant to confer jurisdiction under CPLR 302(a)(1), such an extension of the statute would have to be made by the state legislature.[45]

IV. Return to the Second Circuit

Following the New York Court of Appeals' answer, plaintiff filed a brief with the United States Court of Appeals for the Second Circuit,[46] urging the court to exercise jurisdiction over the defendant nonetheless.[47] Plaintiff argued that the New York Court of Appeals' interpretation of CPLR 302(a)(1) violated the First Amendment and that the issue required "further analysis" by the Second Circuit.[48] Alternatively, plaintiff asked that the Second Circuit at least postpone its final decision until the end of the then-current session of the New York State legislature, in order to await that body's decision on a bill that that would expressly confer jurisdiction over Bin Mahfouz if passed into law.[49]

The Court of Appeals for the Second Circuit rejected plaintiff's assertions, finding them "legally unavailing"[50] under the circumstances. As an initial matter, the court found that plaintiff had failed to timely raise a constitutional challenge against denial of her request for personal jurisdiction over the defendant. The court concluded that, as a matter of Second Circuit jurisprudence,[51] plaintiff's failure to raise the challenge at an earlier point in the "prolonged litigation" was tantamount to a waiver of any such claim on appeal.[52] Likewise, the court also declined plaintiff's invitation to postpone its final decision.[53] The court reasoned that passage of the New York law was entirely too speculative and that delay of its decision would cater too heavily to plaintiff's convenience at the cost of sound judicial process.[54] Ultimately, the Court

43. *See Ehrenfeld,* at 512.
44. *Id*. at 512–13.
45. *Id*.
46. *See* Ehrenfeld v. Bin Mahfouz, 518 F.3d 102, 105 (2d Cir. 2008).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* (citing U.S. v. Braunig, 553 F.2d 777, 780 (2d Cir. 1977)).
52. *See Ehrenfeld*, 518 F.3d at 105.
53. *Id.*
54. *Id.* at 106.

of Appeals for the Second Circuit ignored plaintiff's requests and affirmed the New York Court of Appeals' decision.[55]

V. The Current State of New York Law

In direct response to the Court of Appeals' decision in *Ehrenfeld v. Bin Mahfouz*, a bill was introduced in the New York State legislature, entitled the "Libel Terrorism Protection Act,"[56] which would effectively overrule *Ehrenfeld*.[57] The legislature criticized the court's decision in *Ehrenfeld* as a "hyper-technical"[58] interpretation of the New York long-arm statute and supported introduction of a bill that would better protect authors and their publishers from the "asphyxiating"[59] restrictiveness of foreign defamation laws. The bill, amending CPLR 5304 and adding subdivision (2)(b)(8), prohibits judicial enforcement of foreign defamation judgments in New York, unless it is shown that the original forum guarantees freedom-of-speech protections substantively equal to those of the United States and New York.[60] The justification for this change comes from *New York Times Co. v. Sullivan*[61] and the fervent belief in "uninhibited, robust, and wide-open debate" on important public issues.[62]

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55. *Id.* (final decision rendered March 3, 2008).

56. *See* N.Y. State Assembly, Memorandum in Support of Legislation, http://www.meforum.org/legal-project-ltpa.pdf at *5 (last visited Nov. 4, 2009).

57. *Id.* at *4.

58. *Id.* at *5.

59. *Id.*

60. *Id.* at *4.

61. 376 U.S. 254 (1964).

62. *See* Matt Haber, *Libel Protection Act: This Law Will Give New York Journalists, Authors, and Press the Protection They Need* (Apr. 1, 2008), *available at* www.observer.com (search "terrorism," follow "Libel Protection Act: This law will give…") (asserting that the ongoing War on Terrorism, and those whosupport it, is an important public issue, worthy of uninhibited debate).

A recent article in the *New York Law Journal*, dated July 11, 2008, reported the bill as having been passed by both houses of the New York legislature and signed by New York governor David A. Paterson.[63] In fact, the law had been signed into law months earlier, on May 1, 2008, and had already been given effect.[64] Since that time, several other states have enacted similar legislation designed to protect authors and publishers from foreign defamation judgments.[65]

Philip A. Butler

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63. Joel Stashenko, *Legal Community Sees Modest Gains as Legislative Session Ends*, N.Y.L.J., July 11, 2008,at 1.

64. *See Governor Paterson Signs Legislation Protecting New Yorkers Against Infringement of First Amendment Rights by Foreign Libel Judgments*, NEW YORK STATE, May 1, 2008, http://www.state.ny.us/governor/press/press_0501082.html (reporting Paterson signing the Libel Terrorism Protection Act into law as of May 1, 2008).

65. *See* The Florida Senate, Senate 1066: Relating to Foreign Defamation Judgments/Nonrecognition, www.flsenate.gov (enter 1066 and 2009 under "Jump to Bill" in left-hand column) (last visited Nov. 3, 2009) (reporting the passage of Florida's Foreign Judgment Nonrecognition Statute, effective July 1, 2009); *see also* The Illinois General Assembly, Public Act 095,0865, www.ilga.gov (click "Public Acts," follow "Pub. Acts/Leg. From Previous General Assemblies," follow "95 2007-2008," follow "Public Acts—Listing," follow "Public Acts 095-0801 Thru 095-0900," follow "Public Act 095-0865") (last visited Nov. 3, 2009) (displaying Illinois' foreign defamation judgment law, effective August 1, 2008).

Radmacher v. Granatino

[2009] EWCA Civ 649

The English Court of Appeal (Civil Division) held in divorce proceedings under the laws of the United Kingdom, where the parties are nationals of other European Union countries, the law of the United Kingdom will take precedence, but pre-nuptial agreements, traditionally void as against public policy, will be given due weight and consideration in s. 25 Matrimonial Causes Act 1973 determination of ancillary relief and parties to the agreement need not seek independent legal advice.

I. Holding

In *Radmacher v. Granatino*[1] the Court of Appeal (Civil Division) held that pre-nuptial agreements are not *per se* void as against public policy.[2] Consideration should be given to pre-nuptial agreements[3] foreign nationals enter into when those agreements are valid and enforceable in their foreign nations[4] and when the judge is applying his or her discretionary power under Section 25 of the Matrimonial Causes Act 1973.[5] Additionally, independent legal advice, once viewed as necessary to establish that the "party entered into [the agreement] knowingly,"[6] is no longer necessary, so long as circumstances establish that the party had opportunity to seek advice but chose not to and understood the contract's effect.[7] Each of the three lord justices wrote an opinion that, in addition to discussing the rationale of the opinion, contributed to the overall holding. Lord Justice Thorpe contributed a discussion of the international aspects of the case[8] and the history of ante-nuptial agreements in the United Kingdom.[9] Lord Justice Rix contributed a discussion of the current law regarding pre-nuptial contracts[10] and

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1. [2009] EWCA Civ 649 (hereinafter *Radmacher*).
2. *Id.* at ¶ 122(i) (citing MacLeod v. MacLeod [2008] UKPC 64) (asserting that Section 25 of the Act of 1973 requires that the pre-nuptial contract cannot be presumed dispositive).
3. *Id.* at ¶ 81 (agreeing that pre-nuptial agreements should be given weight in the Section 25 analysis).
4. *Id.* at ¶ 70 (pointing out that pre-nuptial agreements are recognized and valid in Germany and France and "may be argued to have greater regard paid to it than an English contract between English nationals").
5. *Id.* at ¶ 60(iv) (listing as one of the fundamental principles of s. 25 jurisdiction that the courts are becoming more and more ready to give weight to agreements as part of a consideration of the circumstances of a case in total).
6. *Id.* at ¶ 137.
7. *Radmacher* at ¶ 140 (discussing the present law and how it allows the court to "apply common sense" to the analysis of weather independent legal advice is required when parties enter a pre-nuptial contract).
8. *Id.* at ¶¶ 2–11.
9. *Id.* at ¶¶ 12–29.
10. *Id.* at ¶¶ 60–74.

advice to the Law Commission and Parliament for future legislation regarding pre-nuptial contracts.[11] Lord Justice Wilson provided the statement of facts relied on by the court[12] and a discussion of precedents surrounding pre-nuptial contracts.[13]

II. Facts and Procedural History

A. Applicable Facts

Katrin Radmacher ("Radmacher"), a German citizen, and Nicolas Joseph Jean Granatino ("Granatino"), a French citizen, were married in the United Kingdom and Switzerland[14] in November 1998[15] after signing a pre-nuptial agreement.[16] Such agreements are commonplace in both of their native countries.[17] Radmacher's father, who is a very wealthy businessman in Germany,[18] insisted the couple draw up the agreement.[19] Both parties agree that the marriage would not have taken place absent a pre-nuptial agreement.[20] The pre-nuptial agreement calls for application of German law, but the notary[21] drawing up the agreement pointed out to the couple that a foreign jurisdiction might not apply German law.[22] The main issue triggering Section 25 discretion in determining ancillary relief is the clause providing for "mutual waiver of claims for maintenance…to the fullest extent permitted by law…"[23] regardless of need.[24]

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11. *Id.* at ¶ 83.
12. *Id.* at ¶¶ 89–117.
13. *Radmacher*, at ¶¶ 118–134.
14. *Id.* at ¶ 2.
15. *Id.* at ¶ 100.
16. *Id.* at ¶ 102.
17. *Id.* at ¶ 33(ii).
18. *Id.* at ¶ 94 (describing that the Radmacher family owns two groups of companies in the paper industry).
19. *Radmacher*, at ¶ 103.
20. *Id.* at ¶ 144.
21. A German Notary (der Notar) is distinguished from the United States' notary public in that a Notar is a civil law attorney with specialties in property law, corporate law, estate planning and family law. They perform all the functions of United States' notary publics, plus many functions of traditional legal advisors, and require extensive training in law. According to German law, official deeds or contracts must be signed in the presence of a civil law attorney after the entire document is read aloud to the parties involved. Notars do not litigate or advocate for one side or another and must remain neutral. This is the main difference between a Notar and a regular attorney (Rechtsanwalt). *See* Hyde Flippo, *Germany: Der Notar (Civil-law notary)*, THE GERMAN WAY & MORE, http://www.german-way.com/germany-notar.html (last visited Nov. 10, 2009).
22. *Radmacher*, at ¶ 113.
23. *Id.* at ¶ 112.
24. *Id.*

The record indicates a notary instructed by Radmacher drew up the agreement[25] and a clause calling for disclosure of assets was removed before a draft was shown to Granatino and without informing him.[26] Radmacher showed Granatino the contract a week before it was to be executed,[27] which was several months before the marriage was to take place.[28] The contract he received was in German and not translated into either English or French, the languages he speaks.[29] Radmacher went over the contract with Granatino, but not line by line as the notary instructed.[30] Granatino did not consult an independent attorney about the contract and indicated that a translation was unnecessary.[31] At the execution of the contract on August 1, 1998,[32] the notary went over the contract in detail with both of them in English.[33] Although he was given the opportunity to postpone the execution, Granatino declined.[34]

The couple lived in both London and New York during their marriage.[35] At the start of the marriage, Granatino had considerable assets.[36] He was employed by JP Morgan and Co. and made what would today be considered £120,000, annually.[37] During the marriage, he gave up his career in finance and embarked on the pursuit of a D. Phil in biotechnology.[38] Although he holds several patents, he has not yet finished his dissertation to complete the degree.[39] Radmacher also had considerable assets at the start of the marriage[40] and her father demanded she have a pre-nuptial agreement protecting the family wealth or he would disinherit her.[41] She also professed to want the pre-nuptial agreement as proof Granatino was not after her fortune, although he appears not to have been told at the time.[42] During the marriage, Radmacher's father increased her ownership percentages in the family businesses and paid her 25 million euros "for her surrender of any entitlement under German Law to a portion of his estate on death."[43] Absent a pre-nuptial agreement, Radmacher would not have

25. *Id.* at ¶ 104–05 (indicating Radmacher and her mother hired Dr. Magis to draft the agreement).
26. *Id.* at ¶ 106.
27. *Id.* at ¶ 108.
28. *Radmacher*, at ¶ 138.
29. *Id.* at ¶ 110.
30. *Id.*
31. *Id.* at ¶ 138.
32. *Id.* at ¶ 108.
33. *Id.* at ¶ 110.
34. *Radmacher*, at ¶ 110.
35. *Id.* at ¶ 2.
36. *Id.* at ¶ 101.
37. *Id.*
38. *Id.* at ¶ 91.
39. *Id.*
40. *Radmacher*, at ¶ 103.
41. *Id.*
42. *Id.*
43. *Id.* at ¶ 115.

received these assets.[44] The marriage resulted in two children, the younger of which was age seven at the time of this decision.[45]

B. Procedural History

This is an appeal from the High Court of Justice, Family Division. In that decision, Mrs. Justice Baron found where family law is involved, it is the rule in England to apply the law of the forum.[46] The law of the forum is that pre-nuptial agreements are against public policy and therefore not enforceable *per se*.[47] Fairness dictates that foreign elements "must be weighed, as part of the discretionary analysis."[48] Therefore, the pre-nuptial agreement can be weighed as part of "all circumstances of the case."[49] Ultimately, Baron J. found the agreement flawed;[50] and, although she recognized that it might be enforced in foreign jurisdictions,[51] and that the husband entered into the agreement knowingly,[52] Baron J. discounted most of its terms and awarded Granatino £5.56 million.[53]

II. Discussion

A. Choice of Law

Due to the international aspects of the case, the United Kingdom's membership in the European Union and the fact that the pre-nuptial agreement called for an application of German law, the court had to decide first what law to apply.

Since the start of the European Union, the member states have been working toward implementing a unified system of justice.[54] The court notes that "[a]n aim of the European Union is to provide for its citizens both mobility and a common area of justice."[55] After discussing the development of European law and its application to families,[56] the court concluded this case presented issues not yet covered by formal EU proceedings.[57] A comparison of civil law jurisdictions versus common law jurisdictions led to the conclusion that the two were

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44. *Id.*
45. *Id.* at ¶ 89.
46. *Radmacher*, at ¶ 60(i).
47. *Id.* at ¶ 60(iii).
48. *Id.* at ¶ 60(ii).
49. *Id.* at ¶ 60(iv) (quoting NG v. KR [2008] EWHC 1532 (Fam) ¶ 111).
50. *Id.* at ¶ 32(a)-(e) (quoting NG [2008] at ¶ 137).
51. *Id.* at ¶ 34 (quoting NG [2008] at ¶ 92).
52. *Radmacher*, at ¶ 35 (quoting NG [2008] at ¶ 139).
53. *Id.* at ¶¶ 37–43 (quoting NG [2008] at ¶ 140).
54. Council Regulation 44/2001, preamble, 2001 O.J. (L 12) 1, 1–3 (EC) (enumerating the objectives of the Brussels Convention and Lugano Convention with regard to "jurisdiction and the recognition and enforcement of judgments in civil and commercial matters").
55. *Radmacher*, at ¶ 3.
56. *Id.*
57. *Id.* at ¶ 5.

almost diametrically opposed.[58] The European Council has repeatedly met to revise and tweak the regulations attempting to unify the laws dealing with civil and commercial matters (known as "Brussels").[59] Most recently Brussels III[60] yielded a Green Paper,[61] which is a request for recommendations and reactions from member states for improving the Brussels regulations.[62] The United Kingdom was not involved in the negotiations for the Green Paper, and, therefore, is not bound by the outcome. The United Kingdom has yet to respond to these negotiations.[63]

Because it was difficult to formalize a rule for the European Union, the court invoked the doctrine of *forum conveniens*[64] and applied the laws of the United Kingdom.[65] However, the court noted that the results of this proceeding would have been different in France or Germany.[66]

B. Foreign Considerations

Although the court ultimately decided that the laws of United Kingdom would be applied in this case, it recognized "the case has all the hallmarks of internationality."[67] In particular, the court paid special attention to the fact that the couple made the agreement "with the help and advice of a German lawyer, under German law, making an agreement which was familiar to the civil law under which both parties…had grown up…."[68]

The court further explained that since pre-nuptial agreements are prevalent in the couples' native countries, Granatino "was entering into the agreement with full consent in that knowl-

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58. *Id.*

59. *Id.* at ¶¶ 3–6.

60. *Id.* at ¶ 6.

61. *Commission Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, COM (2009) 175 final (Apr. 21, 2009).

62. *Id.* at 2.

63. *Radmacher*, at ¶ 6.

64. *Id.* at ¶ 10. The doctrine of *forum conveniens* is much like the doctrine of *forum non conveniens* just stated in the positive (convenient forum v. inconvenient forum). It deals with a court's determination of jurisdiction where another jurisdiction may or may not be more appropriate and has little or nothing to do with convenience to the parties. The Brussels Conventions are meant to replace this doctrine and the civil law doctrine of *lis alibi pendens*, but, in this case, the subject matter is not yet covered by Brussels, so the court reverts back to *forum conveniens* to establish its jurisdiction. *See generally* De Dampierre v. De Dampierre [1988] A.C. 92, 109.

65. *Radmacher*, at ¶ 11.

66. *Id.*

67. *Id.* at ¶ 2.

68. *Id.* at ¶ 81.

edge."[69] Because these agreements are so prevalent in foreign law, the court did not find Granatino's lack of independent legal advice to be evidence of a defect in the agreement.[70]

Therefore, while the agreement and circumstances of the divorce are to be decided by the court using the laws of the United Kingdom, the court paid attention to the nationality of the couple and the norms and laws of their countries.[71]

C. Pre-Nuptial Agreements in the United Kingdom

1. Traditional United Kingdom View

The traditional view of pre-nuptial agreements in the United Kingdom is that "ante-nuptial agreements are contrary to public policy and thus not valid or binding in the contractual sense."[72] Although this has been the official view for a long time, in practice judges have "consider[ed] what weight [the agreement] should be given as one of the circumstances affecting the exercise of the Section 25 discretion."[73]

According to the traditional approach in the United Kingdom, since pre-nuptial contracts go against existing statutes providing for "rights and responsibilities," they will be given "very limited significance"[74] even if the parties are from countries where such contracts are the

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69. *Id.*

70. *Id.* at ¶ 137.

71. *Radmacher* at ¶ 146 (finding that "the foreign dimension should have fortified a conclusion that the contract should carry decisive weight in the rejection of the husband's claims other than as a home-maker for the girls…").

72. *Id.* at ¶ 14 (quoting MacLeod v. MacLeod [2009] 1 All ER 851 ¶ 31).

73. *Id.* at ¶ 19.

74. *Id.* at ¶ 12 (quoting F. v. F. [1995] 2 FLR 45).

norm.[75] The court is of the view, as stated by the Board of the Privy Council[76] in *MacLeod v. MacLeod,*[77] that any change in the law regarding pre-nuptial contracts or ancillary relief should be made through legislation, not precedent.[78]

2. New United Kingdom View in Light of Section 25 and *MacLeod v. MacLeod*

Section 25 of Matrimonial Causes Act 1973[79] requires the court to "have regard to all circumstances of the case."[80] Section 25 is triggered by the powers granted the court in Sections 23, 24, 24a and 24b to determine financial and property provisions in divorce proceedings.[81] The court also noted that, given the current practice of the law, and that pre-nuptial contracts are considered "subject to the ultimate discretion of the court pursuant to section 25,"[82] there was no reason to consider them void for public policy reasons.[83] The court further pointed out that the law already has provisions safeguarding parties to contracts, and that those provisions should be applied to pre-nuptial agreements as they are applied to all contracts.[84]

MacLeod[85] was decided in the interim between the lower court divorce proceeding in this case and the appeal.[86] Therefore, the court could apply *MacLeod's* reasoning to the present circumstances, while the lower court was without that benefit.[87] Although *MacLeod* was a case involving a post-nuptial agreement, Hale, B. discussed ante-nuptial agreements in her deci-

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75. *Id.*

76. Until October 1, 2009, the Appellate Committee of the House of Lords was the court of final appeal in the United Kingdom civil and criminal cases. Its Justices were members of the House of Lords. The Judicial Committee of the Privy Council is the court of final appeal for overseas territories: Crown dependencies and Commonwealths of the United Kingdom that maintain a wish to appeal to the sovereign. *See* The Supreme Court Appellate Committee of the House of Lords, http://www.supremecourt.gov.uk/about/appellate-committee.html (last visited Nov. 1, 2009); *see also* Judicial Committee of the Privy Council, http://www.jcpc.gov.uk (last visited Nov. 1, 2009).

    On October 1, 2009, the Appellate Committee of the House of Lords ceased to exist and was replaced by the Supreme Court, a new judicial branch. The creation of the Supreme Court removed the judicial function from the Parliament, thus separating the legislature from the judiciary. *See* Parliament.uk, From House of Lord to Supreme Court, http://news.parliament.uk/2009/07/from-house-of-lords-to-supreme-court (last visited Nov. 1, 2009).

77. [2009] 1 All ER 851, [2009] 3 W.L.R. 437 (hereinafter *MacLeod*).

78. *Radmacher*, at ¶ 14 (quoting *MacLeod* [2009] at ¶ 35).

79. UK ST 1973 c 18 Pt II s. 25.

80. UK ST 1973 c 18 Pt II s. 25 (1).

81. UK ST 1973 c 18 Pt II ss. 23, 24, 24(a), 24(b).

82. *Radmacher*, at ¶ 65.

83. *Id*.

84. *Id.* at ¶¶ 27–28 (i–iii) ("[A] carefully fashioned contract should be available as an alternative to the stress, anxieties and expense of a submission to the width of the judicial discretion.").

85. *MacLeod* [2009].

86. *Radmacher*, at ¶ 63.

87. *Id.* at ¶ 1.

sion.[88] In her review of ante-nuptial agreements, Hale, B. affirmed that the legislature, not the courts, could change the policy regarding ante-nuptial agreements as void as being against public policy.[89] At the same time, she "cited with apparent approval (at [27]) the conclusions of Baron, J." who seemingly usurped the legislature by giving weight to the agreement.[90]

Consequently, Rix, L.J. pointed out that, if the court were to follow *MacLeod*, it would have to invalidate all pre-nuptial agreements as against public policy and, at the same time, consider them.[91] Rix, L.J. concluded that pre-nuptial agreements cannot be both void for reasons of public policy and considered under section 25.[92] Finally, he echoed Thorpe, L.J. in stating that the only reason part of a pre-nuptial agreement might be void is if it denied the jurisdiction of the court or the power of the court to "exercise its ancillary relief jurisdiction under section 25."[93]

Therefore, the court reviewed the circumstances of the pre-nuptial agreement's creation and its contents for any provisions making all or part of the contract void. The court found no vitiating circumstances[94] or clauses denying the court jurisdiction.[95] Thus, in the final analysis, the court upheld the pre-nuptial agreement and adjusted the ancillary relief to minimum standards solely regarding the upbringing of the children.[96]

3. Pre-Nuptial Versus Post-Nuptial

The court briefly reviewed the distinction between pre- and post-nuptial contracts. In *MacLeod*, the Board distinguished pre- and post-nuptial agreements,[97] the difference being that in a pre-nuptial agreement, there is "the danger that a pre-nuptial agreement may be extracted as a price of marriage,"[98] whereas in a post-nuptial agreement, "the married woman [already] has rights [to relief]…."[99] However, in considering the difference, the court pointed out that

88. *Id.* at ¶ 13 (quoting *MacLeod* [2009] at ¶ 1).

89. *Id.* at ¶ 14 (quoting *MacLeod* [2009] at ¶ 35).

90. *Id.* at ¶ 63 (referring to *MacLeod* [2009] at ¶ 27).

91. *Id.* at ¶ 64 (criticizing the duality of the law if left as cited in *MacLeod*).

92. *Radmacher*, at ¶ 65 ("[I]f the only difficulty about the validity of a pre-nuptial agreement is that it remains subject to the ultimate discretion of the court pursuant to section 25, it is not obvious to me that there is any need to describe such agreements as being void for reasons of public policy at all.").

93. *Id.*

94. *Id.* at ¶ 33 (Thorpe, L.J.) (contradicting the lower court's holding that the contract was flawed); *see id.* at ¶¶ 100–117 (Rix, L.J.); *see also id.* at ¶¶ 137–148 (Wilson, L.J.).

95. *Id.* at ¶ 67.

96. *Radmacher*, at ¶ 44–53 (Thorpe, L.J.); *see id.* at ¶ 81 (Rix, L.J.); *see also id.* at ¶ 149 (Wilson, L.J.).

97. *Id.* at ¶ 125.

98. *Id.* at ¶ 73.

99. *Id.* at ¶ 125.

both should be "properly negotiated"[100] it boiled down to a matter of fairness[101] and both types of agreements had an equal chance of having vitiating circumstances.[102]

III. Conclusion

The decision presented in this case acknowledged a trend developing in the United Kingdom over the last decade: "greater weight…[should be] given to properly negotiated ante-nuptial contracts not vitiated by any abuse or manifest unfairness."[103] As part of "all circumstances of the case,"[104] the court took the parties' nationalities in to account and gave greater weight to the agreement because these agreements are common in the parties' native countries.[105] However, the court noted, "[I]t is hard to articulate why an agreement made in similar circumstances between English nationals should not receive more or less equal treatment: although it has to be recognized that English law has not prepared the groundwork for such a conclusion."[106] It remains to be seen how the Law Commission and Parliament will respond to the Justices' call for reform of the law regarding pre-nuptial agreements.[107]

Bettina L. Hollis

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100. *Radmacher*, at ¶ 72–73 (citing *MacLeod* [2009] at ¶ 42).

101. *Id.* at ¶ 71 (adopting Baroness Hale's approach that "the guiding principle is that of fairness") (citing *MacLeod* [2009] at ¶ 118).

102. *Id*. at ¶ 125.

103. *Id.* at ¶ 19.

104. UK ST 1973 c 18 Pt II s. 25 (1).

105. *Radmacher,* at ¶ 70.

106. *Id*.

107. *Id*. at ¶ 25 (Thorpe, L.J.) (agreeing with Baroness Hale in *MacLeod* that reform of the law is for parliament); *see id.* at ¶ 83 (Rix, L.J.) (leaving the future of pre-nuptial contracts "in the hands of the Law Commission and Parliament").

Linde v. Arab Bank, PLC

2009 WL 1456573 (E.D.N.Y. May 22, 2009)

The United States District Court for the Eastern District of New York granted in part and denied in part Defendant's motion to compel production of banking documentation from foreign and domestic nonparty respondent banks. Defendant wished to refute the contention that it knowingly supported terrorist organizations. The court granted the motion to compel depositions limited to the issues contained in the discoverable material.

I. Holding

In *Linde v. Arab Bank, PLC*,[1] the United States District Court for the Eastern District of New York considered numerous issues arising out of Defendant Arab Bank, PLC's motion to compel Israel Discount Bank of New York ("IDBNY"), Israel Discount Bank Ltd. ("IDB"), and Bank Hapoalim ("Hapoalim") to produce various transactional documentation.[2] Arab Bank sought to refute Plaintiffs' contention that Defendant acted recklessly in providing banking services to terrorist front organizations.[3] Defendant's motions were granted in part and denied in part.[4] The court denied the motion to compel against subsidiary bank IDBNY, because it did not have access to, or the ability to obtain, its parent's (IDB) records.[5] The court also refused to allow jurisdictional discovery from IDB, because it had limited influence over IDBNY and IDBNY was not a mere department of IDB.[6] The court further determined that jurisdictional discovery from IDB would not lead to a finding of personal jurisdiction and that the information obtained would be attenuated.[7] The court stated that the need, if any, for the privileged subset of the requested information from the other nonparty bank (Hapoalim) was limited.[8] Nevertheless, the court concluded Defendant was entitled to conduct depositions of employees of the nonparty banks, limited to the issues contained in the discoverable materials.[9]

II. Facts and Procedural History

This action involved claims for damages, injuries and deaths caused by suicide bombings and attacks in Israel, the West Bank and Gaza.[10] Linde ("Plaintiff"), and some dozens of other Plaintiffs in the eight consolidated cases, alleged that Defendant knowingly sponsored terrorist

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1. 2009 WL 1456573 (E.D.N.Y. May 22, 2009) (hereinafter *Linde*).
2. *Id.* at *1.
3. *Id.* The court elected to consolidate related cases for "purposes of discovery and other pretrial proceedings." *Id.* at *15 fn. 1.
4. *Id.* at *1.
5. *Id.* at *3–4.
6. *Linde*, at *6.
7. *Id.* at *7.
8. *Id.* at *13–14.
9. *Id.* at *15.
10. *Id.* at *1.

attacks by providing banking and administrative services to organizations through alleged charitable fronts.[11] Specifically, Plaintiffs alleged that Defendant violated U.S. anti-terrorism laws through: (a) administering a "Saudi-funded universal insurance plan for the benefit of Palestinian terrorists," (b) providing financial benefits to all prospective terrorists "regardless of their factional affiliation," and (c) knowingly provided banking and administrative services to Hamas, its charitable front organizations and "other designated Foreign Terrorist Organizations."[12] The suits alleged that Arab Bank's former New York branch was "instrumental" in providing these financial services.[13] The Office of the Comptroller of Currency converted the New York branch to an agency and prohibited it "from processing further wire transfers" on February 24, 2005.[14] Additionally, the Financial Crimes Enforcement Network entered into a Consent Order with Defendant that "levied a $24 million dollar fine" against Arab Bank.[15] The FBI and the Justice Department opened criminal investigations into Defendant's activities in May 2005.[16]

Defendant wanted various documents from the nonparty respondent banks to establish that they also processed transactions for the same terrorist front organizations.[17] Defendant wanted to use this information to contest Plaintiffs' claims that it should have known that the organizations were terrorist fronts.[18] IDBNY opposed producing documents held by IBD in Israel.[19] IDBNY is a wholly owned subsidiary of IDB, chartered by the State of New York and headquartered in New York City.[20] IDB, an Israeli corporation headquartered in Israel, asserted that the court lacked personal jurisdiction.[21] Finally, Hapoalim opposed discovery based on Israeli laws that prohibit such disclosure, as well as on principles of international comity.[22]

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11. *Id*.

12. Osen LLC, Counter Terrorism Practice: Linde v. Arab Bank, http://www.osen.us/index.php?id=20 (last visited Nov. 2, 2009). Osen LLC represented Plaintiffs in the subject case.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id*.

18. Osen LLC, Counter Terrorism Practice: Linde v. Arab Bank, http://www.osen.us/index.php?id=20 (last visited Nov. 2, 2009).

19. *Linde*, at *1.

20. *Id.*

21. *Id*.

22. *Id*.

III. Legal Standard

A. Rule 45(a)(1)(A)(iii) of the Federal Rules of Civil Procedure

Rule 45(a)(1)(A)(iii) of the Federal Rules of Civil Procedure states that a subpoena must "command each person to whom it is directed to…produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control…."[23] Control involves the "legal right to obtain the documents requested upon demand."[24] Additionally, control is established where an entity has "access to, and the ability to obtain, the documents."[25] The party seeking to compel discovery must establish that the documents are within the local subsidiary's control.[26] This is the case where the subject documents ordinarily "flow freely" between the parent and subsidiary.[27]

B. Mere Department and Jurisdictional Discovery

Courts enjoy "broad discretion" in determining whether to permit jurisdictional discovery.[28] The Second Circuit recognizes that a *prima facie* case is not essential for a court to grant jurisdictional discovery.[29] For a New York court to acquire personal jurisdiction over a parent company predicated upon its subsidiary's presence in New York, the parent's "control over the subsidiary's activities…must be so complete that the subsidiary is, in fact, merely a department of the parent."[30] A fact-specific inquiry is made into the parent and subsidiary's relationship.[31] In assessing this relationship, a court will consider: (1) common ownership; (2) financial dependency; (3) the degree to which the parent interferes in the selection/assignment of its subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of control over the marketing and operational policies exercised by the parent.[32]

Furthermore, a court will consider other factors in determining whether to grant jurisdictional discovery under a nonparty subpoena.[33] Factors include: (1) the relationship of the nonparty from whom discovery is sought to the litigation; (2) whether personal jurisdiction will be established; and (3) the likely usefulness of any information that may be obtained if jurisdiction is established.[34]

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23. FED. R. CIV. P. 45(a)(1)(A)(iii).
24. *Linde*, at *2 (quoting Searock v. Stripling, 736 F.2d 650, 653 (2d Cir. 1984)).
25. *Id.*
26. *Id. See* State of New York v. Nat'l R.R. Passenger Corp., 233 F.R.D. 259 (N.D.N.Y. 2006).
27. *Linde*, at *2.
28. *Id*. at *7.
29. *Id. See* Ehrenfeld v. Mahfouz, 489 F.3d 542, 550 n.6 (2d Cir. 2007).
30. *Linde*, at *4 (quoting Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany, 29 N.Y.2d 426, 432 (1972)).
31. *Id*.
32. *Id*.
33. *Id.* at *7.
34. *Id*.

C. Israeli Law

In addressing Hapoalim's arguments, the court considered applicable Israeli law as implicated by the document requests. Israeli lawyer Ehud Arzi's Declaration to the court on behalf of Hapoalim "set out the general background regarding procedures for document discovery and review under Israeli law, the rationale for such procedures and the limitations pertaining thereto."[35] Israeli law provides a privilege to persons, including corporate entities, against self-incrimination.[36] However, this privilege is not absolute, and an Israeli court "may waive the privilege if it determines that the benefits of revealing the document outweigh the likely harm to the person asked to supply the evidence."[37] The protected individual may also waive this privilege.[38] Second, Israeli law protects bank customer account and transactional information from disclosure to third parties, the infringement of which could result in civil and criminal penalties (including imprisonment for a maximum of five years).[39] Third, Section 15A of Israel's Banking Ordinance of 1971 imposes "a duty of confidentiality upon any bank exchanging information or documents with the Bank of Israel, Israel's banking regulatory authority."[40] A violation of that section could result in fines or incarceration for up to one year.[41] Finally, pursuant to the Prohibition on Money Laundering Law, 5760-2000, and the Prohibition on Terror Financing Law, 5765-2002, a bank must maintain the confidentiality of information it receives, subject to civil and criminal sanctions.[42] Providers of financial services must report the activities of their clients to a centralized authority, which analyzes and determines whether further action is required.[43]

D. "True Conflict" Analysis

A true conflict between domestic and foreign law exists when "compliance with the regulatory laws of both countries would be impossible."[44] Section 442 of the Restatement (Third) of the Foreign Relations Law of the United States sets forth factors to assist whether to compel production of protected documents and information.[45] Section 442(1)(a) states that a court or agency of the United States may order a person "subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation…."[46] Pursuant to

35. Declaration of Ehud Arzi, Case 1:04-cv-02799-NG-VVP, Document 376, Paragraph 7.

36. *Linde,* at *9 (citing Section 47 of Israel's Evidence Ordinance 5731-1971).

37. *Id*.

38. *Id*.

39. *Id.* at *10.

40. *Id.*

41. *Id*.

42. *Linde*, at *10.

43. *Id*.

44. *Id*. (quoting Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir. 1998)).

45. *Id.* at *11.

46. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(a) (1987).

Section 442(c), in deciding "whether to issue an order directing production of information located abroad…a court or agency should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located."[47] Courts will also consider the hardship caused to the nonparty.[48]

IV. Discussion

A. The Free Flow of Documents Between Parent and Subsidiary Was Not Established

IDBNY provided sworn statements that it had no access to its parent's documents in the regular course of business,[49] that IDBNY and IDB lacked mutual access to each other's phone and computer systems, and that they did not share confidential information concerning their customers and transactions.[50] The court found the evidence failed to establish the free flow of documents between subsidiary and parent.[51] One memorandum, a regulatory order stating that IDB would make its subsidiary's information available, and an isolated agreement that IDBNY would service seven loans originated by IDB through a Florida branch were deemed insufficient.[52] IDBNY simply had no access to, or the practical ability to obtain, IDB documents. Defendant's motion to compel IDBNY to produce IDB's documents was denied.[53]

B. IDBNY Was Not a "Mere Department" of IDB

The court concluded that IDBNY was not a "mere department" of IDB.[54] IDBNY was wholly owned by IDB.[55] However, IDBNY was not financially dependent on IDB; it paid its own expenses and salaries, and received no funds from IDB.[56] IDBNY appointed its executives without consulting IDB.[57] Although three of IDBNY's twelve-member board were also directors or officers of IDB, the court noted that "having common directors and officers is a normal business practice of a multi-national corporation and absent complete control it is no justification to labeling a subsidiary a mere department of the parent."[58] IDBNY observed corporate

47. *Id.* at 442(1)(c).
48. *Linde*, at *11.
49. *Id.* at *3.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at *3–4.
54. *Linde*, at *4.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

formalities by having its own board of directors, holding regular/shareholder meetings, maintaining separate books and records from its parent, and preparing its own financial statements.[59] Finally, IDB did not exert control over IDBNY's marketing and operational policies.[60] Instead of tight control, IDB exerted limited influence over IDBNY, and IDBNY was not a mere department of IDB.[61]

C. Jurisdictional Discovery Is Unwarranted

Because IDB had a limited relationship to the litigation, the court determined that jurisdictional discovery was unlikely to lead to personal jurisdiction.[62] The court also concluded that "even if personal jurisdiction was established, the information obtained would have been of attenuated relevance to the claims and defenses of this case" and, therefore, may not be admissible.[63] Even though the court determined that the request for jurisdictional discovery was improper, however, the Defendant could seek the information from IDB "through the Hague Convention."[64]

D. Hapoalim's Objections Based on Israeli Law

The court ruled that the documents Hapoalim believed were subject to the privilege against self-incrimination should be itemized on a privilege log.[65] The court reasoned that there is no "Israeli prohibition on the discovery of documents constituting commercial secrets."[66] However, as to confidential commercial information, the court stated that an appropriate protective order could be entered or the subpoena could be modified.[67] Nevertheless, the remaining laws Hapoalim advanced did "erect prohibitions on disclosure" that raised "true conflicts" between United States discovery rules and Israeli confidentiality laws."[68] The court wished to protect Hapoalim against the civil or criminal penalties it might incur by violating Israel's bank-confidentiality laws.[69]

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59. *Id*. at *5.

60. *Linde*, at *5.

61. *Id*.

62. *Id*.

63. *Id.*

64. *Id.* at *8. The court did not specify which of the many Hague Conventions it referred to, but probably meant the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444, 847 UNTS 231.

65. *Linde*, at *9.

66. *Id*.

67. *Id*.

68. *Id.* at *10.

69. *Id*.

E. "True Conflict" Analysis

The bulk of the documents and information sought originated in or were located in Israel.[70] Defendant sought these documents to refute the contention that it "exercised insufficient caution in dealing with entities that it 'should have known' were terrorist fronts."[71] Yet, the court noted that Plaintiffs needed to prove more than recklessness, i.e., that the defendants knowingly sponsored the terrorist organizations, in order to succeed in their claims.[72] Therefore, the court ruled that the need, if any, for the protected subset of the requested information was limited.[73] It also should be noted that the Defendant had alternative means of obtaining some of the account and transactional evidence and that other information was publicly available.[74]

As the court noted, compliance with this nonparty subpoena would undermine important Israeli interests: protecting confidential information and the privacy rights of bank clientele.[75] Finally, the potential hardship imposed on Hapoalim in compelling the requested discovery could be significant.[76] An order compelling production should be imposed on a nonparty only in extreme circumstances, and the court found it improper here.[77] Even though its requests were reasonably specific, the court denied Defendant's discovery of the "Protected Materials," a subset of the requested information.[78]

The remaining information, while discoverable, was temporally limited to the period covering the events alleged in this action.[79] Additionally, the court concluded that Defendant was entitled to conduct depositions of IDBNY and Hapoalim employees, limited to the documents produced (or that would be produced) and the issues those documents might generate.[80] The court stated that IDBNY and Hapoalim would identify the individuals who would provide testimony.[81] Thus, Defendant's motion to compel the depositions of the specific individuals was denied.[82]

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70. *Id.* at *12.

71. *Linde*, at *12.

72. *Id.*

73. *Id.*

74. *Id.* at *13.

75. *Id.*

76. *Id.*

77. *Linde*, at *13 (citing Minpeco, S.A. v. Conticommodity Services, Inc., 118 F.R.D. 517, 526-527 (S.D.N.Y. 1987)).

78. *Id.* at *14. Arab Bank called for the production of 12 categories of documents. *Id.* at *8. The documents that were discoverable included "account, transactional information, and investigatory documents related to accounts held at charitable entities held in Hapoalim's New York Facility," "compliance practices, procedures, regulations, to the extent they are not implicated by the confidentiality provisions in the Bank Ordinance and Prohibition on Money Laundering Law and the Prohibition on Terror Financing Law," and "Hapoalim's business relationship with Arab Bank." *Id.* at *14.

79. *Id.*

80. *Id.* at *15.

81. *Linde*, at *15.

82. *Id.*

V. Conclusion

In *Linde v. Arab Bank, PLC,* the United States District Court for the Eastern District of New York struck a just and appropriate balance in its conflict of law analysis. The court gave respect to Israeli banking privilege laws, yet made documentation available to the Defendant under American discovery doctrines. This case sets forth a compelling and thorough application of competing jurisdictional factors in the context of international, nonparty discovery.

Maeve Ryan

In re Will of Meyer

876 N.Y.S.2d 7 (N.Y. Sup. Ct. App. Div. 2009)

The New York Supreme Court, Appellate Division, affirmed the surrogate's court's dismissal of plaintiff's claim to recover his alleged share of his mother's *inter vivos* gift transfers pursuant to French Civil Law and presented several reasons why foreign forced-heirship laws do not apply to transfers of property situated in New York.

I. Holding

In *In re Will of Meyer*,[1] the New York Supreme Court, Appellate Division, upheld the surrogate's court's grant of respondents' motion to dismiss upon the finding that decedent, petitioner Patrick A. Gerschel's ("Gerschel") mother, Francine Meyer ("Meyer"), was not a domiciliary of France at the time of her death,[2] but added additional reasons why the claim was not actionable as a matter of law.[3] First, Meyer clearly opted in her will to apply New York law to her New York property.[4] In New York, local policy favors giving nonresidential testators' freedom from forced-heirship laws, because it encourages them to invest their assets in New York.[5] Second, Gerschel's claim was time-barred.[6] Finally, documentary evidence showed that decedent was not a domiciliary of France at the time of her death, but, rather, a domiciliary of Bermuda.[7]

II. Facts and Procedural History

On March 16, 2006, Gerschel, a New York resident, brought this action pursuant to Articles 724 and 913–930 of the French Civil Code, which restrict the right of a French domiciliary to exclude her children from inheritances through *inter vivos* gift transfers or by will.[8] He alleged Meyer was a domiciliary of France at the time of her death, and that the French Civil Code "required . . . [her] to leave 75% of her 'augmented estate' to her three children but she did not do so."[9] Additionally, he claimed that French law permitted him to sue to recover lifetime gift transfers that he alleged "encroached upon [his] forced heirship share."[10] This case,

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1. 876 N.Y.S.2d 7(N.Y. Sup. Ct. App. Div. 2009) (hereinafter *Meyer*).
2. *Id*. at 10.
3. *Id*. at 10–13.
4. *Id*. at 9.
5. *Id*. at 11.
6. *Id*. at 11–12.
7. *Meyer* at 12–13.
8. *Id*. at 9.
9. *Id.* at 10.
10. *Id.*

which was initially commenced in New York supreme court, was transferred to surrogate's court.[11]

Although Meyer was born in France and remained a French citizen, she resided in several different countries during her life.[12] She owned homes and property in Switzerland, Bermuda, and New York, and was registered as a resident of Bermuda.[13] During the latter part of her life, she split her time between New York and Europe.[14] When in Europe, Meyer spent most of her time in France, though she never owned or rented property there.[15] Meyer was survived by three children when she died on July 28, 2001.[16] She left "various testamentary instruments" to dispose of her property in Bermuda and New York.[17] She made it explicit in her New York will, dated April 20, 2000, that it be probated in New York and governed by that state's law, even though she had consistently declared that she was a resident of Bermuda.[18] In both her Bermuda and New York wills, she left her property in trust for a New York charity she established.[19]

Defendants[20] moved to dismiss the complaint, asserting that French heirship laws do not apply, because Gerschel did not meet the burden of proving that his mother was a French domiciliary at the time of her death.[21] The surrogate's court granted the defendants' motion grounded on that claim alone.[22] The appellate court affirmed for that reason, but specified additional grounds.[23]

III. The Court's Analysis

A. Foreign Forced-Heirship Laws are Inapplicable to *Inter Vivos* Transfers Executed in New York

The court corrected the parties' erroneous assumption that French forced heirship laws govern the disposition of *inter vivos* transfers of property made in New York.[24] The surrogate's

11. *Id*. at 10 n.1; *see* N.Y. SURR. CT. PROC. ACT. § 206 (2009) (providing that the surrogate's court has proper jurisdiction over cases that deal with "the estate of any non-domiciliary decedent who leaves property in the state").
12. *Meyer*, at 9.
13. *Id.*
14. *Id.*
15. *Id*.
16. *Id*.
17. *Id*.
18. *Meyer*, at 9.
19. *Id.* (indicating Meyer donated in excess of $17 million to the Emerald Foundations that she created).
20. *Id.* at 10 n.2 (listing Gerard and Andrew W. Heymann, brothers, and investment and legal advisors to Meyer; Meyer's individual friends; and the Emerald Foundations as defendants).
21. *Id.* at 10.
22. *Id*.
23. *Id*. at 10–13.
24. *Meyer*, at 10.

court acted under this assumption when it dismissed Gerschel's claim solely on the ground that Meyer was not a French domiciliary when she died.[25]

1. New York Law Permits Testamentary Freedom from Foreign Forced Heirship Laws

New York law clearly provides a foreign non-domiciliary with the option to direct his or her will to be probated in New York and to be governed by its law.[26] New York's Estates, Powers and Trusts Law 3-5.1(h), in particular, provides the "testator the option of having New York law apply to the disposition of property in New York in matters relating to the 'intrinsic validity' of the disposition."[27] Although Gerschel's deliberate decision to bring a French forced heirship claim only against "lifetime New York gifts made by his mother" and not against her testamentary property showed his belief that the statute did not apply to *inter vivos* gift transfers, the court disagreed. In applying the law, the court held that there was "no valid policy decision" to distinguish between a nonresidential decedent's testamentary property and *inter vivos* property. Therefore, it overrode the explicit language of the statute[28] with policy justifications, and found that Meyer, a French citizen, exercised her right to disinherit her son when she chose New York law to govern the disposition of her New York assets.[29]

2. Public Policy

Courts have consistently supported the principle that the law of the state where property is situated should govern the individual's power to affect its transfer and disposition.[30] This reasoning is supported in large part by local policy justifications to encourage foreigners to place assets in New York.[31] Additionally, the court found no policy distinction that would allow a foreign domiciliary to invoke this privilege with regard to testamentary transfers of property and not *inter vivos* transfers.[32] Therefore, freedom from forced heirship laws should apply with "equal force" to *inter vivos* transfers.[33]

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25. *Id.*

26. *Id.* at 11.

27. *Id.* (explaining that a testator's domicile is irrelevant when exercising the legal right to elect New York law to govern the disposition of his New York property).

28. N.Y. EST. POWERS & TRUSTS § 3–5.1(h) (2009) which states:

> Whenever a testator, not domiciled in this state at the time of death, provides in his will that he elects to have the disposition of his property situated in this state governed by the laws of this state, the intrinsic validity…is determined by the local law of this state.

29. *Meyer*, at 11.

30. *See id.* at 10–13, (citing Wyatt v. Fulrath, 211 N.E.2d 637 (1965) and Werthein v. Gotlib, 594 N.Y.S.2d 230 (App. Div. 1993)).

31. *Id.* at 10–11.

32. *Id.* at 11.

33. *Id.*

3. Time-Barred Action

The appellate court also addressed the issue that the applicable statute of limitations had run, which the lower court ignored.[34] It found that, even if Gerschel's claim that the *inter vivos* transfers were subject to the French forced heirship laws was accepted, his action would still be dismissed, because it was time-barred.[35] Since his claims required a statutory remedy where liability "would not exist but for a statute," they were governed by a three-year statute of limitations.[36] Gerschel's forced heirship claims were not created by "pre-1804 French customs"[37] as he argued; rather, they existed "solely by virtue of the French Civil Code."[38] Under French law, the three-year statute of limitations accrues at the date of the decedent's death;[39] therefore, Gerschel's claim expired on July 28, 2004.[40] When he commenced the action, on March 16, 2006, it was too late.[41]

5. Decedent Was Not a Domiciliary of France at the Time of Her Death

Finally, the appellate court affirmed the surrogate's court finding that Meyer was not a domiciliary of France.[42] A domicile is "one's principal and permanent place of residence where one always intends to return to from wherever one may be temporarily located."[43] Intent, which can be determined by "the conduct of the person and all surrounding circumstances,"[44] is an "essential factor in effecting a change of domicile."[45] Meyer's "conduct and declarations" established Bermuda as her domicile.[46] She maintained property and a personal account there, and, in several official documents, declared Bermuda was her residence.[47] In contrast, she did not own any property in France, and did not show any intent to live there permanently.[48] Her French citizenship alone was insufficient to establish France as her domicile.[49]

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34. *Id*.. at 11–12.

35. *Meyer*, at 11-12.

36. *See id.* at 12 (quoting Aetna life & Cas. Co. v. Nelscon, 492 N.E.2d 386,388 (1986)).

37. *Id.* The court's justifications for finding that Gerschel's remedy would not exist but for a statute are weak. The only sound and logical basis for its justification, if any existed, on this point would be that the French Civil Code is somehow different from a mere statute in that it completely replaces prior law dealing with the matter, whereas common law causes of actions somehow remain separate from the statute that codifies it. *See* McConnell v. Caribbean Petroleum Co. 15 N.E.2d 573, 573–75 (1938).

38. *Meyer*, at 12.

39. *Id.* at 11–12.

40. *Id.*

41. *Id.* at 12.

42. *Id*. at 12–13 (quoting Laufer v. Hauge, 528 N.Y.S.2d 878, 879 (1988)).

43. *Id*. at 12.

44. *Meyer*, at 12.

45. *Id.*

46. *Id.* at 13.

47. *Id.*

48. *Id*.

49. *Id*.

III. Conclusion

Although the surrogate's court was correct when it found that Meyer was not a domiciliary of France at the time of her death, the appellate court stressed that this should not be the sole reason for dismissing plaintiff's forced heirship claims.[50] When lifetime gift transfers are executed in New York, foreign forced heirship laws do not govern their disposition if the decedent elects that those transfers be governed by New York laws.[51] Case law and statutory provisions support the public policy of enforcing a foreigner's clear intent to be free from forced heirship laws[52] and encouraging non-domiciliaries to invest their assets in New York.[53]

In addition, Gerschel's claims would not have survived because he did not prove that his mother was a domiciliary of France at the time of her death.[54] Documentary evidence clearly showed that she had never intended to make France her permanent home, because she did not own or lease property or residence there.[55] On the contrary, the court considered it clear that she considered Bermuda her domicile.[56]

Furthermore, even if plaintiff had been successful in arguing for the application of French forced heirship law, his claim was time-barred, and, therefore, would have been dismissed.[57] This was an important procedural issue that the appellate court could not ignore, though the lower court did not address it.

Nan Sze Ling

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50. *Meyer*, at 9–13.
51. *Id.* at 9–10.
52. *Id.* at 10–11.
53. *Id.* at 10.
54. *Id.* at 12–13.
55. *Id.*
56. *Meyer*, at 13.
57. *Id.* at 12.

Apple & Eve, LLC v. Yantai North Andre Juice Co. Ltd.

610 F. Supp. 2d 226 (E.D.N.Y. 2009)

The U.S. District Court for the Eastern District of New York vacated its stay of the pending action, holding that, pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the defendant had waived its contractual right to arbitrate in its home country of China, by engaging in litigation-related conduct inconsistent with asserting that right.

I. Holding

In *Apple & Eve, LLC v. Yantai North Andre Juice Co. Ltd.*,[1] the U.S. District Court for the Eastern District of New York held that, because of the inconsistency and dilatory nature of defendant's actions in first filing a motion in the court to compel arbitration in China, then refusing to actually arbitrate there, while simultaneously secretly petitioning a Chinese court to declare the arbitration clauses invalid, the arbitration clauses of the contracts were nullified under Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[2] These actions constituted a waiver of arbitration by defendant under the Convention, which allowed the court to grant plaintiff's motion to vacate the stay of proceedings.[3]

II. Facts and Procedural History

Plaintiff Apple & Eve, an apple juice distributing company, incorporated in Delaware, but whose principal place of business is Nassau County, N.Y., engaged in business with defendant Yantai Juice Co., a Chinese apple juice concentrate-producing company located in Yantai, Shandong Province, China.[4] In June 2004, the parties negotiated two contracts for the purchase and sale of apple juice concentrate, each containing an arbitration clause calling for any dispute to "be submitted or [sic] arbitration in the country of defendant…."[5]

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1. 610 F. Supp. 2d 226 (E.D.N.Y. 2009) (hereinafter *Apple & Eve*).

2. *See id*. at 234; *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II, § 3, June 10, 1958, T.I.A.S. No. 6997, 21 U.S.T. 2517 (hereinafter "the Convention") which states in its entirety:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

3. *Apple & Eve*, at 231–32.

4. Apple & Eve, LLC v. Yantai N. Andre Juice Co. Ltd., 499 F. Supp. 2d 499 245, 246 (E.D.N.Y. 2007), *vacated*, 610 F. Supp. 2d 226 (E.D.N.Y. 2009).

5. *Id*.

Plaintiff's complaint alleged that defendant breached its contractual obligations by failing to deliver the required quantity of low- and medium-acidity apple juice concentrate.[6] Plaintiff sued in New York State Supreme Court on December 5, 2006.[7] Defendant removed the action to federal court under 28 U.S.C §1332, then filed a motion in the district court to compel arbitration in China.[8] The court granted the motion and stayed the action pending arbitration,[9] as is statutorily mandated.[10]

Defendant refused to arbitrate in China before the Hong Kong International Arbitration Commission ("HKIAC"), after being requested to do so by plaintiff.[11] On January 15, 2008, unbeknownst to counsel for plaintiff or the district court, defendant petitioned a Chinese court to declare the arbitration provisions invalid.[12]

A month later, plaintiff filed its first motion in the district court to vacate the stay or, in the alternative, to compel arbitration in New York.[13] This was denied without prejudice, because there was no ruling by a Chinese court or arbitration commission as to the enforceability of the arbitration provision in question.[14] Plaintiff sought arbitration before the HKIAC again, but once more defendant failed to proceed.[15]

On November 24, 2008, after learning about the January 15 motion by defendant in China to invalidate the arbitration clauses, plaintiff filed its second motion to vacate the stay.[16] The district court ordered defendant to respond, but to no immediate avail.[17] On April 21, 2009, however, defendant's counsel filed a petition opposing plaintiff's motion.[18] In it, defendant's counsel explained that defendant's petition to the Chinese court to declare the arbitration provisions inoperative was made without comprehending the petition's import,[19] and that defendant had now instructed its Chinese counsel to withdraw the motion before the Chinese court and reinstate its arbitral rights.[20]

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6. Plaintiff's Memorandum of Law In Support of Its Motion to Vacate Stay or, Alternatively, Compel Arbitration In N.Y. at 3, Apple & Eve, LLC v. Yantai N. Andre Juice Co. Ltd., 610 F. Supp. 2d 266 (No. 2:07-CV-00745), 2008 WL 1985752.

7. *Apple & Eve*, at 227.

8. *Id.*

9. *Id.*

10. *See* 9 U.S.C. § 3 (1947) (ordering "the courts of the United States," upon application by the party seeking to compel contract-mandated arbitration, to stay the proceeding until the arbitration occurs, provided that the applicant is not in default in proceeding with the arbitration).

11. *Apple & Eve,* at 227.

12. *Id.* at 227–28.

13. *Id.* at 227.

14. *Id.*

15. *Id.*

16. *Id.* at 227–28.

17. *Apple & Eve*, at 228.

18. *Id.*

19. *Id.* at 232.

20. *Id.*

III. Discussion

A. Appropriate Forum to Resolve the Arbitration-Waiver Claim

The first issue the court encountered was whether it or an arbitrator should decide whether defendant actually waived its arbitral right. The United States Supreme Court, in *Howsam v. Dean Witter Reynolds, Inc.*, held that "the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability."[21] Circuit courts, however, have not interpreted *Howsam*'s deference to arbitration commissions to encompass every waiver scenario. In *Doctor's Assoc., Inc. v. Distajo*, for example, the Second Circuit Court of Appeals distinguished between cases in which an application for a waiver of arbitration was predicated upon *prior litigation* by the party now seeking to arbitrate and cases in which it was predicated on "other actions." [22] In the former instance, determination of the issue belonged in the court's realm, whereas, in the latter, the determination would shift to the arbitrator's.[23] In addition to the Second Circuit, both the First and Fifth Circuits limited *Howsam* to pertain only to waiver claims based upon "other actions" exclusive of litigation and, therefore, not to require referral to the arbitrator where the waiver allegation is based on litigation-related conduct.[24] These cases reason that a court has the inherent right to manage conduct before it;[25] therefore, even in cases of alternative dispute resolution, where proceedings are properly stayed, the court has the power to control a party where abuses of the judicial system itself are present.[26] Accordingly, in the instant case, when plaintiff informed the court that defendant had attempted, through litigation, to subvert the arbitration process in China, the court felt entitled to rule on the arbitral status of defendant and to vacate the stay, in accordance with its inherent right to "prevent abuse[s] in its proceedings."[27]

B. Factual Waiver and Resultant Legal Default

1. The "Null and Void" Exception to the New York Convention

Chapter 2 of the Federal Arbitration Act ("FAA"), [28] which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[29] permits federal courts to compel arbitration between parties where there is a finding that an agreement con-

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21. 437 U.S. 79, 85 (2002).

22. 66 F.3d 438, 456 (2d Cir. 1995) (emphasis added).

23. *Id*.

24. *Apple & Eve,* at 230 (citing Reidy v. Cybertronics, Inc., No. 1:06 Civ. 249 at *3 (S.D. Ohio, Feb. 8, 2007)) (pointing to First and Fifth Circuit cases that render unto the court the responsibility of determining the outcome of a claim of arbitration waiver due to litigation-related conduct).

25. *Id*. (quoting Am. Gen. Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 551-52 (Ky. 2008)).

26. *See id*. (citing *Kestel* 253 S.W.3d at 551-52) (noting that the court "has inherent power to control its docket and to prevent abuse in its proceedings…").

27. *Id.*

28. 9 U.S.C. §§ 201–208 (1970). Section 201 states: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."

29. June 10, 1958, 21 U.S.T. 2517.

tains an arbitration clause.[30] The Second Circuit, citing to Article II of the Convention, narrowed the latitude of discretion granted to courts under the FAA by holding that courts "*must* compel arbitration" if such was the mode of resolution in the original agreement.[31] The exception, says the court, quoting the New York Convention, is "unless [the court] finds that the said agreement is null and void, inoperative or incapable of being performed."[32] Courts generally construe the "null and void" exception narrowly in favor of arbitration, declaring a clause inoperative in "situations such as fraud, mistake, duress and waiver—[those] that can be applied neutrally on an international scale."[33] The court in the instant case dealt with the interaction between the concepts of "null and void" and "waiver." It stated: "Dilatory conduct or delay…constitutes a waiver where such conduct is inconsistent with an intention to rely upon arbitration."[34] Furthermore, because waiver of the protection of a contractual provision and a finding that the contractual provision has been rendered null and void are intrinsically connected,[35] a determination that a party has acted to waive its right to arbitrate also allows for a judicial finding that the arbitration provision is null and void.[36]

2. Vacatur of the Stay of Proceedings

Defendant took action inconsistent with its right to arbitrate, delayed the proceedings through dilatory conduct and prejudiced its adversary. The court found that defendant engaged in "unilateral and stealth action" when it filed the petition seeking invalidation of the arbitration clause without telling either opposing counsel or the court.[37] Furthermore, the court found defendant engaged in dilatory conduct when it: (i) failed to agree or to initiate arbitration in its home country; (ii) refused plaintiff's requests to arbitrate before the HKIAC; (iii) filed the petition seeking invalidation of the arbitration clause; and (iv) actively hid the January invalidation petition from plaintiff and the court in order to maintain the stay.[38] The final, but most powerful, part of the court's rationale was that the evasive tactics of defendant prejudiced plaintiff's ability to have its case heard on the merits.[39] Twenty-eight months, calculated the court, had elapsed between the instant motion to vacate the stay and the initial filing of charges and not once during that protracted period did plaintiff have an opportunity to present its case before an adjudicative (or non-adjudicative) body.[40] It was the amalgamation of all of the above which prompted the court to note that "this is not a close case" and conclude

30. 9 U.S.C. § 206.

31. *Apple & Eve*, at 228 (quoting U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd., 241 F.3d 135, 146 (2d Cir. 2001)) (emphasis added).

32. *Id*. at 228–29 (quoting the Convention, *supra* note 2).

33. *Id*. (quoting Riley v. Kingsley Underwriting Agencies Ltd., 969 F.2d 953, 960 (10th Cir. 1992)).

34. *Id.* at 232 (quoting Sucrest Corp. v. Chimo Shipping Ltd., 236 F. Supp. 229, 230 (S.D.N.Y. 1964)).

35. *Id.* at 231 (quoting Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 13 (1st Cir. 2005)).

36. *See id.* at 234 (citing 9 U.S.C. § 3 (1947)) (holding that, "because defendant is now deemed to be in 'default in proceeding with such arbitration,'…the stay in this case is vacated").

37. *Apple & Eve*, at 231.

38. *Id.* at 231–32.

39. *Id.* at 232.

40. *Id.* at 231.

that defendant had waived its right to arbitrate. The court granted plaintiff's motion to vacate the stay of proceedings, nullifying the arbitration clauses within the meaning of the Convention.[41]

III. Conclusion

Based upon an allegation of dilatory, litigation-related conduct, the court reviewed the issue of waiver of the contractual right to arbitrate. Finding that defendant's conduct did amount to an attempt to delay and evade a determination on the merits of the case,[42] prejudicing plaintiff,[43] the court concluded that defendant waived its right to arbitrate and that litigation in district court could proceed.[44] This opinion is important in recognizing U.S. courts' reactions to foreign companies' attempts to subvert the U.S. justice system and fair determinations of disputes. The court saw through defendant's conduct and invalidated its "exit strategy," bringing it from its home in Shandong Province to Long Island, New York for litigation.

Samuel Sroka

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41. *Id.* at 234.
42. *Id*. at 232.
43. *Apple & Eve*, at 232
44. *Id*. at 234.

Halaf v. Halaf

2009 WL 454565 (E.D.N.Y. Feb. 24, 2009)

The United States District Court denied a petition under the Hague Convention on Child Abduction, where petitioner failed to establish that the child was removed from, or retained in, a state different from that of his habitual residence.

I. Holding

In *Halaf v. Halaf*,[1] the United States District Court for the Eastern District of New York held that return of petitioner's son ("child") to Israel was not warranted, because petitioner failed to establish the child was removed from his habitual residence, or retained in another state, within the meaning of the Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention").[2, 3] Habitual residence is largely determined by the intentions of the parents at the last moment they agreed.[4] Respondent's testimony, that the parents intended the child to reside in the United States, was found to be more credible than petitioner's.[5] Therefore, the court found that the child was not removed from his habitual residence.

II. Facts and Procedural History

Petitioner is an Israeli citizen. Respondent is an American and Israeli citizen. Respondent and petitioner met five years ago in Israel and were subsequently married.[6] Respondent had lived in the United States until the age of eighteen, when she and her family moved to Israel.[7] Respondent's family still maintained businesses in New York.[8] According to respondent, petitioner told her that he wanted to live in New York. One year after they were married, petitioner and respondent began discussing moving to New York. In November 2006, when respondent was pregnant, the couple traveled to New York.[9] According to respondent, at this time petitioner tried to urge her to move to New York, but she was concerned about job opportunities.[10] Respondent gave birth in May 2007, and, according to her, that was when they decided to relo-

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1. 2009 WL 454565 (E.D.N.Y Feb, 24 2006) (hereinafter *Halaf*).
2. *Id.* at *8.
3. Oct. 25, 1980, T.I.A.S. No. 11,670, 99 U.S.T. 11.
4. *Halaf*, at *7.
5. *Id.* at *8.
6. *Id*. at *1.
7. *Id.*
8. *Id.* at *2 (discussing that when respondent and her family moved to Israel, the extended family remained in New York and helped maintain the family businesses).
9. *Id.* at *1.
10. *Halaf*, at *1.

cate to New York.[11] Petitioner was aware of the family businesses and began to learn the locksmith trade from respondent's brother, so that, upon arrival in New York, he could work.[12] Petitioner and respondent sold nearly all of their belongings in Israel in August 2007.[13] Both petitioner and respondent wrote resignation letters to their employers, stating that they were moving to New York. Additionally, they bought plane tickets for the child and themselves.[14] When they informed the Israeli Social Security office that they intended to leave, they were advised to continue paying social security in Israel, because their medical benefits were tied to the system. In order to do so, the couple left a joint checking account open. They emptied and closed their savings account.[15]

Before leaving, petitioner and respondent were given farewell parties. On January 15, 2008, petitioner left for New York. Upon arrival, he stayed in Queens with respondent's family.[16] The parties differ as to whether petitioner was enjoying New York, his job situation, and his stay with respondent's family members. Respondent stated that at no point did petitioner give her any indication that he would not be remaining in New York or that she should not come with the child.[17] In fact, respondent's brother spent time with petitioner preparing the apartment for their arrival. According to petitioner, on January 29, 2008, he told respondent that he planned to return to Israel, as they had agreed to do if he was unsuccessful at finding a job or establishing himself in New York.[18] Respondent arrived in New York with the child on January 31, 2008. Petitioner remained in the United States with respondent during February and March, at which time the couple purchased a bed, a television, a two-year cable contract, cell phones, and a Chrysler minivan.[19] Respondent claimed that petitioner was employed at a local deli and was planning to start a taxi business with the minivan they purchased.

There was discrepancy as to the events that led petitioner to return to Israel in April 2008. According to petitioner, he returned for the Passover holidays and asked respondent to join him; she refused, informing him that she intended to remain in the United States permanently and that she no longer wished to be married to him.[20] She requested a religious divorce, which is known as a *get*.[21] As a result, petitioner did not return to the United States. According to

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11. *Id*. at *2 (suggesting that as a result of their decision to move to New York, respondent's mother also sold her house in Israel and decided to relocate to New York).

12. *Id*.

13. *Id.* (enumerating that the belongings sold included furniture, two cars, kitchen items, televisions, and beds, as well as the child's personal belongings).

14. *Id.* at *3.

15. *Id.*

16. *Id.* at *3.

17. *Halaf*, at *3.

18. *Id*. at *4.

19. *Id.*

20. *Id.*

21. *Id.* at *4 n.7 (defining a *get* as a religious divorce and explaining that if the husband does not deliver to his wife this writ of divorce, the divorce will not be recognized under Jewish law); s*ee* Susan M. Weiss, *Sign at Your Own Risk: The "RCA" Prenuptial May Prejudice the Fairness of Your Future Divorce Settlement*, 6 CARDOZO WOMEN'S L.J. 49, 52 (1999) (discussing that under Jewish law, Jewish wives will remain married to their Jewish husbands until the husband gives the wife a Bill of Divorce, or a *get*).

respondent, petitioner confessed to having an extra-marital affair in Israel and that he thought he was in love with the woman.[22] On April 13, 2008, he left for Israel so that he could decide what to do about this woman.[23] Respondent claimed she called him constantly in Israel, urging him to choose respondent and the child or to end their marriage, as she would not tolerate him living with two women.[24]

Since April 13, 2008, petitioner had not made any attempt to reestablish his marriage or provide financial assistance for his family. Additionally, without respondent's knowledge, petitioner withdrew all the money from their joint checking account in Israel, leaving it with a negative balance.[25] In May, respondent hired an attorney to claim custody and child support. On June 30, 2008, petitioner submitted a formal Request for the Return of the Child to the Central Authority of the United States[26] under the Hague Convention.[27] Soon after, petitioner told respondent he was coming to see the child in New York, at which point she secured a temporary restraining order against him.[28] Respondent claimed petitioner threatened her and the child. She further claimed to have no money, home or belongings left in Israel, whereas she had a steady job and life in New York.[29]

III. Discussion

A. The Hague Convention

The Convention was created to prevent the removal of a child by a close family member, from one country to another, in order to obtain a more favorable custody decision; the rationale is that habitual residence is the place where all custody and access claims should be fairly addressed.[30] The Convention is implemented in the United States by the International Child Abduction Remedies Act ("ICARA"),[31] which empowers courts in the United States to decide the merits of abduction claims.[32] Under the Convention, to establish removal or retention of a child, the petitioner must show three things: (1) the child was habitually resident in one state and has been removed to or retained in a different state, (2) the removal was in breach of the petitioner's custody rights under the law of the state of habitual residence, and (3) the peti-

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22. *Halaf*, at *5.
23. *Id.*
24. *Id*.
25. *Id*.
26. The Central Authority for the United States is the Office of Children's Issues in the Department of State. Its Web site is http://www.travel.state.gov/family/abduction/abduction_580.html.
27. *Halaf*, at *5.
28. *Id*.
29. *Id.* at *6
30. *Id.*
31. 42 U.S.C. §§ 11601 *et seq*.
32. *Halaf, at* *6.

tioner was exercising those rights at the time of removal or retention.[33] Petitioner must prove each of these elements by a preponderance of the evidence.[34]

1. Enforceability of the Hague Convention

Under ICARA, the court is limited to assessing only rights under the Convention and not the merits of any child-custody claims.[35] Here, the district court had the power to apply the Convention and to address the merits of the abduction claim, namely, whether the child was wrongfully removed to or retained in a state different from that of his habitual residence.

2. Burden of Proof

Under 42 U.S.C.A. § 11603(a), the district courts and the courts of the states have concurrent original jurisdiction over actions arising under the Convention.[36] Additionally, 42 U.S.C.A. § 11603(e) states that the petitioner in an action brought under this Convention must establish, by a preponderance of the evidence, that the child was wrongfully retained or removed within the meaning of the Convention.[37] If the petitioner succeeds in proving each of these elements by a preponderance of the evidence, the burden shifts to the respondent to establish that one of the exceptions set forth in the Convention applies.[38] As explained below, petitioner failed to establish by a preponderance of the evidence that the child was removed from his habitual residence or retained in another state within the meaning of the Convention.

B. Application of the Hague Convention

To address the first requirement, petitioner had to show not only that respondent removed the child from Israel or retained the child in the United States, but also that the removal or retention was from the State in which the child was a habitual resident. To analyze a child's habitual residence, courts have considered the intent of the child's parents.[39] Should the parents disagree upon the habitual residence, the decision is based on the last time their intentions were shared.[40] Courts look to the parents' actions, as well as their declarations and statements.[41] Courts may also assess acclimatization and the extent to which the child has adapted to the new

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33. *Id.* at *7.

34. *Id.*

35. *Id*. at *6; *see* 42 U.S.C.A. § 11601(b)(4) (affirming the court's power to only decide abduction claims and not the underlying child custody claims).

36. 42 U.S.C.A § 11603(a).

37. *Halaf,* at *7; *see* 42 U.S.C.A. § 11603 (e)(1) (explaining that petitioner must establish by a preponderance of the evidence that the child has been wrongfully removed or retained within the meaning of the Convention).

38. *Halaf,* at *7; *see* 42 U.S.C.A. § 11603 (e)(2) (distinguishing that a respondent who opposes the return of the child has the burden of proving by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies, or by a preponderance of the evidence that any other exception set forth in article 12 or 13 applies).

39. *Halaf,* at *7 (citing Gitter v. Gitter, 396 F.3d 124, 131–132 (2d Cir. 2005)).

40. *See* Gitter v. Gitter, 396 F.3d 124, 133 (2d Cir. 2005).

41. *Halaf,* at *7 (citing *Gitter,* 396 F.3d at 133).

location.[42] While it is important to address acclimatization and whether returning the child to the original residence would be more detrimental than beneficial, in weighing these factors acclimatization does not trump the parents' intended habitual residence.[43]

Petitioner and respondent disagreed as to whether they intended the child to live in Israel or the United States. Petitioner claimed that he never planned to resettle in New York and that he told respondent he would remain only if he found secure employment and felt well established.[44] However, respondent stated that they agreed to relocate to New York, as evidenced by the fact that the couple sold all of their belongings in Israel, resigned from their positions, were given farewell parties, and closed their savings account.[45] Once in New York, the couple made many long-term investments and purchases that would prepare them to live there comfortably.

According to respondent, until April 13, 2008, both parents intended the child to live permanently in New York, and that was the last point at which they agreed.[46] When petitioner moved to Israel, their relationship deteriorated. The court decided, after considering testimony from both parties, that respondent's version of the facts was more credible.[47] March was the last time both parents shared the same intent for the habitual residence of the child and, according to respondent, that intent was to reside in New York; thus, New York was the child's habitual residence.[48]

The child's habitual residence was the United States, from which the child had not been removed, so petitioner failed to establish that the child was removed from his habitual residence. Therefore, it was unnecessary for the court to address whether the child was removed or retained in breach of petitioner's custody rights and whether, at the time of removal, petitioner was exercising those custody rights.[49]

IV. Conclusion

Under the Hague Convention, the petitioner must prove, by a preponderance of the evidence, that the child was a habitual resident in one state and has been removed to or retained in a different state.[50] Habitual residence is not defined in the Convention, but courts assess it in terms of the parents' intended residence for the child at the moment they last agreed.[51] In the

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42. *Id.* (assessing the child's acclimatization by weighing the importance of the child's return to the original forum, and the effects of removal of the child from the social environment in which it has been immersed).
43. *Id.*
44. *Id.* at *8.
45. *Id.*
46. *Id.*
47. *Halaf*, at *8.
48. *Id.*
49. *Id.*
50. *Id.* at *7.
51. *Id.*

present case, when the parties last agreed, their intentions were for the child to reside in New York; thus, that is the child's habitual residence.[52] The child was not removed from the United States, so petitioner failed to establish that he was removed from his habitual residence and did not meet the requirement for wrongful removal or retention under the Convention.

Bianca N. Nicoletti

52. *Id.* at *8.