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Reversing the Flow: International Law and Chinese Hydropower Development on the Headwaters of the Mekong River

L. Waldron Davis*

Introduction

Industrial growth has led China's energy sector to plan to nearly double hydropower capacity by the year 2010.[1] The associated dam building plans are focused on developing the hydrographic potential of the Mekong River's headwaters, which rise in the Tibetan Plateau and descend through Yunnan Province on China's southwestern border,[2] before continuing on a winding 2,870 mile journey through five downstream states to its delta in Vietnam and the South China Sea.[3] The proposed scheme, however, a "grand cascade" consisting of eight massive dams, is predicted to have effects reaching far beyond China's borders.[4] It is envisaged that construction and operation of these dams will result in harmful transboundary impacts on the

1. Julie Chao, *Coal Fuels Chinese Economy, Illness; Thirst for Power has Shanxi Among World's Most Polluted Cities; Dirty Air is Spreading*, AUSTIN AM. STATESMAN, Oct. 17, 2004, at 17 (revealing China's intentions to increase its hydropower activity and enlarge its capacity); *see also* Jonathan Watts, *China Pledges to Double Reliance on Renewable Energy by 2020: Huge Polluter Would be Leading Green Player: Critics Claim Target Will Not Offset Climatic Damage*, GUARDIAN (London), Nov. 8, 2005, at 25, *available at* 2005 WLNR 17994348 (marking the benchmark China will set by doubling its hydropower capacity); John Dore & Yu Xiaogang, *Yunnan Hydropower Expansion: Update on China's Energy Industry Reforms and the Nu, Lancang and Jinhsa Hydropower Dams 1* (March 2004) (working paper, on file with Chiang Mai University's Unit for Social and Environmental Research), *available at* http://www.rwesa.org/images/stories/pdf/yunnanhydropower.pdf (last visited Mar. 8, 2006) [hereinafter Yunnan Hydropower Expansion] (summarizing China's hydropower potential as a result of building dams on the Mekong River).

2. *See* Paul Stanton Kibel, *Nature Beyond the Nation State Symposium: Sovereignty and Ecology: An Introduction to the Issue*, 29 GOLDEN GATE U. L. REV. 311, 314 (1999) (discussing plans to dam the river that has an extensive run through Asia in order to create hydropower); *see also* Alex Liebman, *Trickle-Down Hegemony? China's "Peaceful Rise" and Dam Building on the Mekong,* CONTEMP. SOUTHEAST ASIA, Aug. 1, 2005, *available at* 2005 WLNR 15021940 (reviewing the parameters of the Mekong River as it spreads from China down through neighboring countries); John Dore & Yu Xiaogang, *supra* note 1, at 7 (mapping the flow of the Mekong River through Southeast Asia).

3. *See* Richard Mogg, *A United Plan for the Mekong; Asian Perspectives: Progress; The Mekong Wetlands Biodiversity Program; Six-Nation Mekong Region 'Biodiversity Conservation Corridor,'* ECOS, Apr. 1, 2005, at 8 (exploring the potential threats to a river that extends through so many countries); *see also* Amanda Morison, *Holidays Afloat: Whatever Floats Your Boat: Sometimes the Best Way to See a Destination Is from the Water*, GUARDIAN (London), Aug. 13, 2005, at 6 (examining the position of the river and how it plays out in the political arena); Jane Perlez, *China's Reach: The Trouble Downstream—In Life on the Mekong, China's Dams Dominate*, N.Y. TIMES, Mar. 19, 2005, at A1 [hereinafter Perlez, *China's Reach*] (highlighting the geographical details of the Mekong River and its surrounding territory).

4. *See* Adam S. Rix, *The Mekong River Basin: A Resource at the Crossroads of Sustainable Development*, 21 TEMP. ENVTL. L. & TECH. J. 103, 127 (2003) (hypothesizing about potential problems that are likely to arise due to the great cascade initiative of China); *see also* David Blake, *China's Lancang Dams Endanger Millions Both Upstream and Downstream*, RIVERS WATCH EAST & S.E. ASIA (Kevin Li, ed.) (2003), *available at* http://www.rwesa.org/lancang/intro.html (last visited Mar. 14, 2006) [hereinafter Blake, *China's Lancang Dams*] (reporting on China's plan to create dams on the Mekong River and the ramifications that may result); Richard Mogg, *supra* note 3, at 8 (analyzing the Chinese plans to set up numerous dams along the Mekong to form a cascade).

* **J.D., University of Idaho College of Law, 2005.** **The author would like to thank the New York State Bar Association's International Law and Practice Section, the editors and staff of the New York International Law Review, and Professors Russell A. Miller and Barbara Cosens (University of Idaho College of Law).**

riverine ecosystems and economies of the downstream riparian states, including Cambodia, Laos, Thailand, Myanmar, and Vietnam.[5] Whether the resulting concerns will be resolved cooperatively remains uncertain.

All of these downstream riparian states (excluding Myanmar) are members of the Mekong River Commission (MRC), an intergovernmental organization whose primary purpose is to facilitate "cooperat[ion] in a constructive and mutually beneficial manner for sustainable development, utilization, conservation, and management of the Mekong River Basin water and related resources."[6] The MRC Agreement mandates cooperation among the member states in the development of hydropower projects on the Mekong.[7] Furthermore, the MRC Agreement provides dispute resolution procedures for those circumstances for which cooperation has proven unsuccessful.[8] Hypothetically, the MRC Agreement would provide a mechanism whereby issues revolving around China's hydropower projects could be resolved. Because of China's conspicuous absence as a member of the MRC and a signatory to the Agreement, however, the downstream riparian statesriparian states must rely on other avenues of redress.[9]

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5. *See* Philip Hirsch, *Beyond the Nation State: Natural Resource Conflict and "National Interest" in Mekong Hydro power Development*, 29 GOLDEN GATE U. L. REV. 399, 399–401 (1999) (reflecting on the various social, political, and environmental problems that will arise as China continues to build dams on the Mekong River); *see also* Elizabeth Economy, *The Grass-Roots Greening of China; Spirit of Earth Day,* INT'L HERALD TRIB., Apr. 22, 2004, at 6 (noting that China has already come under fire from environmental groups for their proposed dams); Ron Moreau & Richard Ernsberger Jr., *Strangling the Mekong*, NEWSWEEK, Mar. 19, 2001, at 26 (stating the list of threats that damming the Mekong River will pose to the ecosystems of surrounding countries).

6. The major principles of the Agreement include: peaceful resolution of disputes; freedom of navigation; reasonable and equitable utilization of Mekong waters; state responsibility for injurious activities; and environmental integrity of the Mekong River, including its natural flows. *See Agreement for the Cooperation on the Sustainable Development of the Mekong River Basin,* Mekong River Commission (MRC), 34 I.L.M. 864 (1995) [hereinafter Mekong River Agreement] (citing the major principles of the Agreement to include: peaceful resolution of disputes; freedom of navigation; reasonable and equitable utilization of Mekong waters; state responsibility for injurious activities; and environmental integrity of the Mekong River, including its natural flows); *see also* Le Thanh Long, *Vietnamese Water Resources Legislation and Legal Regulation of Dams: Viewed through the World Commission on Dams' Suggested Policy Framework*, 16 AM. U. INT'L L. REV. 1631, 1657 (2001) (enumerating in detail the powers of the MRC to make decisions regarding its member countries' use of the river); The Water Page, *Comment on the 1995 Mekong Agreement*, *available at* http://www.thewaterpage.com/mekong_comments.htm (last visited Mar. 19, 2006) (explaining the structure and goals of the MRC).

7. *See* Neil Ford, *Southeast Asia Turns Back to Hydropower,* WATER POWER & DAM CONSTRUCTION, Dec. 13, 2005, at 10 (describing the common goals that are being protected by the formation of the MRC); *see also* Liebman, *supra* note 2, at 281 (remarking on the Commission's focus on the goal of controlling the navigability of the river); Mekong River Agreement, *supra* note 6 (requiring that all member states cooperate and consult with the other member states before taking any action that would effect the Mekong River).

8. *See* Angela Z. Cassar & Carl E. Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 N.Y.U. ENVTL. L.J. 169, 242 (2003) (demonstrating an example of the resolution process at work during a disagreement about the Upper Mekong Navigation Improvement Project); *see also* Liebman, *supra* note 2, at 281 (reiterating the principles that are protected by the MRC Agreement); Mekong River Agreement, *supra* note 6 (documenting the resolution process that is intact for member countries when cooperation has broken down).

9. *See* Hirsch, *supra* note 5, at 399–401 (looking at China's absence from the MRC and the comparative advantage it brings); *see also* Rix, *supra* note 4, at 128 (illustrating the various methods that Commission states have used in order to get China involved in discussion about the Mekong River); Ford, *supra* note 7, at 10 (expressing the difficulties presented as a result of China's refusal to join the Commission).

China, the Mekong Basin's hegemonic power, might be justifiably reluctant to place itself in a position that limits, under the auspices of the MRC, its freedom of action in utilizing or controlling the portion of the river's resources within its sovereign territory.[10] According to Milton Osborne, an expert Mekong researcher:

> While China has never made public the reasons for its fail[ure] to join the Commission, these are not hard to find. As indicated by its failure to consult downstream countries in relation to its dam building programs on the upper Mekong in Yunnan province, China takes the view that it has no obligation to submit its actions, so far as these relate to that section of the Mekong River in its territory, to discussion or consideration by other countries . . . . Sources in China, speaking in February 2004, made it clear that this attitude is unlikely to change.[11]

In this article I will argue that, although the Chinese hydropower projects on the upper Mekong will likely result in adverse transboundary environmental and economic effects in violation of international law, the legal remedies that the injured downstream riparian states have at their disposal are not promising. This article will begin with a description of the environmental and anthropocentric concerns that the Chinese hydropower projects are generating. Second, it will identify applicable principles and norms of international law in order to illuminate China's legal obligations to the downstream riparian states, which will suffer the adverse impacts of its upper Mekong hydropower projects. Third, it will propose possible avenues under which the downstream riparian states can seek a resolution to the diplomatic, legal, and environmental problems associated with the dam construction.

I. Discussion

A. The Chinese Hydropower Scheme and Its Adverse Transboundary Environmental Effects

China has completed two large power generating dams on the upper Mekong (the Manwan and the Dachaoshan), has begun work on a third and fourth at Xiaowan and Jinghong,

10. *See* Jasper Becker, *Why All the World Feels China's Growing Pains; The Side Effects of the Chinese Economic Miracle Have an Increasingly Global Reach*, INDEP. (London), May 8, 2004, at 34 (monitoring the problems that neighboring countries have had with China's refusal to consult with them before acting); *see also* Lisa Mastny, *Messing with the Mekong,* WORLD WATCH, Nov. 1, 2003, at 21 (focusing on China's dominant role in the region, and the control that it has over the operations of the Mekong River); Perlez, *China's Reach*, *supra* note 3, at A1 (admitting the weakness of the MRC without China as one of its members).

11. *See* Milton Osborne, *The Mekong and the Water Politics of China and Southeast Asia*, LOWY INST. FOR INT'L POL'Y at 7–8 (2004) [hereinafter Osborne, *Water Politics*] (discussing China's refusal to become a member of the Commission and admitting that recent efforts to persuade China to join the MRC have proved "fruitless"); *see also* Ben Boer, *The Rise of Environmental Law in the Asian Region*, 32 U. RICH. L. REV. 1503, 1523 (1999) (alleging that a major pitfall of the MRC Agreement is the nonparticipation of China as an upstream state); Alexandra Knight, *Global Environmental Threats: Can the Security Council Protect Our Earth?*, 80 N.Y.U. L. REV. 1549, 1575 n.120 (2005) (acknowledging the veto power China enjoys as a member of the Security Council and informing that this power could interfere with attempts to negotiate a regional watercourse agreement with downstream states).

and has plans for an additional four dams[12] to complete its "grand cascade" of eight dams.[13] The Mekong, like all rivers, is, however, much more than a "giant battery."[14] The Mekong Basin encompasses a complex riverine system on which over 60 million[15] mostly impoverished[16] people depend for their nourishment, livelihood, and transportation.[17] Historically, the Mekong's annual and predictable flood–drought cycle and its downstream discharge of nutrient-rich sediment helped maintain the viability of fisheries and agriculture, the two primary

12. *See* James Kynge, *Yellow River Brings Further Sorrow to Chinese People*, FIN. TIMES (London), Jan. 7, 2000, at 8 (recognizing that construction of the Jinghong and Xiaowan dams have raised both economic and environmental concerns); *Watching the Mekong Flow*, ECONOMIST, Sept. 7, 1996, at 31 (positing that it will take a great deal of money in order for China to realize its dream of using hydropower to develop its poorer provinces); *see also* John Vidal, *Dammed and Dying: The Mekong and Its Communities Face a Bleak Future*, GUARDIAN (London), Mar. 25, 2004, at 3 (expressing fear that China's plans to build six more dams on the Mekong could be devastating for the people and environments of the Mekong's downstream countries).

13. *See* Blake, *China's Lancang Dams*, *supra* note 4 (detailing the eight planned dams on the upper reaches of the Mekong and discussing their impacts on downstream and upstream areas); *see also* Perlez, *China's Reach*, *supra* note 3, at A1 (listing China's eight dams, their targeted completion dates, and estimating how many people will be displaced by the construction of each). *See generally* Francis N. Botchway, *The Context of Trans-Boundary Energy Resource Exploitation: The Environment, the State, and the Methods*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 191 (2003) (predicting that the world economy's overwhelming dependence on energy will lead countries to exploit water resources in the search for alternative energy sources).

14. *See* Rix, *supra* note 4, at 126–27 (suggesting that "evil lurks" in the plans of government officials and developers to turn the Mekong River Basin into the "battery of East Asia"); *see also* Moreau & Ernsberger, Jr., *supra* note 5, at 26 (opining that the challenge for governments along the Mekong is to figure out how to use the river to advance economically without destroying it); Michael Richardson, *In Its Water, Laos Sees Power to Cut Poverty: A Hydro Megaproject/Banking on Investors*, INT'L HERALD TRIB., Mar. 11, 2002, at 2 (quoting officials who believe hydroelectric power is the key to developing the Mekong and reducing poverty in Laos).

15. Over the next two decades the population of the Mekong Basin is predicted to increase to over 100 million inhabitants. *See* Trần Tiến Khanh, *Death of a River: The Mekong River and the Chinese Development Project Upstream*, Feb. 2003, at ¶ 1, *available at* http://www.vnbaolut.com/deathofariver.html (last visited Mar. 7, 2006) [hereinafter Khanh, *Death of a River*] (reporting that over the next two decades the population of the Mekong Basin is predicted to increase to over 100 million inhabitants); *see also* Hirsch, *supra* note 5, at 401 (revealing that 60 million people call the Mekong River Basin home); John Henderson, *A Tale of Two Countries: Vietnam–Cambodia Trip on Mekong River Reveals Industry Disparities*, DENV. POST, July 17, 2005, at T07 (referring to the Mekong River as "the lifeblood" of over 60 million people).

16. *See* Karen Bakker, *The Politics of Hydropower: Developing the Mekong*, 18 POL. GEOGRAPHY 209, 214 (1999), *available at* http://www.geog.ubc.ca/~bakker/PDF/hydropoli.pdf (last visited Mar. 8, 2006) (announcing renewed economic interest in Southeast Asia and detailing the hydro-development plans that have been initiated to develop the impoverished Mekong); *see also* Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L L. & BUS. 315, 338–39 (2005) (informing that a large number of people living in the Mekong Delta area are poor catfish farmers who are dependent upon the river for their income); Richard Mogg, *supra* note 3, at 8 (classifying the lower Mekong countries as "low-income economies" and describing the majority of people living there as "poor and underprivileged").

17. *See* Tun Myint, *Democracy in Global Environmental Governance: Issues, Interests, and Actors in the Mekong and the Rhine*, 10 IND. J. GLOBAL LEGAL STUD. 287, 297 (2003) (illustrating the critical role the Mekong River assumes in the daily lives of more than 50 million people as a source of food, water, and transportation); *see also Economic Promises Float Along the Mekong*, FOREIGN POL'Y, July 1, 2003, at S1 (noting the Mekong's rich agricultural base, fisheries, minerals, and energy and proclaiming the river basin as a "vast area of enormous wealth and variety of natural resources"); International Rivers Network, Mekong River—The Lifeblood of Southeast Asia, *available at* http://www.irn.org/programs/mekong (last visited Mar. 8, 2006) (emphasizing the dependence that the inhabitants of Southeast Asia have on the Mekong River).

food sources of the Mekong Basin's inhabitants.[18] "The Mekong River . . . produces more aquatic resources for human consumption than any other river on the planet."[19] Eight out of ten inhabitants of the Mekong Basin directly depend on the river for their nourishment.[20]

As will be explained below, the Chinese dams' interference with the Mekong's natural flood-flow patterns, effects on water temperature, and blockage of sediment are the factors that, when combined, may lead to severely detrimental effects on the downstream states and the riverine ecology.[21] Related to the anthropocentric and economic harms the dams threaten is the threat to the ecosystems and biodiversity of the region.[22] Not only does the Mekong sustain

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18. *See Chinese Dam May Threaten Food Source of Neighbors*, N.Y. TIMES, Sept. 30, 2001, § 1A, at 13 (presenting the argument that damming the Mekong and changing the flood–drought cycle may have disastrous effects on farms and fisheries); *see also* International Rivers Network, *China's Upper Mekong Dams Endanger Millions Downstream*, Oct. 2002, at 1, *available at* http://www.irn.org/programs/mekong/gmskit/03.uppermekongfac.pdf (last visited Mar. 7, 2006) [hereinafter China's Upper Mekong] (claiming that damming the Mekong will disrupt the predictable flood-drought cycle, thereby destroying fish and fisheries and adversely impacting agriculture).

19. *See* Ryan Mitchell & David Braun, *Giant Catfish Critically Endangered, Group Says*, NAT'L GEOGRAPHIC NEWS (Nov. 18, 2003), *available at* http://news.nationalgeographic.com/news/2003/11/1118_031118_giantcatfish.html (last visited Mar. 8, 2006) (rationalizing that there is hope that the decline in the Mekong's aquatic life caused by human development can be reversed or at least stopped); *see also* J. David Allan et al., *Overfishing of Inland Waters*, 55 BIOSCIENCE 1041, 1041 (2005), *available at* http://www.aibs.org/bioscience-press-releases/resources/05_December_Article_Allan.pdf (comparing the average consumption of fish and other aquatic animals in the Mekong Basin to the global average); *The Sweet Serpent of South-East Asia–The Mekong River*, ECONOMIST, Jan. 3, 2004, at 2 (reporting that "the Mekong and its tributaries yield more fish than any other river system").

20. *See* Cassar & Bruch, *supra* note 8, at 215 (affirming that a significant number of communities depend on the Mekong River Basin); *see also* Osborne, *supra* note 11, at viii (reiterating the dependency on fish for the Mekong diet); Mastny, *supra* note 10, at 21 ("The Mekong supplies about 80 percent of the dietary protein consumed in the Mekong Basin.").

21. *See* David Dudgeon, *Large-Scale Hydrological Changes in Tropical Asia: Prospects for Riverine Biodiversity*, BIOSCIENCE, Sept. 1, 2000, at 793 (asserting that dam building will irreversibly alter flood flow patterns to which riverine species are adapted); *see also* Fred Pearce, *Chinese Dams Blamed for Mekong's Bizarre Flow*, NEW SCIENTIST.COM, Mar. 25, 2004, at ¶ 1, *available at* http://www.newscientist.com/article.ns?id=dn4819 (last visited Mar. 8, 2006) [hereinafter Pearce, *Chinese Dams Blamed*] (assessing the relationship between dam construction on the Mekong and bizarre fluctuations in the river's flow); *see also Damming Laos, Damning the Poor*, MULTINAT'L MONITOR, July 1, 2000, at 20 (exploring the downstream impacts of the dams, particularly those felt by fishing communities).

22. *See* Seth Mydans, *Mission on the Mekong: Save the Giant Catfish*, N.Y. TIMES, Dec. 18, 2002, at A4 [hereinafter Mydans, *Mission on the Mekong*] (explaining that the fish ecology is dependent on the flood-drought cycles that hydropower development smoothes out); *see also Organization Summary: The International Rivers Network*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 409, 413 (1996) (referring to the Mekong Basin hydropower development report which the IRN criticized as failing to assess the cumulative environmental effects of the dams). *See generally* MRC, *available at* http://www.mrcmekong.org/about_mekong/about_mekong.htm (last visited Mar. 5, 2006) (revealing that, after the Amazon, the Mekong River Basin has the greatest diversity of plant and animal life in the world).

human life, it is also home to a diverse array of aquatic and wetland species whose continued survival is imperiled by the construction of the dams.[23] Deterioration of the ecosystem and its biodiversity means a decrease in food security for local people and disruption of economic and social structures which are tightly linked to the viability of that ecosystem.[24] These two overlapping macro-concerns of environment and economy will be addressed separately. In order to provide a balanced analysis of the issue of causation, a review of evidentiary concerns that create some ambiguity regarding China's responsibility will follow the discussion of the felt effects of its program.

B. Anthropocentric and Economic Impacts

The massive upstream dams are blamed for lower water levels which, having reduced the once mighty river to a mere trickle in certain stretches, leave it non-navigable.[25] The mean minimum discharge of the Mekong fell by 25 percent at the Thai-Lao border after the construction of the Manwan Dam.[26] In April 2004, the media reported that, due to low water levels, boats were aground and stranded above Chiang Saen in northern Thailand.[27] The river is,

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23. *See* discussion *infra* pp. 11–13; Rix, *supra* note 4, at 115–16 (acknowledging that the Mekong is home to many species of aquatic life); *see also* Perlez, *China's Reach*, *supra* note 3, at A1 (stating that construction of dams on the Mekong has diminished the river's fish population); Connie Rogers, *The Natural and the Sacred in China*, N.Y. TIMES, Apr. 24, 2005, § 5, at 11 (noting that the Mekong harbors a wide array of species).

24. *See* Perlez, *China's Reach*, *supra* note 3, at A1 (stating that the destruction of wildlife along the Mekong results in lower sustenance for local populations); *see also* SOUTHEAST ASIA RIVERS NETWORK, *Downstream Impacts of Hydropower and Development of an International River: A Case Study of Lancang—Mekong*, Nov. 2004, at 4, *available at* http://www.searin.org/Th/Mekong/mek_down_impact_en.pdf (last visited Feb. 19, 2005) [hereinafter *Downstream Impacts of Hydropower*] (stressing that the deterioration of the ecosystem negatively impacts local populations and social structures); *see also* Pianporn Deetes, *Lancang Development in China: Downstream Perspectives from Thailand,* SOUTHEAST ASIA RIVERS NETWORK, at ¶ 11, *available at* http://www.searin.org/Th/Mekong/mek_down_a_e1.htm (last visited Mar. 19, 2005) [hereinafter Deetes, *Lancang Development in China*] (suggesting that socio-economic collapse may result from the deterioration of the ecosystem).

25. *Thais Blame China over Low Mekong*, BBC NEWS, Apr. 1, 2004, at ¶ 1, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/3591555.stm (last visited Mar. 21, 2006) [hereinafter *Thais Blame China*] (claiming that parts of the Mekong have been rendered non-navigable due to dams built by China); *see also* Joshua Kurlantzick, *The Mysterious Mekong Starts to Reveal Itself*, N.Y. TIMES, Oct. 2, 2005, § 5, at 9 (reporting that parts of the Mekong are in danger of drying up); Liebman, *supra* note 2, at 281 (recognizing that dams built by China along the Mekong contribute to low water levels).

26. *See Downstream Impacts of Hydropower*, *supra* note 24; *see also* Sanitsuda Ekachai, *Dying Breeds*, BANGKOK POST, June 15, 1990, *available at* 2005 WLNR 9761593 [hereinafter Ekachai, *Dying Breeds*] (detailing lower levels of river water after the construction of the Manwan Dam); Quang M. Nguyen, *Hydrological Impacts of China's Upper Mekong Dams on the Lower Mekong River*, June 28, 2003, ¶ 13, *available at* http://www.mekongriver.org/publish/qghydrochdam.htm (last visited Mar. 21, 2006) (stating that the minimum mean discharge decreased by 25 percent due to the construction of the Manwan Dam).

27. Osborne, *supra* note 11, at 2 (acknowledging that the media reported that ships were stranded in the Mekong River in northern Thailand because of low water levels). *See generally China Accused of Obstructing Flow of Mekong River*, THAI PRESS REP., Jan. 31, 2006 [hereinafter *China Accused of Obstructing Flow*] (reporting that China's dams along the Mekong obstruct navigation); *China's Dams Put Mekong on Knife's Edge, Say Researchers*, KHMERBUSINESS.COM, June 30, 2004 (providing that the Mekong has become less navigable for boats after the construction of its dams).

in essence, a liquid highway on which millions of people rely.[28] In some areas of the Mekong, the river provides the only mode of transportation;[29] therefore, any adverse impacts on navigation caused by insufficient water levels will have far-reaching effects.[30] Shipping firms on the Mekong are reporting lost profits because they must significantly reduce the size of their normal cargo loads in order to navigate the now-shallower river without running aground.[31] Not only is operation of the Chinese dams frustrating navigation efforts by reducing water levels, the dams also pose an obstacle to navigation when they release high volumes of water to accommodate large, powerful Chinese vessels making the journey to and from Southern Yunnan.[32] Less powerful Thai and Lao cargo vessels are unable to cope with the swiftly moving high-water releases.[33]

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28. *See* Khanh, *Death of a River*, *supra* note 15, at ¶1 (stating that millions of people rely on the Mekong River); *see also* Perlez, *China's Reach*, *supra* note 3, at A1 (emphasizing that the Mekong serves as the "lifeblood" to millions of people); *Thais Blame China*, *supra* note 25, at ¶ 3 (acknowledging that over 60 million people rely on the Mekong's fish).

29. *See* Kurlantzick, *supra* note 25, § 5, at 9 (stressing that the Mekong is used for transportation); Bakker, *supra* note 16, at 220 (providing that the Mekong provides for transportation) (last visited Mar. 21, 2006). *See generally* Jane Perlez, *Frugal Traveler: Laos, Down the Mekong to a City of Buddhas*, N.Y. TIMES, Jan. 2, 2005, § 5 (reporting that the Mekong is used as a mode of transportation for travelers).

30. Osborne, *supra* note 11, at viii (providing that a negative impact on navigation would affect fishing downstream); *see also China Accused of Obstructing Flow*, *supra* note 27 (discussing the negative impact of low water levels and navigation on the ecosystem); Ekachi, *supra* note 26 (remarking that lower water results in extreme hardship for villagers).

31. *See* Peter S. Goodman, *Manipulating the Mekong; China's Push to Harness Storied River's Power Puts It at Odds with Nations Downstream*, WASH. POST, Dec. 30, 2004, at E01 (documenting that fishing firms are losing profits because of a reduction of fish); *see also Thailand: Critically Low Water Levels Halts Thai-Lao Mekong River Ferry Services*, THAI PRESS REP., Mar. 13, 2006 (reporting that ferry services are negatively affected by low water level along the Mekong River); *Vietnam: Mekong Delta Battles Drought and Salt Water Encroachment*, THAI PRESS REP., Mar. 13, 2006 (stating that lower levels of the Mekong Delta resulted in decreased navigation and losses for local farmers).

32. Osborne, *supra* note 11, at 20 (stating that high water levels due to the dams pose problems to navigation). *See generally* Liebman, *supra* note 2 (maintaining that navigation between China and countries to the south along the Mekong is an issue); *Vietnam: Transport and Communications,* EIU VIEWSWIRE VIETNAM, Oct. 4, 2005 (reporting that navigation along the Mekong is affected by changing water levels).

33. *See* Osborne, *supra* note 11 (stating that less powerful boats are not capable of handling the large amount of water). *See generally* Sanitsuda Ekachai, *Doing It for Themselves*, BANGKOK POST, June 27, 2005, *available at* 2005 WLNR 10157520 [hereinafter Ekachai, *Doing It for Themselves*] (providing that navigation channels along the Mekong to Thailand from China exist); Kurlantzick, *supra* note 25 (stating that travel along the Mekong is possible from China).

Lowered and erratic water levels not only affect transportation, but fisheries and agriculture as well. Approximately 90 percent of the inhabitants of the Mekong Basin are involved in agriculture.[34] Less flowing fresh water means some farmers will be unable to irrigate their crops.[35] Rice, the primary agricultural product of the Mekong region, requires an ample supply of water and sediment.[36] Diminished flows could also allow saltwater intrusion from the South China Sea into the Mekong Delta in Vietnam—leading to the destruction of fertile farmlands and frustrating aquaculture efforts.[37] Since more than 50 percent of Vietnam's GDP is generated in the Mekong Delta, primarily through rice agriculture,[38] saltwater intrusion would deal a crippling blow to its national economy.[39]

For many poor families along the Mekong, products from their riverbank gardens are their main source of income and sustenance. Due to erratic water fluctuations and increased erosion, however, these gardens are disappearing.[40] Mike Bird of Oxfam, based in Phnom

34. *See* China's Upper Mekong, *supra* note 18, at 1 (stating that about 90 percent of the Mekong population is engaged in agriculture); *see also* Myint, *supra* note 17, at 298 (explaining that the MRC's annual report states that 45-50 million people are employed in agriculture). *See generally* Rix, *supra* note 4 (emphasizing China's strong commitment to agriculture in regions such as the Mekong River Basin).

35. *See* Greg Browder & Leonardo Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 504 (2000) (stating that most farmers cannot grow rice during the dry season due to a lack of irrigation water). *But see* Bui Chi Buu, *Rice Farmers Urged to Get Smart*, SAIGON TIMES MAG., Mar. 25, 2005, *available at* 2005 WLNR 4662828 (reporting that the rice output from the Mekong region has been rising in recent years). *See generally Vietnamese Cabinet Puts Forth Measures to Boost Growth Rate*, THAI PRESS REP., Mar. 2, 2006, *available at* 2006 WLNR 3519749 (explaining the Vietnamese government's efforts to ensure enough water for the rice crops of its people).

36. *See* Osborne, *supra* note 11, at 3 (stating that the rice fields need water and sediment from the Mekong to flourish); *see also* Annenberg Media Learner.org, Southeast Asia and South Pacific: Discussion of Case Themes, *available at* http://www.learner.org/powerofplace/themes13.html (last visited Mar. 4, 2006) (noting that the river provides soil and water for the rice).

37. *See* Goodman, *supra* note 31, at E01 (describing the possibility that salt water from the South China Sea could spill into the region and ruin crops); *see also* Browder & Ortolano, *supra* note 35, at 504 (explaining that low flows result in the intrusion of seawater into the Mekong Delta). *See generally* Myint, *supra* note 17 (emphasizing the importance of the sustainable utilization of water in the Mekong region).

38. *See* Osborne, *supra* note 11, at 2 (explaining that more than 50 percent of Vietnam's GDP stems from the Mekong Delta); *see also* Alan M. Field, *Field of Dreams*, J. COM., Jan. 2, 2006, at 16, *available at* 2006 WLNR 46938 (claiming that rice is one of the key factors accounting for Vietnam's GDP value). *But see Vietnam Aims for an Industrial Status by 2020*, THAI PRESS REP., Dec. 15, 2005, ¶ 2, *available at* 2005 WLNR 20046442 (stating that economic restructuring should create conditions for agriculture to account for 10 percent of the GDP).

39. *See* Boer, *supra* note 11, at 1511–12 (noting that one of the biggest concerns for the Asian region is the declining availability of fresh water). *See generally* Browder & Ortolano, *supra* note 35 (explaining the importance of water to international basins, including the Mekong River Basin). *But see* Osborne, *supra* note 11, at 21 (stating that, "this could be an instance where the fact that the Chinese dams will 'even out' the flow of the river could have a positive rather than a negative effect, since salination is essentially a dry season problem").

40. *See* Deetes, *Lancang Development in China*, *supra* note 24, at ¶ 3 (describing how the drastic river fluctuations have resulted in serious harm to villagers who depend on the ecosystem of the Basin for their food and livelihood); *see also* Ekachai, *Doing It for Themselves*, *supra* note 33 (detailing the vegetation of the riverbanks and dependency of the people who live near them). *See generally* Piyaporn Wongruang & Preeyanat Phanayanggoor, *Temporary Dykes to Be Constructed*, BANGKOK POST, Aug. 27, 2005, *available at* 2005 WLNR 13512679 (explaining measures planned by the government to ensure that water supplies will be more controlled).

Penh, Cambodia, has remarked regarding the impact of the first Chinese dams: "We've seen the impact on people. The river is more or less dead . . . . The fish cannot spawn when it's dry. Last year, there were sudden and unpredictable releases of water. People along the river are scared to plant vegetables."[41]

In addition to a decrease in available water, as much as 50 percent of the nutrient-rich sediment that is essential for fertilizing agricultural soil is being trapped behind the Chinese dams where it settles uselessly into deposits at the back end of the massive concrete structures, indeed threatening the structural integrity of the dams themselves.[42] Furthermore, it is estimated that one-half of the Mekong's annual sediment load originates in the portion of China where the dams are being constructed.[43] The decrease in the turbidity of the water released from the dams could lead to increased erosion as the "sediment-hungry" water scours downstream banks and beds, further devastating agricultural lands and riverine communities.[44] Wide-scale erosion carries with it significant threats to the financial security and personal safety of downstream people through *inter alia*: alteration of the course and width of the Mekong; the weakening of structural support for buildings, piers, bridges, and other riverside infrastructure;[45] and the ravaging

41. *See* Vidal, *supra* note 12, at 3 (quoting Mike Bird of Oxfam); *see also* Knight, *supra* note 11, at 1574–75 (noting that China's construction of dams on the Mekong River has threatened the people of the riverbanks who rely on the river for food and water). *See generally* Rix, *supra* note 4 (summarizing the uses of the river by the people living on it for agricultural purposes).

42. *See* Perlez, *China's Reach*, *supra* note 3, at A1 (stating that the Chinese dams are holding back as much as 50 percent of the fertile silt that is needed by the soil). *See generally* Deetes, *Lancang Development in China*, *supra* note 24 (noting the risks of current and proposed Chinese dams to China, the Mekong River and Thailand). *But see* Browder & Ortolano, *supra* note 35, at 522 (stating that the Chinese dams will be beneficial to the Mekong Basin).

43. *See* Blake, *China's Lancang Dams*, *supra* note 4 (pointing out that it is estimated that one-half of the Mekong's sediment load originates in China); *see also* Rix, *supra* note 4, at 106–07 (noting that 75-85 million annual tons of river sediment originating in China spreads throughout the Basin). *See generally* Vasana Chinvarakorn, *Troubled Waters*, BANGKOK POST, Mar. 8, 2005, *available at* 2005 WLNR 3563272 (discussing the movement of sediment throughout the Mekong River, as well as the recent construction of dams by the Chinese).

44. *See* Tyson Roberts, *Downstream Ecological Implications of China's Lancang Hydropower and Mekong Navigation Project*, INT'L RIVERS NETWORK, 2001, *available at* http://www.irn.org/programs/lancang/021112.ecoimplications.html (last visited Mar. 4, 2006) (detailing the possible consequence of erosion that results from the "sediment-hungry" water released from the dams); *see also* Doris Shen, *Mobilizing Against China's Dam Plans*, TRINGYI-PHO-NYA: TIBET'S ENV'T & DEV. DIG., Mar. 3, 2004, ¶ 3, *available at* http://www.tibetjustice.org/tringyiphonya/num5.html (last visited Mar. 4, 2006) (stating that the release of "sediment-hungry" water from Chinese dams would destroy the riverbank's ecosystem). *See generally* Southern African Research and Documentation Centre, Water and Water Resources in the SADC Region, *available at* http://www.sardc.net/WaterBook/chap1/threats.htm (last visited Mar. 4, 2006) (summarizing the impacts of dams on the lower Zambezi River, including that erosion was most likely a result of the release of sediment-hungry water from a dam).

45. *See* Blake, *China's Lancang Dams*, *supra* note 4 (presenting the consequences of widespread erosion, such as significant financial losses and threats to the safety of downstream areas); *see also* Nancy Nelson, *Water Allocation*, 1996 COLO. J. INT'L ENVTL. L. & POL'Y 120, 126 (1996) (noting the adverse effects resulting from the Mekong's infringement); Jane Perlez, *China's Growth Threatens Mekong but Nations on River Put Trade Needs First*, INT'L HERALD TRIB., Mar. 21, 2005, at 1 [hereinafter Perlez, China's Growth] (revealing some of the detrimental effects of erosion due to the changes in the Mekong River).

of terraced garden plots carved into the sloping banks.[46] To provide a concrete example, during the rainy season of 2002–2003, four households in the Thai village of Pak Ing lost an entire bank of land to the river, while on the opposite bank of the river in the Laotian village of Baan Don Sawan, the land and homes of 113 families were swept away by the river.[47]

Not only is agriculture being disrupted by the newly irregular flows of the Mekong, but food security in the form of native plants and fish is threatened as well.[48] Mekong seaweed, known as "kai," is a valuable source of protein and income for inhabitants in the upper reaches of the river.[49] Due to the unnatural fluctuations in the water levels, the clear dry-season conditions necessary for kai to grow are no longer present and it has stopped growing from the Myanmar-Laos border to the Chiang Kong district in northern Thailand.[50]

Another natural food source and economic base threatened by the dams are the Mekong's fisheries. The harvest of wild fish provides residents of the Mekong Basin with 80 percent of their intake of protein,[51] and amounts to a $2 billion annual catch.[52] Presently, no obvious

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46. *See* Goodman, *supra* note 31, at E01 (describing the ruination of farm land caused by the river's waters)*; s*ee also Ekachai, *Doing It for Themselves*, *supra* note 33 (highlighting the eroding effect of the Mekong's deterioration upon "kitchen-garden" plots)*;* Rix, *supra* note 4, at 111 (providing insight as to the great number of riverbank crops at risk).

47. *See* Deetes, *Lancang Development in China*, *supra* note 24, at ¶ 3 (elaborating upon these tragic events, which resulted from the extreme and adverse changes in the river)*; see also* Liebman, *supra* note 2 (discussing the pros and cons of the altered waterways of the Mekong River); Perlez, *China's Growth*, *supra* note 45, at 1 (noting the ramifications on the surrounding land banks resulting from the damming of the Mekong River).

48. *See* Deetes, *Lancang Development in China*, *supra* note 24, at ¶ 3 (positing that ecological damage and deterioration have contributed to goods shortages in the areas surrounding the river)*; see also* Anchalee Kongrut, *Green Weed Hopes Wither*, BANGKOK POST, June 12, 2005, *available at* 2005 WLNR 9331143 (testifying how the native Mekong seaweed is heading toward extinction as a result of the Mekong water level alterations)*;* Kurlantzick, *supra* note 25, § 5, at 9 (commenting on the Mekong's dams serving as a reason for the decline in native fish populations).

49. *See* Deetes, *Lancang Development in China*, *supra* note 24, at ¶ 12 (explaining the vital role that seaweed plays in the communities around the river); *see also* Ekachai, *Dying Breeds*, *supra* note 26 (recognizing kai seaweed as a vital source of nutrition for the Mekong region); Mastny, *supra* note 10, at 21 (pointing to the important protein content of the kai plant for the Mekong region).

50. *See* Deetes, *Lancang Development in China*, *supra* note 24, at ¶ 11–12 (highlighting the difficulties that the kai seaweed has had in growing); *s*ee also Ekachai, *Dying Breeds*, *supra* note 26 (acknowledging the serious deterioration of the Mekong seaweed); Sanitsuda Ekachai, *Some Water Problems Are Made in China*, BANGKOK POST, Mar. 24, 2005, *available at* 2005 WLNR 4646389 (detailing the destructive effect the fluctuating water levels have upon the Mekong seaweed).

51. *See* China's Upper Mekong, *supra* note 18, at 1 (describing the Mekong Basin's reliance on the river's waters as a prominent source of food); *see also Ecological Disaster in the Making*, CANBERRA TIMES (AUSTL.), Sept. 20, 2004, at A13 (remarking on the essential nature of the fishing industry in the Mekong regions); *Water and Food Focus of New Mekong Research Programme,* THAI PRESS REP., Apr. 3, 2003 (commenting on how crucial the fish industry is for the local Mekong population's protein intake).

52. *See* Perlez, *China's Reach*, *supra* note 3, at A1 (mentioning the people who depend on the "$2 billion annual catch of migratory fish"); *see also* Allan et al., *supra* note 19, at 1041 (providing insight into the vast amount of fish consumption in the Mekong region compared with the global level); Liebman, *supra* note 2 (outlining the potential financial significance of change in the Mekong waterway).

alternative protein source is available to the Mekong Basin's inhabitants in the event the fisheries collapse.[53] Like agriculture, the health of fisheries will be negatively affected by a change in the natural flows and the decreased sediment load of the water.[54] Fish are extremely sensitive to temperature fluctuations and will be negatively affected by the water released from the dams, which is much colder than the downstream waters.[55] The MRC claimed the fish catch dropped by almost 50 percent in 2004.[56] This significant drop followed declines of approximately 15 percent in both 2001 and 2002.[57] In addition to the findings in the MRC report, severe fishery declines have been recorded by many villages.[58] These declines have taken place despite an increase in fishing effort and efficiency.[59] Additionally, fishermen are having trouble catching fish when the river levels drops too low for navigation and when water levels are fluctuating up and down rapidly because it is difficult to operate vessels in these conditions.[60] Aquaculture

53. *See* Osborne, *supra* note 11, at 7–8 (suggesting the severity of the troubles the river has caused with regards to food shortages); *see also* James R. Davis & Rafik Hirji, *The Myth of Water Wars*, 6 GEO. J. INT'L AFF. 115 (2005), *available at* 2005 WNLR 8621711 (noting the Mekong region's direct dependence on the fishing industry); Perlez, *China's Reach*, *supra* note 3, at A1 (describing the complete dependence upon the fishing and agricultural industries for life to exist).

54. *See* Rix, *supra* note 4, at 103–04 (illustrating the negative effects of water level fluctuation as a result of unnatural damming on the Mekong); *see also* Browder & Ortolano, *supra* note 35, at 503–04 (discussing the problematic water migration situation present in the Mekong, and its destructive effects on surrounding life); Liebman, *supra* note 2 (explaining the disastrous ramifications of the decreased sediment load and changes in natural water flow).

55. *See* Perlez, *China's Reach*, *supra* note 3, at A1(stating that the water temperature fluctuates almost daily); *see also* Christina Rocha, *Temperature Fluctuations Mean Trouble in Fish Ponds,* DELTA FARM PRESS, May 25, 2001, at 21 (explaining that the temperature fluctuations weaken the immune systems in fish and therefore make them prone to disease). *See generally* Wallace Kaufman, *How Nature Really Works: New Ecology,* AMERICAN FORESTS, Mar. 1993, at 17 (indicating that better monitoring of temperature changes in water needs to be done to help protect fish).

56. *See* Goodman, *supra* note 31, at E01 (discussing great concern for the decline in fish caught during 2004); *see also Ecological Disasters in the Making,* CANBERRA TIMES (Austl.), Sept. 20, 2004, at A13 (indicating fear many fisherman have concerning the death of fish); Osborne, *supra* note 11, at 8 (stating that the fish catch dropped by 50 percent from the previous year).

57. *See* Mydans, *Mission on the Mekong*, *supra* note 22, at A4 (noting that the Mekong River Basin is being degraded annually); *see also Ecological Disasters in the Making*, *supra* note 56, at A13 (indicating that not only has the amount of fish caught decreased, but the size of the fish caught has decreased as well); Osborne, *supra* note 11, at 8 (stating that the decline has been going on for a few years and there is fear that it will only get worse).

58. *See* Su-Yin*, Mekong Blasting Threatens Livelihood of Millions; The China-backed Project to Widen the River Is Expected to Hurt Fishing, Tourism and Other Local Trades,* STRAITS TIMES (Sing.), July 26, 2003 (explaining the villagers' problems); *see also* Vidal, *supra* note 12, at 3 (quoting a villager about his plight).

59. *See* Osborne, *supra* note 11, at 8 (noting that the decrease in fish caught is taking place despite new developments); *see also Ecological Disasters in the Making, supra* note 56, at A13 (describing the construction done on the river that has caused this adverse affect); *Journals*, Weekend Austl., Sept. 4, 2004, at 23 (explaining the reasons why, despite development, the wildlife is still suffering due to neglect).

60. *See* Nirmal Ghosh, *Water Level at Mekong Down to 20-year Low; As the Water Levels Drop, Six Countries Which Share the River Are Forced to Study Ways to Protect Crops and Fish Stocks,* STRAITS TIMES (Sing.), Mar. 16, 2004 (explaining that water levels have become so low that villagers can walk across the river); *see also* Perlez, *China's Reach*, *supra* note 3, at A1 (quoting a villager's account of the problem with the river); Edward Tang, *'Dams May Give China Control over Mekong'; Countries Downstream Fear a Series of Dams Will Damage the Ecology and Hurt the Livelihood of Millions,* STRAITS TIMES (Sing.), Nov. 15, 2002 (noting that breeds of fish are dying out because the water level is not high enough).

production in parts of Thailand has fallen by nearly one-third over the past two years due to shifts in water level and changes in water temperature that have adversely affected fish farms.[61]

Of particular significance is the possibility that the Chinese dams will cause the natural, annual reverse flow of the Tonle Sap to cease.[62] The "Great Lake," as it is also known, is so unique and essential to the ecological well-being of the region that it was nominated by UNESCO as a Biosphere Reserve.[63] The Tonle Sap is somewhat of a hydrological oddity.[64] During peak flows on the main Mekong, there is so much water in the main channel that it forces the flow of the Tonle Sap, a tributary of the Mekong, to reverse its direction of flow back towards its source, a shallow lake and wetland area located in Central Cambodia.[65] When the flow reverses—the water moves along an uphill gradient, against gravity, to fill the shallow lake to ten times its size, flooding the surrounding wetlands and rice fields with fertile sediment-laden water.[66] When water levels on the Mekong begin to drop again in the dry season, the

61. *See* Goodman, *supra* note 31, at E01 (detailing how much villagers are losing due to this problem); Suparb Pasong & Louis Lebel, *Political Transformation and the Environment in Southeast Asia,* ENVIRONMENT, Oct. 1, 2000, at 8 (explaining that the fall in aquaculture production has led to villages being deserted). *See generally* Julian Cribb, *Toxic Red Tides Choke Asia's Seas,* WEEKEND AUSTL., Aug. 12, 1995 (describing reasons for decline in aquaculture).

62. *See* Mike Bingham, *Temples to a Tourism Boom,* SUNDAY TASMANIAN (Austl.), Apr. 15, 2001 (describing the fear that building dams has brought to the people); *see also Mekong's Vast Food Source Drying Up,* CANBERRA TIMES (Austl.), Apr. 23, at A13 (explaining that the dams are also catching soil harming other parts of the ecological system); *Downstream Impacts of Hydropower*, *supra* note 24 (stating that there is fear that Tonle Sap will dry up completely).

63. *See* Bakker, *supra* note 16, at 227 (explaining why UNESCO has nominated it as a Biosphere Reserve); *see also* Andrew Ponnampalam*, Birding Paradise in Cambodia*, NEW STRAITS TIMES (Malay.), Sept. 23, 1997, at 7 (describing UNESCO's plan with Tonle Sap); Richard Woodd*, After the Rain*, DAILY NEWS (N.Z.), Oct. 18, 2005, at 12 (stating that Tonle Sap is also called the great lake).

64. *See* John Dore & Yu Xiaogang, *supra* note 1, at 23 (explaining the flow of the Tonle Sap); Richard Strange, *Hidden Dragon–Destination Asia,* AUSTRALIAN, Feb. 3, 2006, at 14 (calling the river flow of the Tonle Sap a trick); *see also Mekong's Vast Food Source Drying Up, supra* note 62, at A13 (describing the "unique spectacle" that is the flow of the Tonle Sap).

65. *See* John Dore & Yu Xiaogang, *supra* note 1, at 23 (describing the flow of the Tonle Sap); *see also* Michael Gebicki, *Asia on Parade,* WEEKEND AUSTL., Feb. 26, 2005, at C05 (explaining that the current reversal marks a festival in Cambodia); Tanya Chilcott Moore, *Tasty Touring*, COURIER MAIL (Austl.), June 11, 2005, at H05, *available at* 2005 WLNR 9229739 (noting that the people of Cambodia celebrate the reversal of the flow of the current of the Tonle Sap).

66. *See* Rix, *supra* note 4, at 126 (referring to the reverse, uphill flow of the river during the wet season); *see also* Strange, *supra* note 64, at 14 (marveling at the "impressive party trick" of the upstream flow of the Tonle Sap River); John Dore & Yu Xiaogang, *supra* note 1, at 23 (explaining the varying depth of the Tonle Sap and the impact it has as a sedimentary delivery system).

Tonle Sap once again reverses its flow, with the water now flowing "normally"—downhill from its source towards the Mekong—and replenishing the thirsty river and delta with its discharge along the way.[67] To use an anatomical-hydrological metaphor, the Tonle Sap is the Mekong's "bladder."[68]

The annual flooding of the Tonle Sap maintains the productivity of Cambodia's rice industry and fisheries, which supply over 60 percent of Cambodia's 11 million citizens with their daily intake of protein.[69] Without the annual reverse flow of the Tonle Sap, Cambodia's fisheries and rice agriculture base would likely collapse.[70] The integrity of this complex and delicate hydro-ecological interface depends on the occurrence of voluminous high-water flows during the peak of the wet season.[71] Because China's dams interfere with the natural flow and flood patterns of the main Mekong, the peak flows needed to flood the Tonle Sap might disap-

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67. *See* Jan Forrester, *A Damming Indictment of China's Power*, AUSTRALIAN, Mar. 10, 2003, at 14 (explaining how the Tonle Sap becomes gorged with rain water and melting snow, and temporarily stabilizes, with no water flowing in either direction, before the water finally rushes back in the other direction, carrying fish with it); *see also* Moore, *supra* note 65, at H05 (describing the Bonn Om Tuk Water Festival, which celebrates the flow of the Tonle Sap into the Mekong River at the end of the rainy season); Woodd, *supra* note 63, at 12 (warning tourists not to travel to Cambodia during the annual water festival in November, which marks the end of the rainy season, and the return of the normal, downhill flow of the river).

68. *See* Bakker, *supra* note 16, at 227 (analogizing the Tonle Sap Lake to a bladder, holding back water from the Mekong River); *see also* Stefan Lovgren, *Saving the Big Fish; Zeb Hogan Is Hooked on Rescuing the Catfish of Cambodia from Oblivion*, HAMILTON SPECTATOR (ONT.), Jan. 21, 2006, at D20 (explaining how, at the end of the rainy season, as the Tonle Sap Lake gets smaller, it pushes its water containing mature fish into the Mekong River); *Jewels of the Jungle*, MANILA BULLETIN (PHIL.), Oct. 30, 2005, ¶ 8 ("[T]he Tonle Sap swells from 2,500 square kilometers in the dry season to more than 12,000 square kilometers in the wet season.").

69. *See* Rix, *supra* note 4, at 115–16 (calling the Tonle Sap the "agricultural heartland of Cambodia" for providing irrigation to the rice paddies and protein, in the form of fish, to 60 percent of Cambodians); *see also* Lovgren, *supra* note 68, at D20 (affirming that fish are "tremendously" important to Cambodians, since they account for up to 80 percent of daily Cambodia protein intake); Tom Vater, *Cambodia Calling*, NATION (THAI.), Oct. 8, 2005, at 1 (dubbing the Tonle Sap the "agricultural heart of Cambodia" for irrigating the rice paddies and providing nearly one-half of the country's protein in the form of fish); *Tonle Sap, the Flowing Heart of Cambodia*, (Nat'l Pub. Radio Morning Edition broadcast Dec. 6, 2005) (asserting that Cambodians depend on fish for 70 percent of their protein, and value fish so much that their currency is even named after an indigenous species).

70. *See The French Version of Lewis and Clark*, NATION (THAI.), June 25, 2005, ¶10 (quoting author John Keay, referring to the Mekong River and the Tonle Sap, saying, "Without the river and the lake, the Cambodian diet would not be deficient just in protein; it would be deficient period."); *see also* John Dore & Yu Xiaogang, *supra* note 1, at 23 (summarizing the threat from Chinese dams perceived by researchers). *But see* Goodman, *supra* note 31, at E01 (commenting that China's dams are not the only risk to Cambodia's fisheries, but overfishing and habitat destruction are also factors).

71. *See* Joanne Lane, *Holidays: Orient Express*, SUNDAY MERCURY (U.K.), May 2, 2004, at 62 (reporting on the Bom Om Tuk festival, celebrating the end of the wet season and the resulting fertilization of the land); *see also Khmer Lake Offers Seafood Delights*, COURIER MAIL (QUEENSL.), Nov. 1, 2003, at H09 (describing the "incredible natural phenomenon" of the Tonle Sap cycle, which brings fish and irrigation to nearly one-half of Cambodia's people); John Dore & Yu Xiaogang, *supra* note 1, at 23 (hypothesizing that changes in water flow and temperature, caused by the Chinese dams, will pose a threat to the Tonle Sap region).

pear, thus having devastating effects on Cambodia.[72] Researchers producing data on the Tonle Sap concluded that:

> regional developments utilizing the Mekong water, such as extensive damming of the tributaries and the main river (in China), as well as irrigation, may lead to lower downstream flood levels and extensive trapping of sediments, and thereby have a negative effect on the fertility of the Tonle Sap system, which appears to be dependent on high flood levels with a high sediment load.[73]

As Cambodian Prime Minister Hun Sen has warned, a vital source of fish for his country could dry up if upstream development projects on the Mekong are not handled carefully.[74]

Concern over maintaining the viability of the Tonle Sap was expressly addressed in the MRC Agreement, which requires "cooperat[ion] in the maintenance of the flows on the mainstream from diversions, storage releases, or other actions of a permanent nature . . . to enable the acceptable natural reverse flow of the Tonle Sap to take place during the wet season."[75] As noted earlier, China is not, however, a member of the MRC, and therefore not bound by the MRC Agreement to cooperate in ensuring that hydrological conditions necessary to ensure the

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72. *See* Kurlantzick, *supra* note 25, § 5, at 9 (positing that many tourists are taking advantage of boat tours of the Mekong because, as a result of the Chinese dam project, some remote sections of the river might not be around much longer); *see also* John Dore & Yu Xiaogang, *supra* note 1, at 23 (noting that the closure of a dam in 1993 cut the sediment load of the lower Mekong region in half, and while the potential impact of more dams is not entirely clear, researchers see more dams as a threat). *But see Ecological Disaster in the Making*, *supra* note 51, at A13 (cautioning a closer look at other factors, including a recent baby boom and resulting widespread poverty, leading to overfishing, and a recent unusually short rainy season, before placing the blame squarely on China's dams).

73. *See Vietnam's Mekong Delta from Space During a Rare Cloudless Day*, SPACE DAILY, May 20, 2005, ¶ 3 ("[The] Mekong silt, [with] rich alluvial deposits . . . support . . . one of the world's great fisheries [and] replenish . . . local wetlands and supplies fresh nutrients to forests and farmland."); *see also* Juha Sarkkula et al., *Modelling Tonle Sap for Environmental Impact Assessment and Management Support, Final Report*. FIN. ENV'T INST. & EIA LTD., 2003, at 44, *available at* http://www.eia.fi/wup-fin/Reports/wup-fin1/WUP-FIN_FinalDraft.pdf (last visited Mar. 9, 2006) (predicting negative downstream consequences of the Chinese damming project).

74. *See* Deetes, *Lancang Development in China*, *supra* note 24, at ¶¶ 3, 9–10; *see also Cambodian Premier Addresses Greater Mekong Subregion Summit*, NEW CHINA NEWS AGENCY, Nov. 2, 2002, ¶ 5 (quoting the Cambodian Prime Minister, as saying, "We have a clear, undeniable obligation to promote sustainable development and poverty alleviation across the [Greater Mekong Subregion]."); *Accord Hook, Line and Soldier: Something's Fishy in Cambodia and Prime Minister Hun Sen Will Have None of It*, EDMONTON SUN (Alta.) July 1, 1999, at 2 (citing a threat by Hun Sen to fire any military officer who may be found to be involved with the black market trade in freshwater fish). *But see* James D. Zirin, *Cambodia's Glimmer of Hope*, WASH. TIMES, Feb. 26, 2006, at B03 (criticizing the Hun Sen government of doing nothing to rally U.N. opposition to the Chinese dam project).

75. *See* Mekong River Agreement, *supra* note 6, art. 6 (agreeing to cooperate in order to permanently maintain the flow of the Mekong, and specifically of the Tonle Sap); *see also* Goodman, *supra* note 31, at E01 (noting that China is not a member of the MRC, and quoting the director of the Southeast Asia Rivers Network as saying that China "is not concerned about the impact on the lives of people downstream"); *World Resources Institute: Asia's Small-Scale Fishers Vulnerable to Global Fish Crisis, Says New WRI Report*, M2 PRESSWIRE, Sept. 30, 2004, ¶14 (pointing to how fishermen's problems are compounded by the Cambodian government ignoring their outcry against the Chinese dams).

annual reverse flow of the Tonle Sap are maintained.[76] Although not bound by the MRC Agreement, customary law may bind China,[77] as will be discussed below.

C. Ecosystem Impacts

Alongside the potentially devastating human consequences of China's hydropower development plans, are the massive potential ecosystem harms likely to result in loss of biodiversity, and the threatened extinction of some fish species.[78] The Mekong River Basin is one of the most biologically rich and productive regions in the world, and home to thousands of other species of birds, turtles, fish, snails, and mussels, many of which remain unidentified.[79] With over 1,245 identified fish species, the Mekong ranks only behind the Amazon River in species diversity.[80] The Yunnan dams would affect the water levels, temperature and flood/drought cycles of the Mekong, changes which would, in turn, affect the birth and growth of all fish spe-

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76. *See* Forrester, *supra* note 67, at 14 (relating the Chinese claim that their damming project will actually benefit the lower Mekong region by bringing in cheap electricity and an increase in tourism); *see also Mekong's Vast Food Resource Drying Up*, *supra* note 62, at A13 (stating that China has refused to join the MRC, which has little doubt that China's dams are harming the lower Mekong region); *The French Version of Lewis and Clark*, *supra* note 70, ¶ 24 (quoting author John Keay, saying that the Chinese are harnessing the Mekong for their own purposes and "there is little other riparian [neighbor] states can do about it").

77. *See* Sherylynn Fiandaca, Comment, *In Vitro Fertilizations and Embryos: The Need for International Guidelines*, 8 ALB. L.J. SCI. & TECH. 337, 395 (1998) (discussing that some forms of humanitarian law are binding on all states and serve as universal customary law as well); *see also* Major Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 269, n.107 (2001) (noting that customary law is binding on all states); Bruce Cronin, *International Legal Consensus and the Control of Excess State Violence*, GLOBAL GOVERNANCE, July 1, 2005, at 311 (indicating that customary law is considered to be universally binding after it has been accepted as such by the international community).

78. *See* Rix, *supra* note 4, at 115–16 (discussing the effect the dams would have on fishermen in the area); *see also* Kibel, *supra* note 2, at 314 (discussing that China's hydropower development has led to harsh conflict between nations—one of the most serious conflicts relating to the impact of the proposed dams on migratory fish, and on the communities that subsist on these fish); *Yunnan Begins Construction of Joint Power-Navigation Facility on Mekong*, CHINA ENERGY WEEKLY, Dec. 23, 2005 (maintaining that China's hydropower development has led to controversy, with opponents saying that the dams built on the river within China's border would have a negative impact on downstream countries in terms of the environment, ease of navigation and power generation).

79. *See Balancing Growth, Environmental Protection a Challenge for China,* STATES NEWS SERVICE, Feb. 2, 2006 (emphasizing that development pressures in southwest China pose threats to one of the most biologically diverse regions in the world); *see also Cambodia Hosts International Symposium on Inland Fisheries,* MALAYSIA GENERAL NEWS, Feb. 11, 2003 (providing that the Mekong River Basin ranks among the top three in the world in species diversity with over 1,500 species of freshwater fish); Mitchell & Braun, *supra* note 19 (declaring that the Mekong River's giant catfish is on the path to extinction).

80. *See* Pratap Chatterjee, *IndoChina/Enviroment: New Mekong Accord Worries Greens*, IPS-INTER PRESS SERVICE, Apr. 4, 1995 (stressing that scientists are still identifying new fish species among the estimated 1,000 believed to live in the river); *see also* Helena Fernz, *Managing Mekong's Resources*, BUS. TIMES (Malay.), Aug. 22, 1996 (recognizing that the Mekong River is the third most biologically diverse river in the world after the Amazon and Zambezi Rivers); Khanh, *Death of a River*, *supra* note 15, at ¶10 (emphasizing that the Mekong River is the second river in the world with the most fish species—with 1,245—just behind the Amazon River in South America).

cies.[81] Additionally, unplanned and unusual releases of water from the Chinese dams have the potential to greatly disturb the river bed, thus negatively affecting its role in providing fish with their necessary sources of food.[82] As researchers from the Southeast Asia Rivers network noted: "As most of the fish in the upper Mekong are migratory species migrating upstream for reproduction, fish depend on the annual river flow. Thus, the water fluctuation inevitably results in a great decline of fish."[83] Additionally, dams will physically block fish migration, which occurs throughout the year and across lengthy stretches of the river.[84] David Blake of River's Watch South and Southeast Asia further explained the potentially disruptive impacts on the Mekong's fish:

> Feeding and spawning conditions for fish that have adapted to living in the sediment-rich Mekong will be seriously disrupted, which may lead to a decline in biodiversity and productivity. Spawning sites may be drastically reduced in the dry season, as rapids fail to become exposed, and in the rainy season lower water levels in the flooded forests of southern Laos and Cambodia will affect important fish feeding spawning and nursery grounds. This will result in a major decline in fisheries in the Mekong basin, including possible extinction of some species.[85]

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81. *See* Marwaan Macan-Markar, *Thailand: Changes Along Mekong River Wash Away Tradition, Jobs*, IPS-INTER PRESS SERVICE, Apr. 14, 2002 (asserting that the dams have affected the natural flow of water and cause the water to fluctuate rapidly at times during the day); *see also Environment Hydropower '05: Green Scene,* WATER POWER & DAM CONSTRUCTION, Aug. 23, 2005, at 24 (positing that with a 20-year perspective in mind, flood levels in Tonle Sap will be reduced by over 50 cm, and the lake area will be reduced by 9 percent during flooding); Khanh, *Death of a River*, *supra* note 15, at ¶10 (revealing that the Yunnan dams will modify the water levels, temperature and cycles of the Mekong River that will affect the birth and growth of all fish species).

82. *See* Osborne, *supra* note 11, at 20 (detailing that unusual or unplanned releases of water greatly disturb the river bed and its role in providing food sources for fish); *see also* Liebman, *supra* note 2, at 281 (commenting that, "[b]ecause they accumulate silt and sediment, they prevent critical nutrients from being carried downstream, where they fertilize the soil and provide food for fish); *Lower Mekong Region Agriculture Threatened by Water Scarcity*, XINHUA GENERAL NEWS SERVICE, Mar. 10, 2004 (revealing that the dams constructed along the river would affect the flow of the river and cause water access problem for food production).

83. *See* Albert E. Utton & John Utton, *The International Law of Minimum Stream Flows*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 7, 17 (1999) (positing that the damning of rivers can result in upstream sedimentation, possible changes in estuarine conditions and interference with fish migration, all of which can adversely affect biological diversity and productivity); *see also Downstream Impacts of Hydropower*, *supra* note 24 (noting that water fluctuation inevitably results in a great decline in fish); *China Urged to Cooperate on Mekong Water Management*, THE NATION (Thail.), Jan. 27, 2006, ¶ 6 (concluding that dam development would critically affect water flow into the lower Mekong River and that the impact might be severe enough to push some species of freshwater fish into extinction).

84. *See* Bakker, *supra* note 16, at 218 (claiming that dams will physically block fish migration that occurs during all times of the year); *see also* Utton & Utton, *supra* note 83, at 17 (arguing that, "[t]he damming of river systems can result in upstream sedimentation, possible changes in estuarine conditions and interference with fish migration); *Mekong's Vast Food Resource Drying Up, supra* note 62, at A13 (declaring that there is a strong relationship between flood flows and fish migration and that the flattening of the flood peaks would have a severe effect on the river's ecosystem).

85. Blake, *China's Lancang Dams*, *supra* note 4; *see also* John Charles Kunich, *Fiddling Around While the Hotspots Burn Out*, 14 GEO. INT'L ENVTL. L. REV. 179, 249–50 (2001) (explaining that the huge hydroelectric dams threaten much of the biodiversity in and near the Mekong).

For example, since the completion of the Manwan Dam, one-half of the 120 fish species indigenous to the Mekong in the Jinghong region can no longer be found.[86]

The dams are also likely to affect the continued survival of several species of critically endangered megafauna endemic to the Mekong region, including: Mekong giant catfish, the freshwater Irrawaddy dolphin, and the Siamese crocodile (the world's "most endangered" reptile).[87] The Mekong giant catfish (*Pangasianodon Gigas*) was relisted from endangered to "critically endangered" by the World Conservation Union (IUCN) in 2003.[88] This species is thought to be the largest freshwater fish in the world.[89] Scientists believe the Mekong giant catfish is an indicator species whose disappearance correlates to the decline in the environmental conditions throughout the river.[90] Damming is one of the many factors that threaten the continued survival of this charismatic creature.[91] For example, the Mekong giant catfish is believed

86. *See* Osborne, *supra* note 11, at 22 (commenting that one-half of the fish species indigenous to the region no longer exist); *see also* Peter O'Sullivan & Matt Lipsey, *Mud and Greed Choke Life Out of Cambodian Lake*, THE TIMES, Dec. 17, 1994, ¶ 6 (stating that the quantity of fish in the river has decreased dramatically); Michael Richardson, *Harnessing the Mighty Mekong*, THE AUSTRALIAN, Apr. 28, 1997, at 24 (declaring that building dams will wipe out migratory fish species and rare animals and displace thousands of villagers).

87. To access more information on the critically endangered Siamese crocodile (*Crocodylus siamensis*), see the IUCN Redlist Report, *available at* http://www.iucnredlist.org/search/details.php?species=5671 (last visited Mar. 9, 2006). For more information on the Mekong giant catfish and the Irrawaddy dolphin, see discussion *infra* pp. 22 & 57. *See* Macan-Markar, *Thailand*, *supra* note 81 (reporting that the fisherman of Chiang Khong failed to net a single Mekong giant catfish during the previous year); *see also* Richard Mogg, *supra* note 3, at 8 (maintaining that the Mekong's unique Irrawaddy dolphin, giant catfish, and Siamese crocodile are all becoming rare).

88. *See* Ronald C. Smith et al., *Year in Review: The International Environmental Community Celebrates a Series of Successes but Laments the One that Got Away*, 13 J. TRANSNAT'L L. & POL'Y 499, 529 (2004) (announcing that the IUCN's 2003 Red List has labeled the Mekong giant catfish as critically endangered); *see also* Mitchell & Braun, *supra* note 19 (acknowledging that the Mekong giant catfish was classified as critically endangered by the World Conservation Union in 2003); Michelle Pountney, *2000 Join List of Species at Risk*, HERALD SUN (Austl.), Nov. 22, 2003, at 16 (noting that the Mekong giant catfish is among the most critically endangered species).

89. *See* Owen Bowcott, *Conservation Clash: Animal Rights Protest Puts £375m Aquatic Centre at Risk: Groups Object to Role of Drug Companies: Backers Say Eden-Style Site Will Preserve Species*, THE GUARDIAN (U.K.), Mar. 6, 2006, at 9 (commenting that the Mekong giant catfish is the largest freshwater fish in the world); *see also* Michael Kilian, *Not Enough Cole Slaw in Asia for This One*, CHI. TRIB., June 30, 2005, at 14 (remarking that a 646-pound Mekong giant catfish was the largest freshwater fish ever recorded); Mitchell & Braun, *supra* note 19 (mentioning that the Mekong giant catfish is the largest freshwater fish according to the Guinness Book of Records).

90. *See* Seth Mydans, *Truly, It Was a Whopper, but Are There Bigger Fish?*, N.Y. TIMES, Aug. 26, 2005, at 4 (proclaiming that the Mekong giant catfish is being threatened by overfishing, pollution, and development); *see also Fish Tale to End All Fish Tales*, DETROIT FREE PRESS, July 1, 2005, ¶ 7 (confirming that the Mekong giant catfish has been declining mainly because of dams and environmental damage along the Mekong River); Mitchell & Braun, *supra* note 19 (revealing that the Mekong giant catfish has been disappearing because of the decline in environmental conditions along the Mekong River).

91. *See* Mark Clayton, *Big Fish that (Sadly) Aren't Getting Away*, CHRISTIAN SCI. MONITOR, July 14, 2005, at 17 (declaring that dam construction along with dynamite blasting and heavy fishing has led to the declining population of the Mekong giant catfish); *see also* Mydans, *Mission on the Mekong*, *supra* note 22, at A4 (noting that dam construction is preventing the migration of the Mekong giant catfish and the fish are becoming extinct); Mitchell & Braun, *supra* note 19 (asserting that dams, along with several other factors, threaten the Mekong giant catfish).

to have previously spawned in Lake Erhai in the west of Yunnan Province;[92] however, access to this lake has been physically thwarted by the construction of the Manwan and Dachaoshan Dams.[93] Similarly, IUCN reports that it is estimated that as few as 69 of the critically endangered Irrawaddy dolphins (*Orcaella brevirostris*) remain in the Mekong River sub-population.[94] IUCN has concluded that potential additional threats to the dolphins' survival include "numerous dams [that] have been proposed for the Mekong River system. If built, these would degrade essential habitat features and interrupt the movements of dolphins and their prey."[95]

II. China's Position

China is aware of the widespread criticism that its dams are already causing adverse environmental effects, and that those effects are likely to be exacerbated in the future when the grand cascade is complete.[96] In response to this criticism, the Chinese claim that the hydroelectric projects should bring several benefits to its downstream neighbors, including alleviation of

92. *See* Su-Yin, *supra* note 58, at ¶ 16 (highlighting that rocks and rapids are natural spawning grounds for the Mekong giant catfish); *see also* Milton Osborne, *Sold Down the River*, AUSTRALIAN FIN. REV., Oct. 8, 2004, ¶ 20, *available at* http://afr.com/articles/2004/10/07/1097089487009.html (last visited Mar. 3, 2006) [hereinafter Osborne, *Sold Down the River*] (emphasizing that Mekong giant catfish previously spawned in Lake Erhai, located in western Yunnan province). *See generally* Ekachai, *Dying Breeds*, *supra* note 26 (informing that the Mekong giant catfish's spawning ground is being destroyed).

93. *See* Osborne, *Sold Down the River*, *supra* note 92, at ¶ 20 (establishing that construction of dams has disrupted migration access and patterns); *see also* Osborne, *Water Politics*, *supra* note 11, at 17 (specifying that access to Lake Erhai is no longer possible due to construction of the Manwan and Dachaoshan Dams); Piyaporn Wongruang, *Civic Groups Urge Funding Freeze*, BANGKOK POST, July 2, 2005, ¶ 9 (pointing out that construction of the Manwan and Dachaoshan Dams has forced changes in water levels and disrupted fish migration patterns).

94. *See* Rix, *supra* note 4, at 115 (detailing that less than 100 Irrawaddy dolphins remain in the Mekong River); *see also Around the Globe*, SEATTLE TIMES, Feb. 5, 2006, at A12 (reporting that the number of Irrawaddy dolphins living in the Mekong River was previously believed to be between 80 and 100); IUCN Redlist Report on the Mekong River Sub-population, *available at* http://www.iucnredlist.org/search/details.php?species=44555 (last visited Mar. 8, 2006) (indicating that approximately 69 Irrawaddy dolphins remain in the Mekong River according to IUCN reports).

95. *See* Margi Prideaux, Article, *Discussion of a Regional Agreement for Small Cetacean Conservation in the Indian Ocean*, 32 CAL. W. INT'L L.J. 211, 219 (2002) (stressing that the dams have prevented the migration of dolphins, reduced the availability of prey species, and reduced the amount of habitat available for dolphins); *see also Mekong Dam Would Uproot Peasants, Destroy a Culture*, ST. LOUIS POST-DISPATCH (Mo.), May 18, 1997, at 11C (identifying that the proposed Sambor Dam would flood more than 310 square miles, jeopardizing the habitat where the Irrawaddy dolphin swim); IUCN Redlist Report on the Mekong River Sub-population, *supra* note 94 (recognizing that the proposed dams for the Mekong River system would corrupt habitats and interrupt the migrations of dolphins and their prey).

96. *See* Michael A. Gheleta, *Sustaining the Giant Dragon: Rational Use and Protection of China's Water Resources in the Twenty-First Century*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 221, 242–44 (1998) (asserting that China's dams have already adversely affected the environment and they would cause even greater adverse impact in the future on the migration of different species of fish, the transportation of wastes downstream, and the water supply for the city of Shanghai); *see also* Swati Rawani & Sabrina Balgamwalla, *International Legal Updates*, 12 HUM. RTS. BR. 28, 28–9 (2005) (conveying that critics believe China's dams will cause significant environmental damage, including threatening the river's endangered species); Osborne, *Water Politics*, *supra* note 11, at 15 (affirming that China is aware of the criticisms regarding its dams' adverse environmental effects and the potential effects in the future).

flooding problems during the monsoon season and the drought problem in the dry season.[97] For instance, it is predicted that impoundment of water during the dry season at the Xiaowan Dam would increase dry season flows up to 70 percent as far as 1,000 kilometers downstream.[98] One report from the Asian Development Bank (ADB)[99] optimistically found that, "upstream development of hydropower *will not sharpen the conflict* of multi-objective competitive uses and will give benefits to downstream [sic] for the development of irrigation, navigation, and hydropower, and for flooding control."[100] As Mekong researchers John Dore & Yu Xiaogang commented, the conclusion that the upstream hydropower "will not sharpen the conflict" with downstream users is "naïve."[101] They point out that significant tension already exists in river-dependent communities in Thailand, which are already concerned with the very low flow of the river and apparent fluctuations caused by the Yunnan dams.[102]

Contrary to China's claims regarding its hydropower projects' beneficial effects of "evening out"[103] the flow of the river downstream, there are indications that the Yunnan dams

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97. *See* William Shapiro, *Human Rights and the Environment: IV. China's Three Gorges Dam*, 1997 COLO. J. INT'L ENVTL. L. & POL'Y Y.B. 146, 148–49 (1997) (illustrating that the Chinese authorities believe the dams will bring three major benefits, which include providing "clean" electricity, alleviating flooding, and allowing a significant increase in traffic); *see also* Deetes, *Lancang Development in China*, *supra* note 24, at ¶ 4 (clarifying that China believes that the dams would provide a benefit to all by controlling flooding); Khanh, *Death of a River*, *supra* note 15, at ¶ 4 (confirming that China has said that the hydroelectric projects should bring several benefits downstream, including alleviating flooding and drought problems).

98. *See* Browder & Ortolano, *supra* note 35, at 522 (claiming that the Xiaowan Dam would increase low flow to the Mekong River at about 35 percent or about 555 cubic meters per second); *see also* Blake, *China's Lancang Dams*, *supra* note 4 (observing that the collection of water during the wet season in the Xiaowan Dam would increase dry season flows up to 70 percent and about 1,000 kilometers downstream); Forrester, *supra* note 67, at 14 (determining that the Xiaowan Dam would store 15 billion tons of water, which would help to ease downstream wet season flooding and the water shortages during the dry season).

99. *See* Blake, *China's Lancang Dams*, *supra* note 4 (quoting the Asian Development Bank (ADB)'s attitude toward funding dams on the Mekong); *see also* Ford, *supra* note 7, at 10 (assessing loans from the ADB and others to secure hydro development in the region); Osborne, *Water Politics*, *supra* note 11, at 7 (establishing ADB's involvement in the Greater Mekong Subregion's energy production concerns).

100. *See* D. Plinston & He Daming, *'Water Resources and Hydropower,' Report for ADB TA-3139 Policies and Strategies for Sustainable Development of the Lancang River Basin*, ASIAN DEVELOPMENT BANK, MANILA (1999) (emphasis added); *see also* Amy Kazmin, *Asia Ponders Environmental Price of Hydro Power*, FIN. TIMES, June 7, 2004, at 4 (assessing the benefits and detriments to the region post-dam construction); *ADB Team Reviews Progress of Poverty Reduction Scheme*, FIN. EXPRESS, July 28, 2003, at 1 (noting economic benefit to people through the Mekong development).

101. *See* John Dore & Yu Xiaogang, *supra* note 1, at 19; *see also* Marwaan Macan-Markar, *Environment: Countries Sharing Mekong Brace for a 'Water War,'* IPS-INTER PRESS SERVICE, Sept. 6, 2004, at 1 (referring to the tension in downstream communities caused by Mekong dam development); Perlez, *China's Growth*, *supra* note 45, at 1 (assessing China's control over the upper Mekong and its ecologically disastrous potential).

102. *See* John Dore & Yu Xiaogang, *supra* note 1, at 25; *see also* Antoaneta Bezlova, *Asia: Mekong Leaders Back 'Biodiversity Corridors' for Wildlife*, IPS-INTER PRESS SERV., July 5, 2005 (finding that downstream Mekong communities suffer severe fluctuations in river flow due to the dams); Ford, *supra* note 7, at 10 (concluding that the Mekong's flow rate decreased drastically as a result of the upstream dams).

103. *See* Osborne, *Water Politics*, *supra* note 11, at 15 (referring to China's insistence that water flow and quality will be positively affected by the Mekong dams); *see also* Forrester, *supra* note 67, at 14 (addressing China's claim that dam construction will enable flow regulation in the Mekong's annual cycle); Moreau & Ernsberger, Jr.,

led to an increase in flood intensity in 2002.[104] Because the reservoirs had been full, excess water was released from the dams, further raising the flooding level of the Mekong.[105] In Cambodia, Thailand, and elsewhere, the number of flood victims and damage to homes and crops increased.[106] More importantly, it is the river's natural flood-flow variability that is its major source of productivity.[107]

Despite the fact that China has not conducted an adequate assessment of the downstream environmental impacts,[108] Chinese leaders have claimed that any ecological and environmental effects, should they result, would be minimal.[109] Because only 16 percent of the Mekong's runoff originates in China, China claims that any effects of its hydropower program on overall river flow could only be proportionally limited to the amount of water flowing out of its territory, and thus negligible.[110] However, this argument ignores the fact that during the dry season, when rainfall is less abundant, the melting snow and glaciers in Tibet are of great

104. *See* Khanh, *Death of a River*, *supra* note 15, at ¶ 6 (emphasizing the Yunnan dams' effect on flooding); *see also Mekong's Vast Food Resource Drying Up*, *supra* note 62, at A13 (clarifying the dams' effect on flooding extremes in the wet and dry seasons); Michael Richardson, *Sharing the Mekong*, INT'L HERALD TRIBUNE, Oct. 30, 2002, at 2 (detailing an increase in flooding that led to substantial deaths and damage).

105. *See* Khanh, *Death of a River*, *supra* note 15, at ¶ 6 (explaining the flooding process caused by the Yunnan dams); *see also* Michael Richardson, *China's Key Role in the Politics of Mekong Water*, STRAITS TIMES, Aug. 18, 2005, at 1 [hereinafter Richardson, *China's Key Role*] (illustrating the extreme water levels that result when water is released from the dams); *Northeastern Provinces Hit Hard As Heavy Rain Falls Again*, BANGKOK POST, Aug. 31, 2001, at 1 (reiterating how the Mekong's overflow caused unpredictable flooding and damage).

106. *See* Khanh, *Death of a River, supra* note 15, at ¶ 6 (noting the consequences of hydroelectric dams downstream); *see also* James Borton, *'Mother of Rivers': China's Dams Pose Threat to Way of Life for Nations Downstream*, WASH. TIMES, Sept. 6, 2002, at A16 (recognizing the Mekong dams' contribution to international deforestation, erosion, and overfishing in Southeast Asia); Supalak Ganjanakhundee, *China Blocking Flow of Mekong: Experts*, THE NATION, Jan. 26, 2006, at 1 (arguing that downstream inhabitants cannot predict seasonal floods as a result of the dams, causing decreased agriculture production).

107. *See* Bakker, *supra* note 16, at 220 (stressing the delicate balance between productivity and destruction sustained by the Mekong's variability); *see also* Fred Pearce, *Where Have All the Fish Gone?: The Mighty Mekong is Drying Up—and So is the River's Rich Harvest*, INDEP. (London), Apr. 21, 2004, at 1 [hereinafter Pearce, *Where Have All the Fish Gone?*] (attributing the intense fluctuations in river flows and subsequent negative consequences for the fishing industry on the Mekong's hydroelectric dams); Perlez, *China's Reach*, *supra* note 3, at A1 (codifying the Mekong dams' effects on fishing, water temperature, and productivity).

108. *See* Blake, *China's Lancang Dams*, *supra* note 4 (reporting China's unwillingness to assess the environmental impact on downstream communities and the Mekong itself); *see also* Rungrawee C. Pinyorat, *Mekong River: China Vows to Limit Blasting of Rapids*, THE NATION, June 13, 2003, at 1 (citing Thailand's reluctance to demand that China allow a "genuine" environmental impact assessment to be executed); Shigefumi Takasuka, *Basin's Main Artery Key to Growth*, DAILY YOMIURI (Japan), Jan. 3, 2002, at 15 (remarking that a study had not been done on the Mekong dams' impact on the downstream ecological system).

109. *See* Bezlova, *supra* note 102, at 1 (addressing the environmental matters affecting the countries in the Mekong biodiversity corridor); *see also* Vidal, *supra* note 12, at 3 (acknowledging China's and the ADB's contention that the Mekong dams will aid development); Khanh, *Death of a River*, *supra* note 15, at ¶ 4 (citing Chinese leaders' claim that any effect on the Mekong environment would be nominal).

110. *See* Osborne, *Water Politics*, *supra* note 11, at 2 (stating that China may argue that the effects of its dam building program are limited—to a degree—by the amount of water that flows out of its territory); *see also* Victoria Brown, *Mekong River: Dynamic Lifeline at Risk*, ORLANDO SENTINEL, Dec. 20, 2004, at A13 (stating that Chinese scientists contend that the Chinese dams will, in fact, reduce harmful flooding and drought downstream); Marwaan Macan-Markar, *Thailand: Drought, Not Dams, Blamed for Low River*, IPS-INTER PRESS SERVICE, Mar. 31, 2004, at ¶18 [hereinafter Macan-Markar, *Drought*] (discussing the low percentage of water flowing from China into the Mekong as compared to Laos).

importance, as China's contribution to the river's overall volume rises to a significant 40 percent.[111] China also points to the absence of data definitively linking its dams to the downstream problems,[112] and argues that there will be no change in water quality as a result of the dams.[113] This absence of definitive data is due to the complexity of the Mekong system, the paucity of research, and a lack of basic data about in-stream flows, flooding patterns, and aquatic species, partially a result of the lack of trained personnel in the downstream riparian nations, and partially a result of China's own lack of cooperation.[114]

Moreover, any environmental analysis is complicated by the recent occurrence of droughts and existing development projects.[115] For example, issues of causation are raised by the fact that Thailand already diverts water from the Mekong at a large number of points and Laos has constructed three tributary dams.[116] Presently, there are no plans to coordinate water

111. *See* Osborne, *Water Politics*, *supra* note 11, at 2 (asserting that water from China could account for 40 percent of the river's volume during the dry season); *see also* Macan-Markar, *Drought*, *supra* note 110, at ¶18 (stating that some MRC officials have said the proportion coming from China during the dry season reaches 50–70 percent); *Neighbors Mull Mekong River Water Mystery*, THE NATION, Mar. 24, 2004, at ¶¶ 10–11 (stating the assumption that two dams already operational in China's Yunnan Province are the cause of the situation, but there is little evidence). *See generally* Craig Simons, *Beware of Falling Ice; Asia's Glaciers Are Melting at an Alarming Rate, Creating a Host of Environmental Problems from Flooding to Disease*, NEWSWEEK INT'L, June 6, 2005 (discussing the environmental damage and massive flooding caused by the glacier runoff on the Tibetan Plateau).

112. *See* Goodman, *supra* note 31, at E01 (stating that China defends its dams by citing to the absence of data linking its dams to downstream problems); *see also* Marwaan Macan-Markar, *Southeast Asia: River Communities Bracing for Mekong Floods*, IPS-INTER PRESS SERVICE, Feb. 24, 2003, at ¶¶ 22–26 (discussing China's decision to share information about flood levels with the MRC in the wake of criticism of its dam construction).

113. *See* Osborne, *Water Politics*, *supra* note 11, at 15 (stating that Chinese spokesmen have argued that there will be no change in water quality as a result of the dams on the river); *see also* Rix, *supra* note 4, at 106–07 (describing environmentalists' concerns regarding the effect of Chinese dams on the water quality); Kamol Sukin, *Mekong River Countries Say China Increasing Cooperation on Environment*, THE NATION, Nov. 20, 2004, at ¶¶ 10–11 (discussing how representatives of China guaranteed water quality and quantity downstream at a recent meeting between the Mekong countries).

114. *See* Bakker, *supra* note 16, at 218 (explaining why discussions of potential impacts of hydro development are highly speculative). *See generally* Hirsch, *supra* note 5 (discussing the reasoning behind China's failure to join the MRC).

115. Three decades of conflict waged in the riparian states resulted in relatively little development on the Mekong to date when compared to other rivers of its size throughout the world. However, there is no shortage of plans for future hydropower development on the Mekong and its tributaries. Although figures on the number of planned projects vary, as of 1996, Laos had 60 dams planned or under construction; Vietnam had 36; China planned 15 on the Mekong itself and an unknown number on its tributaries; Thailand has planned at least two dams and two major water diversion projects; and there are currently 17 dams under construction in Cambodia on over a dozen of its rivers. *See* Bakker, *supra* note 16, at 218 (outlining the planned hydroelectric projects in the region); *see also* Edward Lanfranco, *China and the Mekong: A Tale of Two Rivers*, U.P.I., July 6, 2006, at ¶¶ 18–19 (discussing hydroelectric dam projects in the works throughout the region); Vidal, *supra* note 12, at 3 (describing the recent drought conditions and upcoming dam projects in the Mekong River countries).

116. *See* Bakker, *supra* note 16, at 218 (stating that Thailand already diverts water at a large number of points and Laos has built three tributary dams); *see also* Heda Bayron, *China's Dams Threaten Mekong, Conservationists Say*, VOICE OF AMERICA NEWS, July 19, 2004, at ¶¶ 13–14 (stating that several large dams in Mekong tributaries could further harm the Mekong); Brown, *supra* note 110, at A13 (discussing the dam projects in Laos).

releases from various planned and existing dams in the region.[117] In the first half of 2004, lower water levels were observed throughout the Mekong Basin, including Cambodia and the Mekong Delta in Vietnam, locations where China's contribution to the river's overall flow is substantially less.[118] Additionally, rainfall during the 2003 wet season was much lower than usual.[119] As BBC News reported: "Researchers admit that the Chinese dams are not alone in altering the flow of the Mekong. Downstream countries including Laos and Thailand take significant amounts of water for irrigating their rice crops."[120] While the MRC is not blaming China directly for the crisis, saying drought conditions are their responsibility, the commission finds that China is contributing to the irregular fluctuations.[121]

Several researchers and environmentalists in China have been studying the environmental and social impacts of the hydropower projects.[122] While they do not vocally oppose the dams,

117. *See* Bakker, *supra* note 16, at 218 (stating that presently there are no plans to coordinate water releases from dams in the region); *see also* Helena Fernz, *Mekong River Basin's Total Hydropower at 31,500MW,* BUS. TIMES, Aug. 21, 1996, at 2 (discussing the existing and planned dams in the Mekong River Basin); Michael Richardson, *Worry Rising on Mekong; As China and Laos Move to Harness River, Concern Mounts in Countries Downstream*, INT'L HERALD TRIB., Apr. 4, 1997, at 1 (describing various dam projects throughout the region and the problems they could create).

118. *See* Marwaan Macan-Markar, *Asia: As Mekong Levels Dip, Millions Worry about Livelihood*, IPS-INTER PRESS SERVICE, Mar. 11, 2004, at ¶¶ 3–5 (discussing the receding water levels observed in Thailand, Laos, and Cambodia); *see also* WORLD WILDLIFE FUND, *Damning the Mekong: A River in Trouble*, *available at* http://www.panda.org/about_wwf/what_we_do/freshwater/our_solutions/policies_practices/removing_barriers/dams_initiative/examples/mekong/index.cfm (last visited Mar. 7, 2006) (explaining that the low water levels observed throughout the region were also in areas where China's contribution to the river's flow is substantially less); Vidal, *supra* note 12, at 3 (stating that the Mekong was at its lowest recorded level).

119. *See* Macan-Markar, *Drought*, *supra* note 110, at ¶¶ 1–8 (discussing the low levels of rainfall during the 2003 wet season as a cause of the low water levels in the Mekong); *see also* WORLD WILDLIFE FUND, *supra* note 118 (stating that rainfall during the 2003 wet season was much lower than usual); Vidal, *supra* note 12, at 3 (stating that low rainfall is partly to blame for the low river levels).

120. *See* Pearce, *Chinese Dams Blamed, supra* note 21, at ¶ 12 (explaining that researchers admit that Laos and Thailand use large amounts of water to irrigate their rice crops); *see also* Bayron, *supra* note 116, at ¶ 17 (stating that conservationists also blame dams in the Mekong tributaries outside of China for contributing to the low water levels); Macan-Markar, *Drought*, *supra* note 110, at ¶¶ 12–15 (quoting an environmentalist with the MRC as saying Chinese dams are not fully responsible for the low water levels of the Mekong).

121. *See Thais Blame China*, *supra* note 25, at ¶¶ 11–12 (attributing the MRC's blame for the low water levels in the Mekong to a drought while saying that China is contributing to the problem); *see also* Liebman, *supra* note 2, at 281 (commenting that China's dam building will further contribute to irregular fluctuation in the Mekong); *Vietnamese Deputy Prime Minister Calls for Measures to Store Flood Water for Dry Season*, THAI PRESS REP., Apr. 5, 2005, at ¶ 3, *available at* 2005 WLNR 5237008 ("[The MRC] has studied the regulations and management of other international basins for application to the Mekong River Basin with a view to helping regional people effectively use the water resources and equally share the natural resources.").

122. *See* Rix, *supra* note 4, at 106–07 (claiming that environmentalists are concerned about hydropower in China because it would deplete precious nutrients from vital water supplies); *see also* James Salzman, *Creating Markets for Ecosystem Services: Notes from the Field*, 80 N.Y.U. L. REV. 870, 961 n.5 (2005) (positing that hydropower in China can harm the drinking water and supply of electricity in China); Kevin Li, *Addressing Our Concerns in China's Context*, INT'L RIVERS NETWORK, *available at* http://www.rwesa.org/lancang/yunnan.html (last visited Mar. 6, 2006) (discussing the ecological and societal effects of hydropower development in China).

they are still seriously concerned about the negative impacts of the hydropower projects and seek ways to address them.[123] Additionally, China allows at least one NGO that is highly critical of the dams to operate in Yunnan,[124] but there is no indication that these minor internal criticisms are leading to a revision of the government's policies on the hydropower projects.[125]

While there remains uncertainty as to the nature and extent of the dams' impacts, there is little doubt that the Yunnan dams are impacting, and will continue to impact, downstream hydrology and ecology.[126] Although the two completed Yunnan dams, which are not particularly large by international standards,[127] are not the single direct cause of the lower water levels,[128] there is still reason to be concerned because as previously mentioned, six more dams are planned to be built. Two of those additional dams are already under construction, one of which, the Xiaowan Dam, when completed will be the second-largest dam in China, after the Three Gorges Dam on the Yangtze;[129] therefore, if the effects of the two completed dams are

123. *See* Li, *supra* note 122; *see also* Jonathan H. Adler, *The Problem with Wind Power; Hint: It Has Two Wings, Feathers, and Goes Splat When It Hits the Turbine*, THE WEEKLY STANDARD, Oct. 25, 1999, at 17 (questioning why environmental groups are against building hydropower dams in China if they would eliminate the need to burn massive amounts of coal); *China to Surpass 2010, 2020 Electricity Generating Capacity Targets*, AFX ASIA FOCUS, Aug. 10, 2005, at 1 (stating that environmental groups object to China's hydropower projects).

124. *See* Osborne, *Water Politics*, *supra* note 11, at 16 (mentioning that China allows at least one nongovernmental organization critical of its hydropower policies to operate in the capital of the Yunnan province); *see also* Alice Yan, *Environmental Watchdogs Hungry for Action; Volunteers Flocking to NGOs Dedicated to Protecting Mainland's Natural Resources*, S. CHINA MORNING POST, Mar. 28, 2005, at 4 (claiming that NGOs in China have attempted to petition the government concerning their dam building in Yunnan).

125. *See* Osborne, *Water Politics*, *supra* note 11, at 16 (lamenting that China has not altered its hydropower policies in the face of criticism); *see also China to Surpass 2010, 2020 Electricity Generating Capacity Targets*, *supra* note 123, at 1 (illustrating that China's hydropower development continues despite criticism); Jonathan Watts, *supra* note 1, at 25 (recognizing that China is continuing its policy of building dams for hydropower regardless of the internal criticism it is receiving).

126. *See* Rix, *supra* note 4, at 114 (cautioning that dam development in China will affect environmental resources in downstream countries, such as Cambodia, Thailand, and Laos); *see also* Deetes, *Lancang Development in China*, *supra* note 24 (noting the effect that the Mekong Dam has on the environment downstream in Thailand); WORLD WILDLIFE FUND, *supra* note 118 (mentioning that even though dams in Mekong are over 100 miles away they still have effects on the water and ecosystem downstream).

127. *See* Osborne, *Water Politics*, *supra* note 11, at 12 (comparing the size of the two Yunnan dams to international standards for dams); *see also* Browder & Ortolano, *supra* note 35, at 513 (listing Manwan and Dachaoshan as two dams in Yunnan); Liebman, *supra* note 2, at 281 (postulating that even though the Chinese have two dams in Yunnan, they will build more).

128. *See* WORLD WILDLIFE FUND, *supra* note 118 (determining that the Manwan and Dachaoshan Dams are singlehandedly responsible for lower water levels); *see also Still Room for Agents,* BANGKOK POST, Aug. 4, 2005, at ¶ 24, *available at* 2005 WLNR 12285986 (theorizing that an extensive hovercraft expedition of the Mekong will no longer be possible because the dams cause the water levels to drop too low); Piyaporn Wonpruang, *Civic Groups Urge Funding Freeze*, BANGKOK POST, July 2, 2005, at ¶ 9, *available at* 2005 WLNR 10438278 (correlating the problems in water levels in Vietnam, Laos, and Thailand to when the Yunnan dams were completed).

129. *See* Osborne, *Water Politics*, *supra* note 11, at 12 (reasoning that the that Xiaowan Dam is being constructed in a manner to minimize sediment build-up behind the dam wall); *see also* Liebman, *supra* note 2, at 281 (noting that when it is complete, the Xiaowan Damn will be second only to the Three Gorges Dam in size). *See generally* Jean Scheidnes, *Cruising Up the Yangtze Time to Reflect on China*, PALM BEACH POST, Mar. 5, 2006 (informing that the Three Gorges Dam on the Yangtze is going to be the largest dam on earth).

being felt to some extent, the effect of eight dams will increase the negative impacts exponentially. This illustrates the point that it may be a number of years before the full range and extent of the negative impacts of the dams become apparent.[130]

Although the preceding paragraphs do not contain an exhaustive description of the potential problems that could arise from alterations in the natural flow cycles of the Mekong, they nonetheless provide a backdrop for analyzing the legal implications of China's hydropower development on the upper Mekong.

A. Application of International Law to Address Adverse Transboundary Impacts and China's Concomitant Legal Obligations to Downstream Riparian States

The benefits of the hydropower scheme will accrue mostly to China and the costs will fall heavily on the downstream riparian states.[131] Khy Tanglim, a Cambodian cabinet minister who heads a team devoted to Mekong policy, aptly summed up the situation when he said, "What can we do? They are upstream. They are a richer country operating in their own sovereign territory. How can we stop them? . . . . We are downstream, so we suffer all the negative consequences. If there is no more water for us, no more fish, no more vegetation, this is a big disaster."[132]

Minister Tanglim's remarks provide a useful framework for considering the applicable international law, and what hopes of protection it offers to the downstream riparian states. In order to address the different facets of the legal analysis, the accuracy of Minister Tanglim's statement will be repeatedly referenced below as a focal point for the discussion. The legal analysis will be rooted in the formal sources of international law: (i) treaties and conventions, particularly the United

130. *See* Osborne, *Water Politics*, *supra* note 11, at 17 (determining that the total impact of the Chinese dams will not be known for years); *see also Cambodia's Leader to Attend Summit of Six-Nation Mekong Group in China*, AP ALERT, June 29, 2005 (recapitulating that environmentalists are concerned that China's hydropower production will cause a negative environmental impact). *See generally* THE AM. HERITAGE C. DICTIONARY 350 (3d. 1997) (defining a dam as "[a] barrier built across a waterway to control the flow or raise the level of water").

131. *See* Bakker, *supra* note 16, at 214 (determining that hydropower in China is reallocating the costs of the development to others in the region); *see also* Roberts, *supra* note 44 (concluding that all the benefits of Chinese hydropower will go to China while the costs will be dealt with by other states); *Thai Prime Minister Thaksin Visits Beijing for Talks with Chinese Leaders*, A.P. ALERT-DEFENSE, July 1, 2005 (restating that environmentalists worry that the harm resulting from China's hydropower policies will fall on its downstream neighbors).

132. *See* Goodman, *supra* note 31, at E01 (quoting Khy Tanglim, a frustrated Cambodian minister). *See generally* THE TIMES ATLAS OF THE WORLD 16 (10th ed., 1999) (illustrating that the Mekong runs south from China down to Cambodia).

Nations Convention on the Non-navigational Uses of International Watercourses;[133] (ii) custom as embodied in the Helsinki Rules on International Rivers[134] and as informed and interpreted by declarations, including the Stockholm and Rio Declarations;[135] and (iii) historical state practice in watercourse dispute settlement, including decisions of international and domestic courts and arbitrational tribunals.

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133. *See* Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700, 703 [hereinafter Watercourses Convention] (encouraging the development of international law to promote cooperation and address international watercourse problems among neighboring countries); *see also* Salman M. A. Salman, *Dams, International Rivers, and Riparian States: An Analysis of the Recommendations of the World Commission on Dams*, 16 AM. U. INT'L L. REV. 1477, 1504 (2001) (recognizing the U.N. Convention on International Watercourses as a source of international law, supported by the majority of members of the U.N. and referenced by the International Court of Justice in one of its decisions); *cf.* Jordan C. Kahn, *1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses*, 1997 COLO. J. INT'L ENVTL. L. Y.B. 178, 183 (1997) (positing that the success of the U.N. convention depends on the countries adopting its principles to create watercourse agreements; in this way, the convention could be binding on non-signatory states by way of it becoming a customary international law).

134. *See* International Law Association, The Helsinki Rules on the Uses of the Waters of International Rivers (Aug. 1966), *reprinted in* STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES 465 (Oxford 2001), *available at* http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm (setting forth the general rules of international law applicable to the use of waters of an international drainage basin); *cf.* Gabriel Eckstein & Yoram Eckstein, *A Hydrogeological Approach to Transboundary Ground Water Resources and International Law*, 19 AM. U. INT'L L. REV. 201, 228 (2003) (commenting that although the Helsinki Rules represent the earliest stages in the evolution toward developing an international norm of transboundary ground water resources, they have had limited influence on state practice and treaty development). *See generally* Carolin Spiegel, Note, *International Water Law: The Contributions of Western United States Water Law to the United Nations Convention on the Law of the Non-Navigable Uses of International Watercourses*, 15 DUKE J. COMP. & INT'L L. 333 (2005) (recognizing the Helsinki Rules as the first important effort in the codification of international watercourse law).

135. While these declarations are considered "soft law" and therefore not binding, the environmental principles outlined in these declarations are not merely aspirational, but rather are evidence of existing and emerging norms in customary international environmental law. *See* 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, 464–65 (2001) (indicating that the "good neighborliness" concept of international environmental law is embodied in the Stockholm and Rio Declarations); *see also* United Nations Conference on the Human Environment Principle 21, U.N. DOC. A/CONF.48/14 (June 16, 1972), 11 I.L.M. 1416, 1420 [hereinafter Stockholm Declaration] (providing that states have the right to explore their own resources and the responsibility to ensure that the ensuing activities do not adversely affect the environment of neighboring states); United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc.A/CONF.151/26 (June 14, 1992), 31 I.L.M. 874, 876 [hereinafter Rio Declaration] (reaffirming the Stockholm Declaration in its goal of protecting the integrity of the global environment).

Collectively, these sources establish the following principles of international watercourse law that apply to this discussion of China's legal obligations to its downstream neighbors: (1) territorial sovereignty, (2) territorial integrity, and (3) the obligation not to cause significant harm.[136]

Some legal scholars maintain that the preceding principles are "fundamental and universally accepted,"[137] while others maintain that while not rising to the level of *jus cogens*, these principles represent existing and developing norms in international water law.[138] These differences of opinion reflect the reality that, while some of these principles are rooted in established

136. The sources, definitions, and applicability of these individual principles will be discussed below. Additionally, the governing principles of equitable utilization and the obligation of notification apply to the analysis of the Mekong situation, but will not be developed in this article. *Compare* Melanne A. Civic, *A New Conceptual Framework for Jordan River Basin Management: A Proposal for a Trusteeship Commission*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 285, 293–94 (1998) (maintaining that international law approaches to sharing transboundary watercourses considers not only the traditional concepts of territorial sovereignty and integrity, but also considers the customary law principle premised on the obligation of a state to refrain from engaging in activities injurious to other sovereign states) *with* Gamal Abouali, *Natural Resources under Occupation: The Status of Palestinian Water under International Law*, 10 PACE INT'L L. REV. 411, 495 (1998) (concluding that principles of territorial integrity and sovereignty have been replaced by the duty of equitable and reasonable use of waters, duty not to cause harm, and obligation to cooperate in the optimal utilization and protection of international waters). *See generally* Shlomi Dinar & Ariel Dinar, *The State of the Natural Resources Literature*, 43 NAT. RESOURCES J. 1217 (2003) (positing that states have the right to utilize their waters in an equitable and reasonable manner, which includes the duty to cooperate in the maintenance and protection of the shared waters).

137. *See* FENG YAN & GEORGE E. RADOSEVICH, *Policies & Strategies for the Sustainable Development of the Lancang River Basin: International Law & PRC/Yunnan Province Water Laws & Regulations*, *in* TOWARDS COOPERATIVE UTILIZATION AND CO-ORDINATED MANAGEMENT OF INTERNATIONAL RIVERS 164 (He Daming, Zhang Guoyou & Hsiangke Kung eds., Science Press 2001); *see also* Dante Caponera, *The Role of Customary International Water Law*, *in* WATER RESOURCES POLICY FOR ASIA 365, 385 (Mohammed Ali ed., 1985); *cf.* Astrid Boos-Hersberger, *Transboundary Water Pollution and State Responsibility: The Sandoz Spill*, 4 ANN. SURV. INT'L & COMP. L. 103, 111 (1997) (using customary principles of territorial sovereignty and integrity to address problems of global harm and develop standards of liability in water pollution).

138. *See* STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES 316 (Ian Brownlie ed., Oxford Press 2001) (commenting that despite the lack of a unanimous agreement on the adoption of the Watercourse Convention, the weighty majority indicates a broad international agreement on the general principles governing the non-navigational uses of international waters); *see also* Gabriel Eckstein, *Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute over Gabcikovo-Nagymaros*, 19 SUFFOLK TRANSNAT'L L. REV. 67, 72 (explaining that the development of contemporary international water laws are based on the principles of territorial sovereignty and integrity, even though those principles are not widely accepted or applicable today); *cf.* A. Dan Tarlock, *Safeguarding International River Ecosystems in Times of Scarcity*, 3 U. DENV. WATER L. REV. 231, 241 (2000) [hereinafter Tarlock, *International River Ecosystems*] (positing that modern international water laws reject the principle of territorial sovereignty, as they are focused more heavily on protecting the environment; taking into account factors relating to the reasonable and equitable uses of international waters).

doctrines, the development of a specific corpus of international environmental law is a relatively recent occurrence in history.[139] Moreover, as Dr. Radosevich, an international water law expert, points out, "[t]hese principles are subject to considerable interpretation by the various riparian parties [on the Mekong] according to their perspectives and riparian position."[140] Dr. Radosevich's claim underscores the importance, in interpreting and applying international watercourse law, of whether the party is an upstream or downstream state and whether its portion of the river is wholly within its territory or forms a shared border with another riparian state.[141] Bearing this caveat in mind, the preceding principles, their sources, their status as binding international law, and their application to the Mekong situation, are addressed below.

1. Territorial Sovereignty

Put simply, territorial sovereignty means that a state is entitled to do as it pleases within the confines of its national borders. Territorial sovereignty is inarguably a generally accepted principle of international law, of which international water law is only a distinct subset, and is credited as the fundamental right of any country in the world.[142] For the purposes of this article, however, I am only concerned with how the doctrine of territorial sovereignty relates to

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139. *See* Meredith A. Giordano, *Managing the Quality of International Rivers: Global Principles and Basin Practice*, 43 NAT. RESOURCES J. 111, 115 (2003) (detailing that international water quality law has evolved from general principles, such as territorial sovereignty, into current concepts reflecting the reasonable and proper use of international waters); *see also* Florencio J. Yuzon, *International Law Concerning Marine Pollution and the United States Navy—Steaming Towards State Responsibility and Compliance*, 9 PACE INT'L L. REV. 57, 72–73 (1997) (noting that significant developments in the area of international environmental law have their origins in the Stockholm Declaration and its progeny, the Rio Declaration). *But see* Afshin A-Khavari & Donald R. Rothwell, *The ICJ and the Danube Dam Case: A Missed Opportunity for International Environmental Law?*, 22 MELB. U. L. REV. 507, 525 (1998) (indicating that, although inevitably related, international watercourse law and international environmental law developed independently of each other, causing some tension between the two sets of jurisprudence and treaty law).

140. *See* Yan & Radosevich, *supra* note 137, at 173.

141. *See, e.g.,* Scott L. Cunningham, Comment, *Do Brothers Divide Shares Forever? Obstacles to the Effective Use of International Law in Euphrates River Basin Water Issues*, 21 U. PA. J. INT'L ECON. L. 131, 144–46 (2000) (explaining that depending on their upper or lower riparian position, countries differ in invoking the principles to territorial sovereignty or territorial integrity as the basis for water sharing); *see also* Aaron Schwabach, *The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 33 TEX. INT'L L.J. 257, 276–77 (1998) [hereinafter Schwabach, *Law of Non-Navigational Uses*] (reporting that upper riparians favor the principle of territorial sovereignty while the lower riparians favor the territorial integrity; and such imbalance is the source of tension preventing some countries from reaching a common approach to the management of shared water sources). *See generally* Gregory E. Heltzer, Note, *Stalemate in the Aral Sea Basin: Will Kyrgyztan's New Water Law Bring the Downstream Nations Back to the Multilateral Bargaining Table?*, 15 GEO. INT'L ENVTL. L. REV. 291 (2003) (illustrating the struggle in the uses of the shared waters between the upper and lower riparians as it pertains to their economic development, whether it is based on agriculture and farming or on hydroelectric power).

142. *See* Yan & Radosevich, *supra* note 137, at 173. *But see* Niveen Tadros, Comment, *Shrinking Water Resources: The National Security Issue of This Century*, 17 NW. J. INT'L L. & BUS. 1091, 1101–03 (1996) (stressing that the principle of state sovereignty is mostly favored by the upper riparian states and that the modern framework of international water law distinguishes between the principles of absolute and limited sovereignty in the utilization of shared waters); *see also* Michelle R. Sergent, *Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the Progression of International Watercourse Law Be Damned?*, 8 VILL. ENVTL. L.J. 435, 444–45 (1997) (emphasizing that the principles of absolute territorial sovereignty and integrity are not generally accepted norms of customary international law and that the international community has moved away from these concepts towards a different approach that balances the interests of the neighboring states).

China's ability to utilize the waters of the Mekong, a natural resource, while they remain within its borders. Principle 21 of the Stockholm Declaration addresses the distinctly environmental dynamic of territorial sovereignty in these terms: "States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies."[143] Although the Stockholm Declaration was not intended to be legally binding, at least Principle 21 is now generally viewed as binding customary international law.[144] Principle II of the Rio Declaration provides the same recognition of sovereignty over natural resources, repeating the mandate of Stockholm Principle 21 word-for-word.[145] Pursuant to this international norm, China appears to have an unequivocal international law right to develop hydropower in its own sovereign territory; this right is not absolute, however, but qualified,[146] as will be discussed below.

Nonetheless, as noted above, the geographic location of the various riparians along the Mekong will largely determine how they view and interpret the applicable principles of international water law.[147] Recall Minister Tanglim's regretful conclusion that, *"They are upstream. They are a richer country operating in their own sovereign territory."* Still, China can be characterized as a "successive" riparian state because the portion of the river and its headwaters over which it asserts control are wholly within its sovereign territory.[148] In contrast, all of the down-

143. *See* Markell, *supra* note 135, at 464–65 (describing the effect of the Stockholm Declaration, which allows the sovereign right to exploit natural resources within one's boundaries); *see also* John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment,* 98 AM. J. INT'L. L. 291, 292 (2002) (explaining that Principle 21 does not prohibit all transboundary harm).

144. *See* Stockholm Declaration, *supra* note 135 (explaining that Principle 21 must be "in accordance with the Charter of the United Nations and the principles of international law"); *see also* Knox, *supra* note 143, at 292 (contending that Principle 21 has been declared the cornerstone of international environmental law). *See generally* PAUL C. SZASZ ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (Edith Brown Weiss ed., 1998) (detailing the effect of the Stockholm Declaration).

145. *See* Rio Declaration, *supra* note 135 (codifying the text of Principle 21); *see also* William K. Stevens, *Worlds Apart; Rio: A Start on Managing What's Left on This Planet,* N.Y. TIMES, May 31, 1992, at D1 (detailing the signing of the Rio Declaration).

146. *See* Colleen P. Graffy, *Water, Water Everywhere, Nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes,* 10 GEO. INT'L. ENVTL. L. REV. 399, 404 (1998) (providing that there is a need to coordinate comprehensive worldwide efforts to preserve the world's water supply); *see also* Rix, *supra* note 4, at 103–04 (asserting that China relies on Mekong River hydropower to the detriment of Vietnam); Perlez, *China's Reach*, *supra* note 3, at A1 (detailing that China has a "ravenous appetite for hydroelectric power").

147. *See* Long, *supra* note 6, at 1656 (outlining the geographical location of the six countries which border the Mekong River Basin); *see also* Perlez, *China's Reach*, *supra* note 3, at A1 (explaining that the river serves as the "life blood" to the 60 million people who live downstream on the Mekong River Basin); The Mekong River Commission, *available at* http://www.mrcmekong.org (last visited Mar. 8, 2006) (detailing the geographic proximity of the six countries which border the Mekong River).

148. *See* MCCAFFREY, *supra* note 138, at 40–41 (explaining that China has control over the Mekong River facilities within its own territory); *see also* Rix, *supra* note 4, at 129 (asserting that due to data sharing, increased trade, tourism, and the MRC, China has delegated some of its authority over use of the river); Perlez, *China's Reach*, *supra* note 3, at A1 (describing that China's economic and political power along the Mekong River is unrivalled by riparisian countries).

stream riparian states can be at least partially characterized as "contiguous"[149] riparian states because at some point along their territory, the Mekong forms a shared boundary with another riparian state.[150]

The downstream riparians share the river by virtue of their contiguity, a fact which has increased the necessity that they pursue cooperation in the development and utilization of this shared river resource.[151] The creation of the MRC is an excellent example of this dynamic. In stark contrast, China's position as the most upstream and only entirely successive riparian allows it to act more or less self-interestedly with the river's resources while the river remains within its borders.[152] Again, China's refusal to participate in the MRC is an example of the benefits in the form of independence and exclusivity it enjoys as a result of the principle of territorial sovereignty.[153] What happens once the water leaves China has little effect on China. Once more, Minister Tanglim put his finger on the governing legal dynamic: "We are downstream, so we suffer all the negative consequences."[154] China has little to gain through cooperating with its downstream neighbors and, based on the principle of territorial sovereignty, has properly asserted its right to do what it wants

149. *See* MCCAFFREY, *supra* note 138, at 40–41 (describing the lack of decision-making power between other riparian states); *see also* Long, *supra* note 6, at 1656 (mentioning that Cambodia, Laos, Thailand, and Vietnam were four lower riparian countries that formed a body called the "Committee for Coordination of Investigations of the Lower Mekong Basin"); Rix, *supra* note 4, at 129 (providing that there is more cooperation between China and the lower Mekong countries due to navigation projects, which increase trade and tourism).

150. *See* Philip Hirsh, *Nature Beyond the Nation State Symposium: Beyond the Nation State: Natural Resource Conflict and "National Interest" in Mekong Hydropower Development,* 29 GOLDEN GATE U. L. REV 399, 401–02 (1999) (explaining that the Mekong River Basin is home to about 60 million people, most of whom live in rural areas); *see also* Long, *supra* note 6, at 1656 (asserting that the Mekong River is shared by China, Burma, Thailand, Laos, Cambodia and Vietnam); Myint, *supra* note 17, at 298 (contending that the MRC, established in 1957 under the United Nations, originally consisted of Cambodia, Laos P.D.R., South Vietnam and Thailand]).

151. *See* MCCAFFREY, *supra* note 138, at 40–41 (explaining how the riparian states share use of the Mekong River); *see also* Hirsh, *supra* note 150, at 405 (contending that impact on the river's hydrology and ecology have the potential to affect both water availability and environmental quality most notably downstream); Myint, *supra* note 17, at 297 (asserting that the Mekong is the world's 12th-largest river, which connects China, Burma, Laos, Thailand, Cambodia, and Vietnam).

152. *See* Long, *supra* note 6, at 1656 (indicating that China has been unwilling to participate in cooperative activities involving the Mekong River, refusing to join the MRC); *see also* Goodman, *supra* note 31, at E01 (reporting that China does as it pleases with its portion of the Mekong River due to its position as an upstream state); Richardson, *China's Key Role*, *supra* note 105, at 1 (stating that China has the upper hand in harnessing the waters of the Mekong River for power, irrigation, and flood control because of its geographical positioning).

153. *See* Cassar & Bruch, *supra* note 8, at 216 (indicating that China is not a member of the MRC despite occupying the upper reaches of the Mekong River Basin); *see also* Schwabach, *Law of Non-Navigational Uses*, *supra* note 141, at 276 (reporting China's comments that, "State enjoys indisputable territorial sovereignty over international watercourses that flow through its territory"); Rix, *supra* note 4, at 110 (stating that downstream riparian states are disturbed by China's lack of consultation in implementing their project regarding the river).

154. *See* Goodman, *supra* note 31, at E01 (quoting Cambodian Cabinet Minister Khy Tanglim: "We are downstream, so we suffer all the negative consequences. If there is no more water for us, no more fish, no more vegetation, this is a big disaster"); *see also* Richardson, *China's Key Role*, *supra* note 105, at 1 (claiming that China's ravenous appetite for hydroelectric power at home is having an adverse impact on the Mekong River). *See generally* Rix, *supra* note 4 (discussing many projects involving the Mekong River that China has implemented without consulting the other riparian states).

on its portion of the Mekong.[155] As an example of an exercise of this right, China publicly dismissed the 2002 findings of the World Commission on Dams,[156] which raised doubts about the utility and desirability of large dams, describing the report as biased and an affront to the sovereign rights of nations.[157]

Thus, China's position is one of "absolute" territorial sovereignty.[158] This position equates to one embracing the legitimacy of unlimited use and control of an international watercourse while it remains wholly within that state's borders.[159] It was first expressed in the Harmon Doctrine.[160] This doctrine was proposed by the U.S. Secretary of State in a dispute

155. *See* Hirsch, *supra* note 5, at 407 (explaining that China has more to lose than to gain from participation in the MRC, already building one dam on the mainstream with no consultation from other riparian states, and with several more dams under construction); *see also* Goodman, *supra* note 31, at E01 (opining that the Chinese government asserts rights to do what it wants on its portion of the Mekong, while arguing that its dams could be beneficial to downstream states); Kahn, *supra* note 133, at 184 n.72 (stating that China is the best example of an upstream riparian resenting all qualifications on the use of a watercourse that originates within their boundaries).

156. *See* Salman, *supra* note 133, at 1477; *see also* Henry Fountain, *Unloved, but Not Unbuilt*, N.Y. TIMES, June 5, 2005, at D3 (indicating that China went ahead with its mammoth Three Gorges Dam despite international protests and pressure upon World Commission on Dams' report); *see also* Osborne, *Water Politics*, *supra* note 11, at 15 (asserting that China has dismissed the findings of the World Commission on Dams published in 2000); THE WORLD COMM'N ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 37–133 (2000), *available at* http://www.dams.org//docs/report/wcdreport.pdf (last visited July 17, 2006) (finding that large dams' economic performance is less than expected, their impact on ecosystems is detrimental, and they will cause disproportionate levels of people displacement).

157. *See* Patrick McCully, *The Use of a Trilateral Network: An Activist's Perspective on the Formation of the World Commission on Dams*, 16 AM. U. INT'L L. REV. 1453, 1454 (2001) (noting that the report released by the World Commission on Dams in 2000 supports the anti-dam activists' view of the high impact and low performance of dams); *see also* Scott LaFee, *Damming Evidence; Do Large Dams Do More Harm Than Good?*, SAN DIEGO UNION-TRIB., May 25, 2005, at F1 (illustrating the World Commission on Dams' findings that large dams tend to be massive environmental disasters and that those most affected by dams rarely benefit from them).

158. *See* Kahn, *supra* note 133, at 182 (reporting that China concurred in the objection to the United Nations Convention on the Law of Non-Navigational Uses of International Watercourses' failure to acknowledge territorial sovereignty); *see also* Schwabach, *Law of Non-Navigational Uses*, *supra* note 141, at 276–77 (stating that China's reference to the territorial sovereignty of a watercourse state is an expression of the Harmon Doctrine); Goodman, *supra* note 31, at E01 (discussing the Cambodian minister's statements that China is an upstream country operating in their own sovereign territory).

159. *See* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT A CASEBOOK IN LAW & PUBLIC POLICY 1024 (5th ed. 2002); *see also* Aaron Schwabach, *Diverting the Danube: The Gabcikovo-Nagymaros Dispute and International Freshwater Law*, 14 BERKELEY J. INT'L L. 290, 325 (1996) [hereinafter Schwabach, *Diverting the Danube*] (defining absolute territorial sovereignty as a theory granting a riparian state complete control over all waters lying within its territory allowing the state full utilization of all waters without regard for the effects on the downstream states); Cunningham, *supra* note 141, at 144 (stating that a sovereign nation has the right to do whatever it chooses with the water of a transboundary watercourse flowing through its borders).

160. MCCAFFREY, *supra* note 138, at 76–77 (explaining Harmon's view that a state has complete freedom of action regarding the portion of an international watercourse that is situated within its territory, irrespective of any harmful consequences that may ensue for other riparian states); *see also* William A. Paddock, *The Rio Grande Convention of 1906: A Brief History of an International and Interstate Apportionment of the Rio Grande*, 77 DENV. U. L. REV. 287, 295–96 (1999) (quoting Harmon: "The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory."); Schwabach, *Law of Non-Navigational Uses*, *supra* note 141, at 276 (stating that absolute territorial sovereignty is often known as the Harmon Doctrine, after Grover Cleveland's Attorney General Judson Harmon).

with Mexico over the use of the waters of the Rio Grande, an international river course whose headwaters rise entirely within U.S. territory.[161] Significantly, the U.S. did not rely on the Harmon Doctrine when it settled the Rio Grande dispute with Mexico.[162] Furthermore, the U.S. expressly repudiated the Harmon Doctrine as an inaccurate statement of the law when it found itself in the position of a downstream state in a dispute with Canada over the waters of the Columbia River.[163] It has been suggested that, due to its dubious practical and theoretical virtues, or lack thereof, "the 'Harmon Doctrine' of absolute territorial sovereignty should once and for all, be laid to a richly deserved rest."[164] This is because "international water law rests on the principle that absolute territorial sovereignty is unfair and inequitable."[165] China's stance in the Mekong dispute, however, illustrates the reality that, despite the neat claims of legal theorists, absolute rather than limited territorial sovereignty, without regard to the interests of coriparians, is oftentimes the actual practice among states.[166]

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161. *See* MCCAFFREY, *supra* note 138, at 76–77 (illustrating that Attorney General Judson Harmon's 1895 opinion in response to Mexico's protest over the Rio Grande has become known as the Harmon Doctrine); *see also* Paddock, *supra* note 160, at 295–96 (stating that Secretary of State Richard Olney sought Attorney General Harmon's advice over the dispute with Mexico regarding the Rio Grande, with Harmon concluding that there was absolute sovereignty within a state's own territory); Schwabach, *Diverting the Danube*, *supra* note 159, at 325 (explaining that the Harmon Doctrine originated in response to Mexico's protest of the United States' diversion of water from the Rio Grande in the 19th century by then-Attorney General Harmon).

162. *See* A. DAN TARLOCK ET AL., *supra* note 159, at 1024 (finding that the U.S. did not apply the Harmon Doctrine, which established the controversial belief that a state had unlimited use and control of an international watercourse within its borders); *see also* MCCAFFREY, *supra* note 138, at 108 (explaining that the U.S. did not adhere to its own self-proclaimed power under the Harmon Doctrine when settling a water use dispute with Mexico over the Rio Grande River); Spiegel, *supra* note 134, at 335 (noting that the U.S.-Mexico dispute was resolved by an equitable solution, rather than the Harmon Doctrine).

163. *See* MCCAFFREY, *supra* note 138, at 108 (detailing how the U.S. expressly withdrew its support for the Harmon Doctrine when it found itself in a disadvantageous downstream position over a dispute with Canada for use of the Columbia River); *see also* Cunningham, *supra* note 141, at 144 n.59 (finding that the political nature of transboundary water disputes often relates back to what advantages or disadvantages a state will gain or suffer due to its geographic location); Karen A. Baim, Note, *Come Hell or High Water*: *A Water Regime for the Jordan River Basin*, 75 WASH. U. L.Q. 919, 932 n.92 (1997) (explaining the U.S. reversal in its support of the Harmon Doctrine because of the downstream repercussions from Canadian use of the Columbia River).

164. *See* MCCAFFREY, *supra* note 138, at 111 (concluding that the Harmon Doctrine should be completely revoked as a doctrine of international water law because of its poor practical and equitable policies); *see also* Sanford E. Gaines*, Fresh Water: Environment or Trade?,* 28 CAN.-U.S. L.J. 157, 159 (2002) (reiterating that the Harmon Doctrine has fallen into disrepute with international water lawyers); Michael A. Hyman, Note, *Under the Danube Canopy*: *The Future of International Waterway Law*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 355, 360–61 (1998) (indicating that the Harmon Doctrine has been rejected as impracticable and too potentially damaging to the environment of other nations).

165. *See* TARLOCK ET AL., *supra* note 159, at 1024 (proclaiming that international water law has rejected the principle of absolute sovereignty); *see also* Eckstein, *supra* note 138, at 74–75 (emphasizing that the principle of absolute sovereignty is inequitable because of its unfair application of water resources); Tarlock, *International River Ecosystems*, *supra* note 138, at 240–41 (asserting that international water law relations rest primarily upon equitable principles rather than absolute rights and privileges of individual states).

166. *See* TARLOCK ET AL., *supra* note 159, at 1024 (suggesting that the practical results of a dominant state's water use more closely resembles absolute territorial sovereignty); *see also* Boos-Hersberger, *supra* note 137, at 112–13 (recognizing that several states' water use practices continue to follow the universally rejected absolute territorial sovereignty principle); Schwabach, *Diverting the Danube*, *supra* note 159, at 325–26 (arguing that despite the universal rejection of the Harmon Doctrine, many states continue such a practice without regard to the effects on the downstream states).

2. Territorial Integrity

The principle of territorial integrity means that a state is entitled to be free from outside interference or intrusion into its national borders.[167] Like the principle of territorial sovereignty, territorial integrity is inarguably a generally accepted principle of international law with similar applicability in the field of international water law.[168] The principles of territorial sovereignty and territorial integrity share a nexus in that the principle of territorial integrity serves as a limit on another state's absolute territorial sovereignty.[169] As explained above, the principle of territorial sovereignty means that a state is free to do as it chooses within its national borders. However, the principle of territorial integrity qualifies this notion of absolute territorial sovereignty to the extent that a state is only free to do what it pleases within its national borders so long as the effects of those internal actions do not result in transboundary effects that interfere with a neighboring state's territorial integrity.[170] In other words, the sovereignty of a state over its territory is "limited" to the extent that the use of the territory must not infringe upon the territorial integrity of another state.[171]

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167. *See* MCCAFFREY, *supra* note 138, at 129 (supporting the view that the principle of territorial integrity allows a sovereign state to enjoy their territory and property without interference from another state); *see also* Nedzad Basic, *International Law and Security Dilemmas in Multiethnic States*, 8 ANN. SURV. INT'L & COMP. L. 1, 6 (2002) (finding that the U.N. Charter supports the principle of territorial integrity).

168. *See* MCCAFFREY, *supra* note 138, at 113 (showing that the general principle of territorial integrity is applied to international water law); *see also* YAN & RADOSEVICH, *supra* note 137, at 173 (noting that principles of territorial integrity have been applied to the international water law context); Eckstein, *supra* note 138, at 72 (commenting that the principles of international water law are based on the general principles of absolute sovereignty and integrity).

169. *See* MCCAFFREY, *supra* note 138, at 138 (recognizing that states sharing an international watercourse have substantial rights to use of the water, which must be evened out by respecting the rights of the other states); *see also* Schwabach, *Law of Non-Navigational Uses*, *supra* note 141, at 276 (emphasizing the equilibrium that must be found between one state's absolute territorial sovereignty and another state's absolute integrity); Sergent, *supra* note 142, at 442–44 (suggesting that an equilibrium between absolute sovereignty and integrity will be maintained so long as the states do not cause injury to another state).

170. *See* MCCAFFREY, *supra* note 138, at 144 (finding that a state's territorial integrity limits the principles of absolute sovereignty as expressed in the Harmon Doctrine); *see also* Dinar & Dinar, *supra* note 136, at 1251 (finding that the 1997 U.N. Convention on the Non-Navigational Uses of International Water Courses was adopted to help settle water disputes among states by recognizing the legitimate interests of states based on territorial sovereignty and integrity); Aaron Schwabach, *From Schweizerhalle to Baia Mare*: *The Continuing Failure of International Law to Protect Europe's Rivers*, 19 VA. ENVTL. L.J. 431, 449 (2000) [hereinafter Schwabach, *From Schweizerhalle to Baia Mare*] (applying territorial sovereignty and integrity principles to international water law results in the territorial integrity of the lower riparian states limiting the territorial sovereignty of the upper riparian states).

171. *See* MCCAFFREY, *supra* note 138, at 137 (concluding that the sovereignty of a state over its territory is limited to the extent that it may not injure or interfere another state); *see also* Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources*: *Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT'L L. 27, 35–37 (1994) (finding that conflicting interests of states' territorial sovereignty and integrity will result in a limited sovereignty for states sharing an international watercourse); Yonatan Lupu, Note, *International Law and the Waters of the Euphrates and Tigris*, 14 GEO. INT'L ENVTL. L. REV. 349, 360 (2001) (suggesting that a more reasonable approach to transboundary water disputes is addressed by limited territorial sovereignty, which calls for non-interference with the water usage of other states).

The doctrine of absolute territorial integrity posits that states have an absolute right not to have the use of their territory interfered with, or affected by, the intrastate actions of other states.[172] In the context of international watercourse law this means that upstream states could do nothing that affects the natural flow of water in the downstream state.[173] Economic and resource development would be unnecessarily stymied by strict adherence to the theory of absolute territorial integrity.[174] Like territorial sovereignty, territorial integrity is also only entitled to "limited" force in the context of international watercourse doctrine.[175] In this sense, limited territorial integrity is the Janus face of *limited* territorial sovereignty. As Stephen McCaffrey explains, the principles of absolute sovereignty and integrity "may be useful tools of advocacy, but they afford little assistance in the resolution of concrete controversies. One would allow unbridled action irrespective of harm caused in a neighboring state; the other would confer a veto over action in a neighboring state, irrespective of its reasonableness."[176]

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172. *See* MCCAFFREY, *supra* note 138, at 128 (illustrating that absolute territorial integrity limits the complete freedom of upstream states claimed under the principle of absolute territorial sovereignty); *see also* Shashank Upadhye, *The International Watercourse*: *An Exploitable Resource for the Developing Nation Under International Law?*, 8 CARDOZO J. INT'L & COMP. L. 61, 70 (2000) (suggesting that absolute territorial integrity protects a state's national boundaries from being violated due to any change in composition or flow of water); Daniel J. Epstein, Note, *Making the Desert Bloom*: *Competing for Scarce Water Resources in the Jordan River Basin*, 10 TEMP. INT'L & COMP. L.J. 395, 402 (1996) (declaring that lower stream states have naturally favored the principle of absolute territorial integrity to protect their interests from the potential negative practices of upper stream states).

173. *See* MCCAFFREY, *supra* note 138, at 128 (stating that upstream states could not interfere with the flow of water to downstream states under watercourse law); *see also* Joseph W. Dellapenna, *The Law of International Watercourses: Non-navigational Uses*, 97 AM. J. INT'L L. 233, 235 (2003) (book review) (noting the relationship between upper and lower riparian states); Upadhye, *supra* note 172, at 70 (discussing that under watercourse law changes in watercourse are considered a breach of the nation's boundaries).

174. *See* MCCAFFREY, *supra* note 138, at 128 (explaining that strict adherence to absolute territorial integrity would hinder economic development); *see also* R. Andrew Lien, *Still Thirsting: Prospects for a Multilateral Treaty on the Euphrates and Tigris Rivers Following the Adoption of the United Nations Convention on International Watercourses*, 16 B.U. INT'L L.J. 273, 294 (1998) (stating that modified versions of territorial integrity and territorial sovereignty are used in order to allow for countries to share resources); Schwabach, *Law of Non-navigational Uses*, *supra* note 141, at 277 (declaring the concern of tension between states who have to share resources).

175. *See* MCCAFFREY, *supra* note 134, at 135 (stating that territorial sovereignty is only entitled to limited force); *see also* Lupu, *supra* note 171, at 360 (explaining that limited territorial integrity is a moderate form of territorial sovereignty and territorial integrity); Spiegel, *supra* note 134, at 336 (detailing that limited territorial sovereignty is a middle ground between two more extreme theories).

176. *See* MCCAFFREY, *supra* note 138, at 316 (explaining the principles of absolute sovereignty and integrity); *see also* Hyman, *supra* note 164, at 361 (discussing the benefits and problems with absolute sovereignty ideology).

3. Obligation Not to Cause Significant Harm

States must comply with the international obligation not to use the territory in a way that causes significant harm to other states.[177] The roots of this principle can be traced to the *Trail Smelter* Arbitration,[178] which is the foundation of modern international environmental law.[179] *Trail Smelter* involved the harmful effects of transboundary noxious fumes from an ore smelter in Canada passing across the U.S. border, through the Columbia River Valley, where the fumes damaged farmland and the crops of U.S. citizens.[180] Although that case was not an international watercourse dispute *per se*, the principles of limited territorial integrity and sovereignty, qualified by the obligation to not cause significant harm espoused by the *Trail Smelter* tribunal, have been readily transferred to international environmental law generally.[181] The *Trail Smelter* tribunal stated that:

> no State has the right to use or permit the use of its territory in a manner as to cause injury . . . in or to the territory of another or the property or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[182]

A similar edict was expressed in Principle 21 of the Stockholm Declaration, which reads:

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177. *See* Jutta Brunnee & Stephen J. Toope, *Environmental Security and Freshwater Resources Ecosystem Regime Building*, 91 AM. J. INT'L L. 26, 37 (1997) (stating that a state's right to exploit its natural resources is limited by its obligation not to cause significant harm to other states); *see also* Leticia M. Diaz & Barry Hart Dubner, *The Necessity of Preventing Unilateral Responses to Water Scarcity—The Next Major Threat Against Mankind This Century*, 9 CARDOZO J. INT'L & COMP. L. 1, 10–11 (2001) (reporting that the Watercourse Treaty requires that states take all measures necessary not to cause significant harm to other watercourse states); Yehenew Tsegaye Walilegne, *The Nile Basin: From Confrontation to Cooperation*, 27 DALHOUSIE L.J. 503, 521 (2004) (noting that watercourse states are required to take all measures necessary not to cause significant harm to other watercourse states under Article 7 of the treaty).

178. *See Trail Smelter* case (U.S. v. Can.), 3 R.I.A.A. 1905 (Perm. Ct. Arb. 1935); *see also* Graffy, *supra* note 146, at 411 (citing the *Trail Smelter* case); Stephen Stec, *Nature Beyond the Nation State Symposium: Do Two Wrongs Make a Right? Adjudication Sustainable Development in the Danube Dam Case*, 29 GOLDEN GATE U.L. REV. 317, 379 (1999) (reporting that the *Trail Smelter* case sets out the significant harm principle).

179. *See* TARLOCK ET. AL., *supra* note 159, at 1024 (stating that *Trail Smelter* was the foundation of international environmental law); *see also* Schwabach, *Diverting the Danube*, *supra* note 159, at 327 (emphasizing that the *Trail Smelter* Arbitration is the foundation for all other discussions of international environmental law); Daniel K. Dewitt, Note, *Great Words Needed for the Great Lakes: Reasons to Rewrite the Boundary Waters Treaty of 1909*, 69 IND. L.J. 299, 309 (1993) (explaining that *Trail Smelter* became the foundation for transboundary pollution law today).

180. *See Trail Smelter* case (U.S. v. Can.), 3 R.I.A.A. 1905 (Perm. Ct. Arb. 1913) (citing the facts of the *Trail Smelter* case); *see also* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 947 (1997) (discussing how the *Trail Smelter* case started over sulfur fumes that were blown into the Columbia River Valley from Canada); Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritorially, International Environmental Law, and the Search for Solutions to Canada-U.S Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 420 (2005) (stating that the *Trail Smelter* Arbitration began because sulfur dioxide fumes were blown into the Columbian River Valley from Canada, harming crops, woodlands, and fisheries).

181. *See* Giordano, *supra* note 139, at 115 (stating that the *Trail Smelter* decision reinforced limited territorial sovereignty); *see also* Parrish, *supra* note 180, at 365 (illustrating that the *Trail Smelter* Arbitration is the only decision of an international court that deals with transfrontier pollution); Upadhye, *supra* note 172, at 86 (stating that the *Trail Smelter* decision did not discuss the international watercourse at all).

182. *See Trail Smelter* case (U.S. v. Can.), 3 R.I.A.A. 1905 (Perm. Ct. Arb. 1934).

> States have in accordance with the Charter of the United Nations and the principles of international law . . . 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 their national jurisdiction.[183]

As noted above, although the Stockholm Declaration was not intended to be legally binding, Principle 21 is now generally accepted as customary international law.[184] Principle 21 of the Stockholm Convention was repeated verbatim in Principle 2 of the Rio Declaration, further evidence that the obligation not to cause significant harm constitutes a customary international law norm.[185]

This principle has emerged as relevant in the context of international watercourse law. The 1997 U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses mandates that all "[w]atercourse states shall, in utilizing an international water-course in their territories, take all appropriate measures to prevent the causing of significant harm to other riparian states."[186] Although the Watercourses Convention does not purport to contain provisions rising to the level of *jus cogens*, it arguably contains a number of principles that are

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183. *See* Stockholm Declaration, *supra* note 135, at ¶ 21 (stating Principle 21 of the Stockholm Declaration).

184. *See* SZASZ ET AL., *supra* note 144, at 316 (citing Principle 21 of the Stockholm Declaration on the Human Environment); *see also* Laura Edgerton, *Eco-Terrorist Acts During the Persian Gulf War: Is International Law Sufficient to Hold Iraq Liable?*, 22 GA. J. INT'L & COMP. L. 151, 159–61 (1992) (suggesting that Principle 21 of the Stockholm Declaration is one of a number of international treaties and cases that have become binding as international customary law despite its original intent); Joanna E. Arlow, Note, *The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large-Scale Environmental Destruction*, 7 WISC. ENVTL. L. J. 93, 128 (2000) (referring to Principle 21 of the Stockholm Declaration as "soft law"—repeated in various unbinding international texts to the point where it is now considered customary international law).

185. *See* SZASZ ET AL., *supra* note 144, at 317–18 (suggesting that Principle 2 of the Rio Declaration is virtually identical to Principle 21 of the Stockholm Declaration); *see also* Ann Hooker, *The International Law of Forests*, 32 NAT. RESOURCES J. 823, 850 (1994) (stating that Article 21 of the Stockholm Declaration has become customary law, as evidenced by its incorporation into the Rio Declaration, and frequent citation by United Nations documents); Dan Tarlock, *Five Views of the Great Lakes and Why They Matter*, 15 MINN. J. INT'L L. 21, 30–31 (2006) (noting that the idea of extraterritorial duties toward areas of global concern is reflected in Principle 21 of the Stockholm Declaration and affirmed in Principle 2 of the Rio Declaration).

186. *See* MCCAFFREY, *supra* note 138, at 451 (referring to Article 7, paragraph 1, which states, "[w]atercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States"); *see also* Salman M.A. Salman, *Legal Regime for Use and Protection of International Watercourses in the Southern African Region: Evolution and Context*, 41 NAT. RESOURCES J. 981, 1002–03 (2001) (affirming that the Watercourses Convention requires watercourse states to take all appropriate measures to prevent the causing of significant harm to other watercourse states); Sergent, *supra* note 142, at 456–57 (quoting the Watercourses Convention, which stipulates that watercourse states, "shall in their respective territories utilize an international watercourse in an equitable and reasonable manner").

recognized as the embodiment of existing and developing norms in international law, including this manifestation of the *Trail Smelter* principle.[187] The potential customary status of the principle is important because the Watercourses Convention will not enter into binding effect until at least 35 member states have signed, ratified, accepted, or acceded to it.[188] As of the date of this writing, this has not yet occurred and, most significant to the present analysis, China has made no indication of willingness to become a member, although a number of the downstream Mekong River States have signed and ratified the Convention.[189] China demonstrated its resistance to the Convention by casting one of only three negative votes when the Watercourses Convention was adopted in the General Assembly by a vote of 103 in favor and 3 against, with 27 abstentions.[190] China's negative vote may be attributable to its position as an upstream state

187. *See* MCCAFFREY, *supra* note 138, at 316 (suggesting that the Watercourses Convention is of value, regardless of whether it is entered into force because it was negotiated in a forum in which virtually any interested state could participate and subsequently adopted by an overwhelming majority of countries, thus reflecting broad agreement in the international community on the general principles governing the non-navigational uses of international watercourses); *see also* Schwabach, *From Schweizerhalle to Baia Mare*, *supra* note 170, at 449 (recognizing that customary international law has struggled to define the limits on discharge of pollutants into the river, as evidenced by the *Trail Smelter* principle—balancing the right of a downstream neighbor to receive an uninterrupted flow of uncontaminated water against the upper riparian to make equitable use of the river's waters). *See generally* Antonio Herman Benjamin et al., *The Water Giant Awakes: An Overview of Water Law in Brazil*, 83 TEX. L. REV. 2185 (2005) (recognizing that Brazilian water law is affected by developing international norms related to the non-navigable uses of international watercourses, including the principle of equitable utilization).

188. *See* United Nations Convention on the Non-Navigational Uses of International Watercourses, G.A. Res. 51/299, U.N. Doc. A/Res/51/229 (May 21, 1997), 36 I.L.M. 700, 715 ("The present Convention shall enter into force on the 90th day following the date of deposit of the 35th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."); *see also* Salman, *supra* note 133, at 1505 n.30 (noting that 35 instruments of ratification are necessary for the Convention to enter into full force and effect); Christina M. Carroll, Note, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVTL. L. REV. 269, 286 (1999) (pointing out that the Convention will enter into force on the 90th day after the United Nations receives 35 instruments of ratification).

189. *See* Kahn, *supra* note 133, at 184 (listing Cambodia, Lao People's Democratic Republic, Thailand, and Vietnam as states on the Mekong River voting for the Convention, China voting against it, and Myanmar being absent); *see also* Browder & Ortolano, *supra* note 35, at 526–27 (noting that China is one of the three governments to vote against the Watercourses Convention, so it is unlikely that it will vote in favor of the more comprehensive Mekong Agreement); Status of the Watercourses Convention as of 4 October 2005, *available at* http://www.internationalwaterlaw.org/IntlDocs/watercourse_status.htm (last visited Mar. 7, 2006) (listing governments that have approved the convention to date. China is not included.).

190. *See* United Nations Convention on the Non-Navigational Uses of International Watercourses, *supra* note 188 (outlining the breakdown of votes for the Watercourses Convention—103 in favor, 3 against (Burundi, China, Turkey), and 27 abstentions (Andorra, Argentina, Azerbaijan, Belgium, Bolivia, Bulgaria, Columbia, Cuba, Ecuador, Egypt, Ethiopia, France, Ghana, Guatemala, India, Israel, Mali, Monaco, Mongolia, Pakistan, Panama, Paraguay, Peru, Rwanda, Spain, Tanzania, and Uzbekistan); *see also* Lien, *supra* note 174, at 273–74 (1998) (suggesting that while the Watercourses Convention is the culmination of nearly three decades of work by the International Law Commission and embodies much of the prevailing customary law on the subject, 3 countries rejected it, and 27 abstained from voting); Stephen C. McCaffrey & Mpazi Sinjela, *The 1997 United Nations Convention on International Watercourses*, 92 AM. J. INT'L L. 97, 105 (1998) (noting the breakdown of votes for the Watercourses Convention).

in the ongoing Mekong River controversy, rather than to a dispassionate assessment of the law.[191]

The customary norm regarding an obligation not to cause significant transboundary environmental harm emerging from the *Trail Smelter* Arbitration, and reiterated in the Stockholm and Rio Declarations, as well as the Watercourses Convention, has obvious implications for China's use and control over the Mekong's headwaters. China's sovereignty is not absolute, but limited to the extent that it cannot use the river in a way that causes significant harm to the downstream riparian states.[192]

This principle really consists of three distinct norms of customary international law that are relevant to the discussion of China's legal obligations regarding its hydropower project and the Mekong River: (i) China's territorial sovereignty is limited to the extent that it has an obligation not to use its territory in a way that causes significant harm to the downstream riparians;[193] (ii) the downstream riparian states' territorial integrity is limited to the extent that they

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191. *See* McCaffrey & Sinjela, *supra* note 190, at 105 (affirming the authors' perspective that China's negative vote is probably attributable to its position as an upstream state in ongoing controversies rather than a dispassionate assessment of the law); *see also* Schwabach, *Law of Non-Navigational Uses*, *supra* note 141, at 260–61 (recognizing that although only three states voted against the adoption of the Convention, including China, they were all primarily upper riparians); Spiegel, *supra* note 134, at 344 (finding that the vote in the General Assembly displayed a tendency by upstream riparians, such as China, not to support the Convention because of their assessment that the law favored downstream riparians states at their expense).

192. *See* Graffy, *supra* note 146, at 421 (recognizing that the basic duties of riparian states to one another are embodied in the Watercourses Convention, i.e., to cooperate and negotiate in good faith, to prevent unreasonable harm to other states, and to use international watercourses in an equitable manner); *see also* Schwabach, *From Schweizerhalle to Baia Mare*, *supra* note 170, at 449–50 (explaining that under limited territorial sovereignty there is an attempt to balance the territorial integrity interest of lower riparians against the territorial sovereignty interest of upper riparians so as to limit the harm caused by the latter against the former). *See generally* Lupu, *supra* note 171 (validating Turkey's objections to the Watercourses Convention, namely that it goes against absolute territorial sovereignty in favor of lower riparian rights since it is highly unlikely that a downstream state could use a river in a manner that would cause "substantial harm" to an upstream state).

193. *See* Schwabach, *Law of Non-Navigational Uses*, *supra* note 141, at 279 (establishing that while the trend in international watercourse law has turned away from absolute territorial sovereignty and toward protection of the rights of lower riparians, this is still a very fluid standard and harm is measured on a continuum). *But see* Press Release, General Assembly, General Assembly Adopts Convention on Law of Non-Navigational Uses of International Watercourses, U.N. Doc. GA/9248 (May 21, 1997) at ¶ 27, *available at* http://www.thewaterpage.com/UNPressWater.htm (last visited July 17, 2006) (listing China's objections to the Watercourses Convention, i.e., the text did not reflect the principle of the territorial sovereignty of a watercourse state, as there is an imbalance between the rights and obligations of the upstream and downstream states). *See generally* Lien, *supra* note 174 (recognizing the tensions between absolute territorial sovereignty and absolute territorial integrity, and explaining the compromise that limits state sovereignty in its exercise of rights to exploit a transboundary river by making it conditioned on not harming downstream riparian countries).

can only expect to be free from significant harm, but not all harm;[194] and (iii) according to the statement of law established in the *Trail Smelter* Arbitration, the downstream riparian states must establish, by clear and convincing evidence, that China's upper Mekong hydropower project is the cause of the negative effects they are experiencing.[195]

So characterized, the relevance of this principle to the Mekong River dispute depends on two questions. First, is there enough factual evidence to establish that the Chinese dams are the cause of the irregular flow patterns experienced on the Mekong, and if so, does this rise to the level of significant harm? Under the statement of the law as expressed in *Trail Smelter*, the downstream riparian nations may have some difficulty in establishing, by clear and convincing evidence, a direct causal link between the Chinese hydropower projects and the *milieu* of environmental problems and erratic flows they are experiencing, including: a lack of solid scientific research and data;[196] the hydrological complexity of the Mekong Basin;[197] the recent

194. *See* Gilbert M. Bankobeza et al., *Public International Law: Environmental Law*, 35 INT'L LAW. 659, 687 (2001) (explaining that international water law is comprised of equitable apportionment and equitable utilization principles); *see also* Stephen C. McCaffrey, *The United Nations Starts Work on a Watercourses Convention*, 91 AM. J. INT'L L. 374, 375 (1997) (mentioning that the International Law Commission has articulated an obligation on riparian states to exercise due diligence in the utilization of international watercourses to be done in a manner that does not cause significant harm to other riparian states). *See generally* Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384 (1996) (noting that a highly debated issue on the matter of shared bodies of water is defining the rights and duties of riparian states under the standard of equitable utilization or subjecting them to the rule of "no appreciable harm").

195. *See* Jennifer S. Bales, *Transnational Responsibility and Recourse for Ozone Depletion*, 19 B.C. INT'L & COMP. L. REV. 259, 281 (1996) (explaining the *Trail Smelter* tribunal's ruling that states' liability is incurred when: (1) injury is caused to the territory, properties or persons within another state; (2) the injury is of serious consequence; and (3) the injury is established by clear and convincing evidence); *see also* Hyun S. Lee, *Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands*, 26 DENV. J. INT'L L. & POL'Y 399, 413–14 (1998) (acknowledging that the *Trail Smelter* Arbitration ruling, also known as the "Polluter Pays" principle in international environmental law, has been interpreted as standing for the proposition that liability should not be based on fault, but something closer to strict liability); A. Dan Tarlock, *Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management*, 32 TEX. INT'L L.J. 37, 45–46 (1997) (referring to the rule of modern international environmental law, which was promulgated by the 1941 *Trail Smelter* Arbitration between Canada and the United States).

196. *See Careful Planning Can Avert Mekong Disaster*, S. CHINA MORNING POST, Dec. 3, 2003, at 12 (emphasizing the need for comprehensive assessment of the environmental impact of the Mekong development); *see also* Rix, *supra* note 4, at 128–29 (stating that in March 2002, the MRC voiced concern over the lack of dialogue with China and the Chinese Ministry of Water Resources responded in April 2002 by agreeing to share flood season data with the MRC via two Yunnan Province water monitoring stations); Richardson, *China's Key Role*, *supra* note 105, at 1 (mentioning a study by the MRC, which concludes that the recent low water levels in the river are not due to Chinese dams).

197. *See* Browder & Ortolano, *supra* note 35, at 513–14 (noting the complexity of China's hydroelectric development program and how it will fundamentally alter the water resource picture of the entire Mekong Basin); *see also* Dinar & Dinar, *supra* note 136, at 1228 (mentioning that Arun Elhance, who has studied the Mekong, believes that the geographic and hydrologic nature of an international river basin creates a complex network of environmental, economic, political, and security interdependencies between its riparian states); Hirsch, *supra* note 5, at 414 (concluding that, with reference to the Mekong Basin, the legal framework developed to govern issues of sovereignty, redress, environmental regulation, financing arrangements and a host of other questions associated with large dams, needs to go well beyond the limited arena of national law).

droughts;[198] and the host of other ill-considered development ventures on the lower stretches of the Mekong.[199] The evidentiary problem is further compounded by China's secrecy and lack of transparency in its dam-building projects and their post-construction operation.[200] Despite the evidentiary gaps that exist, according to Surachai Sasisuwane, director of the MRC's water resource department, "[t]here is an assumption that the two dams are the cause of the situation."[201] However, a mere assumption does not rise to the level of clear and convincing evidence.

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198. *See* Nirmal Ghosh, *Cloud-Seeking Efforts Bring Little Relief*, STRAITS TIMES (Sing.), Mar. 29, 2005 (reporting on the drought and its effects in Thailand, adding that Cambodia is in its second year of drought, while Vietnam's eight Central Highlands provinces are suffering their worst dry period in 28 years); *see also* Alex Renton, *It's Nouvelle Cuisine Every Day for Kids in the Third World: The World Produces More Than Enough Food for All of Us. So Why Will 200 Million Children Go to Sleep Tonight Hungry?*, OBSERVER (United Kingdom), Aug. 14, 2005, at 22 (illustrating the hardships that poor families in the Mekong Basin area are facing as a result of the drought); Michael Richardson, *Warning from the Highest Source*, S. CHINA MORNING POST, June 3, 2005, at 13 (mentioning that drought and water shortages in China, South Asia, and Southeast Asia are serious problems).

199. *See, e.g.,* Rix, *supra* note 4, at 112–13 (explaining that Thailand's attempts to harness electricity via dams on the Mekong tributaries have made it more difficult to catch fish in the region); *Enron Plans $4bn of Projects*, FIN. TIMES, Dec. 6, 1997, at 15 (reporting in 1997 that Enron, the doomed energy company, was working on a $2 billion build-operate-transfer power project in the southern Mekong Delta). *See generally* Long, *supra* note 6 (mentioning that there is great potential for the harnessing of hydropower in Cambodia and Laos and that until now only a few projects have been built on the Mekong tributaries, while the river's mainstream development is still in an embryonic and preparatory phase).

200. *See Thais Blame China*, *supra* note 25, at ¶ 15 (reporting that the Thais suspect that the clandestine building of dams by the Chinese is contributing to the Mekong River's erratic fluctuations in depth); *see also* Economy, *supra* note 5, at 6 (mentioning that environmentalist groups in China are demanding disclosure about the most internationally sensitive projects, like proposed dams on the Mekong River). *But see* Rix, *supra* note 4, at 128–29 (stating that in April 2002, China, via its Ministry of Water Resources, agreed to share flood season data with the MRC in an attempt to alter its image as the "boogeyman" of the Mekong Basin).

201. *See* Pearce, *Where Have All the Fish Gone*, *supra* note 107, at 8 (discussing the bizarre fluctuations in the flow of the Mekong River and its negative impact on the inland fisheries of the lower Mekong region); *see also* Pearce, *Chinese Dams Blamed, supra* note 21, ¶ 1 (reporting that large Chinese dams on the headwaters of the mighty Mekong River are being blamed for strange fluctuations in the flow of the river in recent weeks); *Thais Blame China*, *supra* note 25, at ¶ 11 (reporting that the Thais suspect that the clandestine building of dams by the Chinese is contributing to the Mekong River's erratic fluctuations in depth).

Second, if a causal connection can be substantiated, it still must be established that the harm is "significant."[202] The significance of harm will vary from situation to situation and needs to be determined on a case-by-case basis, according to the facts of the particular circumstances and the hydro-geography of individual watercourses.[203] It is clear, however, that the harm must be more than a trifling interference with another riparian's use of the river's resources, as was discussed above in the dismissal of absolute territorial integrity as a governing principle.[204]

Again recalling Minister Tanglim's statement, in the context of the application of the *Trail Smelter* principle to the case, his conclusion that, "[*i*]*f there is no more water for us, no more*

202. *See* Markell, *supra* note 135, at 464 (emphasizing the "good neighbor" notion of one country not causing significant environmental harm to another); *see also* James C. McMurray & A. Dan Tarlock, *The Law of Later-Developing Riparian States: The Case of Afghanistan*, 12 N.Y.U. ENVTL. L.J. 711, 747 (2005) (arguing that the right to equitable apportionment of transboundary waterways is derived from the rule that states have a duty not to allow their territory to be used in a way to cause pollution that harms another territory); Rachel Kastenberg, Comment, *Closing the Liability Gap in the International Transboundary Water Pollution Regime, Using Domestic Law to Hold Polluters Accountable: A Case Study of Pakootas v. Teck Cominco Ltd.*, 7 OR. REV. INT'L L. 322, 334 (2005) (citing the Stockholm Declaration and asserting that the international transboundary water pollution regime adheres to the prohibition against causing significant harm).

203. *See* Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U.L. REV. 745, 784 (2004) (emphasizing that the 1991 Espoo Convention is authoritative hard-law, which can be used to determine what constitutes significant environmental damage); *see also* Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71, 91–92 (2005) [hereinafter Osofsky, *Learning from Environmental Justice*] (arguing that mere disruption of a geographic area, where the indigenous people rely on the land for survival, may be enough to cause significant harm); *cf.* Viola Blayre Campbell, Comment, *Ghost Ships and Recycling Pollution: Sending America's Trash to Europe*, 12 TULSA J. COMP. & INT'L L. 189, 211–12 (2004) (detailing the common but differentiated responsibilities of developing versus developed countries to fix pollution problems).

204. *See* The Convention on Environmental Impact in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800, 803 (listing activities that are considered likely to cause significant transboundary harm); *see also* Civic, *supra* note 136, at 298–99 (noting that the definitions used in the Helsinki Water Convention are broadly defined as prohibiting adverse impact to socio-economic conditions, physical structures, and natural resources); Schwabach, *From Schweizerhalle to Baia Mare*, *supra* note 170, at 450 (stating that the amount of harm and what is considered substantial is usually a hotly contested battle between the upper and lower riparian states).

fish, no more vegetation, this is a big disaster,"[205] only serves to point out the relevant questions and does not represent a satisfactory set of answers: Is China the cause of the lack of water? Is the harm described "significant?" The first part of this article addressed a host of environmental and economic impacts that could result if China's grand cascade of eight dams on the Upper Mekong is completed. If and when these impacts are felt to the degree they have been predicted to reach, the harm would certainly be more than trivial. It would be widespread, long-term, and devastating—in short, "significant." As of the writing of this article, however, many of these harms have not yet occurred and they remain only as ominous clouds on the horizon.

B. Possible Avenues of Recourse for the Downstream Riparian States

Recall Minister Tanglim's remark, "[w]hat can we do? . . . . How can we stop them?"[206] His dismay is warranted. As the situation is playing out, the downstream riparian states have been reluctant to raise a formal complaint to the Chinese government.[207] Each downstream state has its own reason for muting its criticism.[208] For example, Laos has its own dam building projects. Thailand hopes to buy electricity from China. Cambodia sees China as a key source of aid, and Vietnam is economically dependent on China.[209] Although the states may be hesitant,

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205. *See* Long, *supra* note 6, at 1675 (recognizing the substantial environmental impact that dams create and reviewing Vietnam's environmental protection laws); *see also* Jennifer S. Berman, Comment, *No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia*, 84 CALIF. L. REV. 817, 869 (1996) (noting fish as the main source of protein for Cambodians, while noting other sources that impact the Cambodian economy); Goodman, *supra* note 31, at E01 (quoting Cambodian cabinet minister Khy Tanglim, who is in charge of a team devoted to Mekong policies).

206. *See* Goodman, *supra* note 31, at E01 (reflecting Minister Tamlin's helplessness to remedy the transboundary harm); *see also* Carrie Noteboom, Comment, *Addressing the External Effects of Internal Environmental Decisions: Public Access to Environmental Information in the International Law Commission's Draft Articles on Prevention of Transboundary Harm*, 12 N.Y.U. ENVTL. L.J. 245, 250–51 (2003) (citing the International Law Commission's draft articles on Prevention of Transboundary Harm from Hazardous Activities as requiring an environmental impact assessment conducted whenever intrastate activity poses a risk of transboundary harm). *But see* Cassar & Bruch, *supra* note 8, at 171–72 (arguing that a transboundary environmental impact assessment would be effective in improving environmental management and cooperation between nations sharing watercourses).

207. *See* Devereaux F. McClatchey, Comment, *Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters, 1986-1996*, 25 GA. J. INT'L & COMP. L. 659, 674 (1996) (arguing that many conventions and treaties have also evaded directly addressing the issue of liability for transboundary harm); *see also* Goodman, *supra* note 31, at E01 (describing the motives of downstream riparians and their reluctance to condemn China's use of dams); Perlez, *China's Reach*, *supra* note 3, at A1 (listing various economic development reasons why downstream countries are, beyond muting their concerns, seeming to favor China's dam development).

208. *See* Rix, *supra* note 4, at 109–10 (noting Thailand and Laos' agreement with China to develop port facilities, remove navigational obstructions, and reduce trade barriers); *see also* Goodman, *supra* note 31, at E01 (clarifying downstream riparians' interest in not criticizing China's actions); Denis D. Gray, *Major Plans Raise Worry in Mekong River Basin; Heavy Hand of China Is Felt Far Downstream,* WASH. POST, May 16, 2004, at A27 (explaining that while Southeast Asia River International Network, a Thai environmental group, has placed blame for water displacement on China, officials in several of the basin countries have remained silent).

209. *See* Ford, *supra* note 7, at 10 (reasoning that because of Vietnam's growing economy, and potential shortage, it was forced to import electricity from China); *see also* Goodman, *supra* note 31, at E01 (citing the downstream riparians' possible conflict of interest; whereas on the one hand, the riparians have an interest in maintaining amicable relations with China to continue to receive resources, and on the other, the riparians have an interest in maintaining their sovereignty's resources derived from the Mekong River); Perlez, *China's Reach*, *supra* note 3, at A1 (noting that while China has obstructed the water flow, it has also removed reefs and rocks bordering Laos to allow trading vessels ingress and egress deep into Laos).

they are, nonetheless, deeply concerned. In March 2004, the MRC called an emergency meeting to discuss the crisis on the river, after which it sent an official letter to China demanding information about the operation of its dams.[210] If, despite protest from the downstream riparian states, China continues with its hydropower projects in a manner that causes significant harm to the downstream riparian states, China will be acting in violation of its international legal obligations.[211]

Minister Tanglim's succinct observation is itself a critical commentary on the lack of enforceability of the international environmental law regime, a disdain that was similarly echoed in the 1992 United Nations Conference on Environment and Development (UNCED) Declarations of Principles where it was proclaimed that, "[s]tates shall . . . cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."[212] Regardless,

> [d]eclarations of international principles have been of limited value in the absence of an effective mechanism for applying and enforcing them. While vague norms of international liability may have some impact on the behavior of nations, international law has yet to provide meaningful relief for even

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210. *See* Myint, *supra* note 17, at 300 (noting the MRC programs in place to facilitate its water conservation and other objectives); *see also* Pearce, *Chinese Dams Blamed, supra* note 21, at ¶ 2 (noting China's lack of membership in the MRC, and the Commission's assertive action to obtain information about China's dams). *But see* Kynge, *supra* note 12, at 8 (highlighting China's water shortage across the major portions of it northern latitudes and the potential solutions, which in turn may cause further problems).

211. *See* Kibel, *supra* note 2, at 314 (indicating that downstream riparian states, such as Laos, Thailand, Cambodia, and Vietnam, are concerned that China's proposed hydropower project may have a negative impact on communities that subsist on the Mekong's migratory fish population); *see also* Rix, *supra* note 4, at 103 (asserting that China's Mekong hydropower reliance strains the entire basin, placing stress on agriculture and aquaculture). *But see* Liebman, *supra* note 2, at 281 (arguing that the immense value of the Mekong's resources and the cost for China to sign a comprehensive water sharing agreement with the downstream riparian nations outweigh any international environmental legal obligations).

212. *See* Rio Declaration, *supra* note 135, at ¶ 13, (stating Principle 13 of the Rio Declaration)*; see also* Bonnie Docherty, *Challenging Boundaries: The Arctic National Wildlife Refuge and International Environmental Law Protection,* 10 N.Y.U. ENVTL. L.J. 70, 116 (2001) (opining that the limited enforceability of international environmental law demonstrates the need for the international community to enforce accepted norms); Anne C. Dowling, Note, *"Un-Locke-ing" a "Just Right" Environmental Regime: Overcoming the Three Bears of International Environmentalism—Sovereignty, Locke, and Compensation,* 26 WM. & MARY ENVTL. L. & POL'Y REV. 891, 959 (2002) (claiming that enforcing international environmental law occupies a low rung on the policy makers' ladder of priorities).

> the most egregious examples of transboundary pollution, such as radiation from the Chernobyl nuclear power plant accident.[213]

Although China may be acting in violation of its international obligations, the options for resolving this issue are indeed limited and lacking in promise. The possible avenues of recourse available to persuade China to comply with its international legal obligations are examined below.

III. The Use of Armed Force

Some commentators have suggested that because China has not considered the interests of the downstream countries in the development of its hydropower projects, and due to the severity of the potential negative impacts of this development, the possibility for armed conflict, political crisis, or even war in the near future is not farfetched.[214] The United Nations Charter informs us, however, that resorting to violence is not a proper response,[215] nor would it be wise considering the relative military superiority of China. The destruction of dams as military targets is particularly prohibited by international law under the "dangerous forces" doctrine, which is concerned with the protection of civilian lives and ecological integrity—which would be put at great risk by the ensuing flooding if a massive dam was breached by a military

213. *See* L.F.E. GOLDIE, *Liability for Nuclear Accidents*, *in* INTERNATIONAL LAW AND POLLUTION (D. McGraw ed., 1991) (asserting that international law has failed to provide meaningful relief for even the most extreme forms of transboundary pollution); *see also* GÜNTHER HANDL, PAYING THE PIPER FOR TRANSBOUNDARY NUCLEAR DAMAGE: STATE LIABILITY IN A SYSTEM OF TRANSNATIONAL COMPENSATION 150 (D. McGraw ed., 1991) (asserting that no meaningful action has been taken to relieve victims of the Chernobyl nuclear disaster); ROBERT V. PERCIVAL ET. AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1040 (4th ed., 2003) (describing the limited value of international environmental law); William Lang, *Environmental Protection: The Challenge of International Law,* 20 World Trade L. 4989, 490 (1986) (noting that international law does not provide for strict enforcement of environmental violations).

214. *See China Dam Threat,* COURIER MAIL (Australia), June 17, 2004, at 30 (reporting that a Chinese general said that any strike on China's hydropower project by Taiwan's military would lead to war); *see also* Joseph W. Dellapenna, *Custom-built Solutions for International Disputes; What Price Water?; Includes Related Articles on Nile, Jordan, Mekong and Danube Rivers; Use of Customary Laws in Resolving Water Sharing Problems in International River Basins,* UNESCO COURIER (France), Feb. 1, 1999, at 33 (stating that the Mekong flows through an area that has been at war for much of the century); Khanh, *Death of a River*, *supra* note 15, at ¶ 11 (asserting that downward riparian states may take military action in response to China's hydropower project); Marwaan Macan-Markar, *Mekong River's Development May Flow into Conflict,* ASIA TIMES ONLINE, Mar. 26, 2003 at 2, *available at* http://www.atimes.com (hypothesizing that the dispute over China's hydropower project may result in armed conflict in the future).

215. *See* Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War,* 137 MIL. L. REV. 1, 1 (1992) (claiming that environmental damage that occurs during armed conflict is illegal under international law unless it is justified by military necessity); *see also* Stephen Gordon, Comment, *The Prospects for Challenging U.S. Nuclear Weapons Policy in Light of the World Court's Advisory Opinion on the Legality of the Threat of Use of Such Weapons,* 28 ST. MARY'S L.J. 665, 670–72, 727 n.17 (1997) (indicating that the United Nations Charter and several agreements concerning environmental protection prohibit the threat or use of force against the territory or political independence of any state).

strike.[216] Adopted in 1977, Additional Protocol I to the 1949 Geneva Conventions Article 56 provides:

> Works or installations containing dangerous forces, namely dams, dykes . . . shall not be made the object of an attack, even where these objects are military objectives, if such an attack may cause the release of dangerous forces and consequent severe losses among the civilian population.[217]

Additionally, Article 29 of the Watercourses Convention states:

> International watercourses and related installations, facilities and other works shall enjoy the protection accorded by principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.[218]

Furthermore, the Madrid Resolution on the Protection of Water Resources and Water Installations in Times of Armed Conflict, adopted by the International Law Association, provides in Article IV that, "[t]he destruction of water installations containing dangerous forces, such as dams and dykes, should be prohibited when such destruction may invoke grave dangers to the civilian population or substantial damage to the basic ecological balance."[219] In sum, the use of military force is not a practical option, nor a legitimate response under international law.

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216. *See* SZASZ ET AL., *supra* note 144, at 841–42 (discussing the importance of a state's environment)*; see also* John S. Applegate, *National Security and Environmental Protection: The Half-Full Glass,* 26 ECOLOGY L.Q. 350, 358–59 (1999) (commenting that a state's environment constitutes a potential military target because it is both a resource and a national symbol); John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection under the International Law of War,* 15 FLA. J. INT'L L. 481, 483 (2003) (describing attacks on dams and dykes during times of war as environmentally devastating to the region because of the potential for flooding).

217. *See* George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions,* 85 AM. J. INT'L .L. 1, 12 (1991) (suggesting that Article 56, which restricts attacks on dams and dykes, is a reasonable, precautionary measure and does not prohibit necessary military attacks on nuclear or hydroelectric generating stations); *see also* John Ainslie, *Laws of War,* THE HERALD (U.K.), Feb. 3, 1998, at 18 (asserting that attacking nuclear power stations, dams, and dykes in times of war, are all explicitly prohibited by Article 56 and the rules of international law).

218. *See* Eyal Benvenisti, *Future Implication of the Iraq Conflict: Water Conflicts During the Occupation of Iraq,* 97 AM. J. INT'L L. 860, 872 (2003) (reiterating the protection afforded to international watercourses and related installations and facilities by the Watercourses Convention); *see also* Stephen C. McCaffrey, *An Overview of the U.S. Convention on the Law of the Non-Navigational Uses of International Watercourses,* 20 J. LAND RESOURCES & ENVTL. L. 57, 68 (2003) (referring to Article 29 as a reminder that there are rules of international law that protect international watercourses during times of armed conflict); Osborne, *Water Politics*, *supra* note 11, at 7–8 (discussing the protection afforded to international watercourses by international law.

219. *See* Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity,* 92 AM. J. INT'L L. 213, 231 (1998) (acknowledging that destroying dams, dykes, and other traditionally civilian objects as an end in itself is a violation of international law); *see also* Burrus M. Carnahan, *Protecting Nuclear Facilities from Military Attack: Prospects After the Gulf War,* 86 AM. J. INT'L L. 524, 532–33 (1992) (maintaining that attacks against dams are prohibited under international law if severe losses among the civilian population may result).

IV. Countermeasures

The Draft Articles on State Responsibility suggest that such a situation could be resolved by the use of coercive non-violent countermeasures.[220] Countermeasures are activities that would normally be considered illegal, save for the fact that they are considered legitimate in response to an ongoing violation of international law that they seek to rectify.[221] Possible countermeasures could include: blocking Chinese access to the navigable portions of the river lying outside its territory, or suspension or withdrawal from the Agreement on Commercial Navigation Along the Upper Reach of the Mekong River signed by China, Myanmar, Laos, and Thailand.[222] The scope of this multilateral compact signed by China, Myanmar, Laos and Thailand requires each state to develop port facilities capable of handling 100-ton vessels, removing navigation obstacles, and reducing trade barriers.[223]

V. Forum Seeking

Aside from the use of countermeasures or diplomacy (in which legal arguments will play a major role), the downstream riparian states could seek a forum in which to lodge a com-

220. *See* Rix, *supra* note 4, at 128–29 (describing steps China has taken to cooperate with its neighbors over water resources and to alter its image as the "boogeyman" of the Mekong Basin); *see also* Arthur H. Westing, *Environment, Scarcity and Violence,* 44 ENV'T. 44, 44 (2002) (dismissing dam construction as a potential cause of future armed conflict). *See generally Report of the International Law Commission to General Assembly on State Responsibility* (1996), *available at* http://www.un.org/law/ilc/reports/1996/chap03.htm (last visited July 17, 2006) (downplaying the possibility of armed conflict over China's proposed hydropower project).

221. *See Draft Articles on State Responsibility*, [1980] 1 Y.B. Int'l L. Comm'n 271, U.N. Doc. A/CN.4/L.318 (outlining the permissibility of wrongful acts in the case of self-defense in international arenas); *see also* Marco Bronckers & Naboth van den Broek, *Improving the Remedies of the WTO Dispute Settlement*, 8 J. INT'L ECON. L. 101, 111 (2005) (recognizing that the Draft Articles are in compliance with the principles of international law); James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 455 (1999) (noting the revisions made to the self-defense article).

222. *See* Davis Brown, *Enforcing Arms Control Agreements by Military Force: Iraq and the 800-pound Gorilla*, 26 HASTINGS INT'L & COMP. L. REV. 159, 205 (2003) (reiterating the ramifications allowed if a state does not comply with international agreements); *see also* Alexandria Knight, Note, *Global Environmental Threats: Can the Security Council Protect Our Earth?*, 80 N.Y.U. L. REV. 1549, 1574–75 (2005) (commenting on the possibility of the Security Council's involvement if China fails to comply); Deetes, *Lancang Development in China*, *supra* note 24 (outlining the significant destruction China's actions have had on the environment surrounding the Mekong River).

223. *See* Qingjiang Kong, *China's WTO Accession and the ASEAN-China Free Trade Area: The Perspective of a Chinese Lawyer*, 7 J. INT'L ECON. L. 839, 856 (2004) (enforcing the idea that China is moving toward the reduction of trade barriers); *see also* Rix, *supra* note 4, at 109–10 (outlining the details of the agreement set between the river-dependent states); Kulachada Chaipipat, *Mekong River Pact to Be Signed Today*, THE NATION, Apr. 19, 2000, *available at* http://www.burmalibrary.org/TinKyi/archives/2000-04/msg00015.html (reporting on the historical pact to be signed by officials from China, Burma, Thailand, and Laos).

plaint.[224] The problem with this option is that being drawn into a forum to resolve an international dispute is often by consent.[225] For example, China would not likely voluntarily submit to having the case decided under the jurisdictional competence of the International Court of Justice.

A. Tribunal under a Multinational Environmental Agreement

One option for the downstream riparian states is to seek a tribunal hearing under a multinational environmental agreement, to which China is a party, with compulsory procedures for binding decisions, such as the United Nations Convention on the Law of the Sea (UNCLOS).[226] Article 64 of UNCLOS calls for cooperation in ensuring conservation of highly

224. *See* Rix, *supra* note 4, at 129 (concluding that with effective communication among the riparian states, the Mekong River could be sustained); *see also* Upadhye, *supra* note 172, at 79 (citing attempts made by other international organizations to enforce water navigation pacts between countries); Spiegel, *supra* note 134, at 344–45 (predicting international law forums available to countries searching for assistance in enforcing waterway agreements).

225. *See* Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States*, 64 WTR LAW & CONTEMP. PROBS. 13, 13 (2001) (explaining that the problem with international criminal courts is the requisite consent of both parties to participate in the process); *see also* Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 EUR. J. INT'L L. 1, 17 (2003) (reiterating the lack of compulsory jurisdiction for parties involved in international law disputes); Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 578, 578 (1991) (declaring international legal resolution to be consensual by nature).

226. *See* United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (Dec. 10, 1982). "Choice of procedure" as provided in Article 287 of UNCLOS provides as follows:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to chose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
>
> a. the International Tribunal for the Law of the Sea established in accordance with Annex VI;
>
> b. the International Court of Justice;
>
> c. an arbitral tribunal constituted in accordance with Annex VII;
>
> d. a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Additionally, UNCLOS Article 296 on "Finality and binding force of decisions" provides that, "[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute."; *see also* John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 113 (1998) (elucidating the extensive details of the binding decision agreement); Deborah Horowitz, Note, *The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the Southern Bluefin Tuna Case*, 25 MELB. U. L. REV. 810, 815 (2001) (holding that the tribunal's decision was binding per the UNCLOS provisions).

migratory species listed in Annex I of UNCLOS.[227] Cetaceans, and particularly Family Delphinidae (dolphins), are listed in Annex I. Because endangered Irrawaddy dolphins[228] are found in the Mekong, the downstream riparian states could invoke China's obligation to ensure their conservation, which is being threatened by the construction of the dams.[229]

Another possible avenue for the downstream riparian states is to bring a complaint before the International Tribunal for the Law of the Sea under Article 66 of UNCLOS.[230] The same

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227. *See* Wood v. Verity, 729 F. Supp. 1324, 1326–28 (S.D. Fla. 1989) (recognizing that highly migratory species can be managed by international agreements, such as UNCLOS); United Nations Convention on the Law of the Sea, *supra* note 226 (calling for cooperation among states and coastal states in conservation of fish and wildlife); *see also* George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention IV: The Last Round of Definitions Proposed by the International Law Association (American Branch) Law of the Sea Committee*, 36 CAL. W. INT'L L.J. 133, 151 (2005) (articulating the intent of the article).

228. *See* Steven Connor, *Man Versus Nature: Found but How Long Can Borneo's New Creature Survive?*, INDEP., Dec. 7, 2005, at 28, *available at* 2005 WLNR 19657114 (reporting that the endangered dolphins' numbers have "dwindled" down to about 1,000); *see also* Deetes, *Lancang Development in China*, *supra* note 24, at ¶ 10 (linking the building of the dams to the survival of several species of endangered megafauna of the Mekong region); *Dolphin Population on the Rise*, FIN. TIMES, Feb. 18, 2006, *available at* 2006 WLNR 3018397 (explaining that the Irrawaddy dolphin is naturally rare because they give birth to one baby every three years and there are only two places in the world where dolphins live in lakes).

229. For an example of a case involving a complaint under Article 66 of UNCLOS, see the Proceedings in the Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South Eastern-Pacific Ocean (European Community v. Chile) (Int'l Trib. L. of the Sea 2000). *See generally* World Trade Org., Environmental Backgrounder: The Effects of Trade Liberalization on the Environment, *available at* http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/c1s2_e.htm (last visited Mar. 8, 2006) [hereinafter Environmental Backgrounder]. Swordfish are highly migratory species that cross jurisdictional boundaries along their extensive journeys. For over ten years, the European Communities and Chile have been involved in a controversy over swordfish fisheries in the South Pacific. Chile had passed domestic laws forbidding foreign swordfish boats from unloading their catch in Chilean ports. Both sides have resorted to different international law regimes to support their positions. The EC brought the case before the WTO in April 2000 and Chile brought the case before the ITLOS in December 2000. In March 2001, the parties to this controversy informed the ITLOS that they had reached a provisional arrangement and requested that the proceedings be suspended. The suspension was confirmed for an additional two years beginning in January 2004. Therefore, as of the date of this writing, the case remains on the docket of the tribunal as unresolved. *Id.*; *see also River Dolphins in Urgent Battle Against Extinction*, CHINA DAILY, Mar. 22, 2005, *available at* 2005 WLNR 4433483 (detailing the deadly effect dams have in restricting the Irrawaddy dolphins' movement); Wiwat Pandawutiyanon, *Irrawaddy Dolphins Disappearing from the Mekong*, *available at* http://www.ipsnews.net/mekong/stories /dolphins.html (last visited Mar. 15, 2006) (detailing the sad decline of the Irrawaddy dolphins of the Mekong River).

230. *See* Jennifer L. Talhelm, *Curbing International Overfishing and the Need for Widespread Ratification of the United Nations Convention on the Law of the Sea*, 25 N.C. J. INT'L L. & COM. REG. 381, 397 (2000) (setting forth the criteria for states to maintain responsibility for animals and fish that may spawn in one body of water and live in another); *see also* James T. Johnson, Comment, *Treaty Fishing Rights and Indian Participation in International Fisheries Management*, 77 DENV. U. L. REV. 403, 419 (1999) (entertaining the hope that states will cooperate in protecting the fish populations).

procedural mechanisms would apply as in an Article 64 action; this is just a different cause of action, as Article 66 relates to the conservation and harvesting of anadromous fish species.[231] If anadromous fish species are found in the Mekong River and if China's construction of the dams threatens the conservation of these anadromous species, then the downstream riparian states could bring a formal complaint before the International Tribunal for the Law of the Sea claiming that China was in violation of Article 66 of UNCLOS.[232]

B. World Trade Organization

Another body that has compulsory dispute settlement mechanisms is the World Trade Organization (WTO) Dispute Settlement Body (DSB). All members of the WTO[233] must

231. Anadromous species of fish migrate from freshwater sources out to sea, where they spend the majority of their adult life, before migrating back inland to their upstream birth waters to spawn. A familiar example is the salmon. Some relevant language from Article 66 of UNCLOS is as follows:

> The State of origin shall co-operate in minimizing economic dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred . . . . In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall co-operate with the State of origin with regard to the conservation and management of such stocks. The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.

Ibid. *See* United Nations Convention on the Law of the Sea, Article 66 (December 1982), 21 I.L.M. 1261 (showing the duties of the United Nations signatories regarding fishing stocks); *see also* George K. Walker & John E. Noyes, *Definitions for the 1982 Law of the Sea Convention—Part II*, 33 CAL. W. INT'L L.J. 191, 285 (2003) (illustrating the duties of a state under the UNCLOS Article 66); Christian C. Polychron, Comment, *Towards a Solution to the Problem of the Common Anadromous Stocks of the North Pacific*, 4 SAN DIEGO INT'L L.J. 543, 551–52 (2003) (analyzing the power of Article 66 to protect anadromous fish populations)

232. *See* Fabrizio Marrella, *Emerging Dilemmas in International Economic Arbitration: Unity and Diversification in International Arbitration: The Case of Maritime Arbitration*, 20 AM. U. INT'L REV. 1055, 1060 (2005) (commenting on the role of the International Tribunal for the Law of the Sea in deciding international disputes over the law of the sea); *see also* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. SOC'Y INT'L L. 535, 552–53 (2001) (examining the jurisdiction and enforcement options available to the International Tribunal for the Law of the Sea); Walker & Noyes, *supra* note 231, at 285 (discussing UNCLOS Article 66 and the duties of signatory states).

233. China, Thailand, Cambodia, and Myanmar are members of the WTO. Laos, and Vietnam are observer governments. *See* William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L.J. 427, 432–36 (1995) (detailing the goals, creation, and procedures of the WTO); *see also* Debra P. Steger, *Trade as a Guarantor of Peace, Liberty, and Security? The Role of Peace in the Bretton Woods Institutions*, 20 AM. U. INT'L REV. 1133, 1133–34 (2005) (addressing the reasons for the creation of the WTO); WTO, *Understanding the WTO: The Organization Members and Observers*, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 7, 2006) (listing the members and observers of the WTO).

"affirm their adherence to the principles of management of disputes" under the rules and procedures of the WTO agreement.[234] In regards to dispute settlement, the WTO agreement provides that, "[t]he last resort which this understanding provides to the Member invoking the dispute settlement process is the possibility of suspending the application of concessions or other obligation under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures."[235]

General Agreement on Tariffs and Trade (GATT), Article XX, insulates health and environmental regulations from attacks as trade restrictions as long as they "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[236] The measure must be either "necessary" to protect human, animal, or plant life or health under XX(b), or "related to" the conservation of exhaustible natural resources, and made effective "in conjunction" with restrictions on domestic production or consumption under XX(g).[237]

In the Preamble to the Marrakesh Agreement establishing the WTO, reference was made to the importance of working towards sustainable development.[238] WTO members recognized that:

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234. *See* General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, art. 3 (Sept. 1994), 33 I.L.M. 1125, 1227 [hereinafter General Agreement on Tariffs and Trade] (stating the obligation of members to follow the treaty's dispute management principles); s*ee also* George A. Bermann, *Section IV: Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463, 476–77 (1998) (discussing WTO procedures for resolution of issues); Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 107 (1999) (commenting on the risks of noncompliance with WTO rulings).

235. *See* General Agreement on Tariffs and Trade, *supra* note 234, art. 3, § 7 (stating the last resort of dispute resolution is the possibility of suspending treaty obligations between member states involved in a dispute); *see also* Steger, *supra* note 233, at 1133–34 (analyzing the effectiveness of the WTO's dispute settlement system). *See generally* Peng Jiang, Comment, *Fighting the AIDS Epidemic: China's Options Under the WTO TRIPS Agreement*, 13 ALB. L.J. SCI. & TECH. 223 (2002) (revealing the changes in the WTO settlement procedures).

236. *See* General Agreement on Tariffs and Trade, *supra* note 234, art. 20 (listing the general exceptions available from the duties imposed under the GATT); *see also* Miller & Croston, *supra* note 234, at 91 (analyzing GATT Article XX exceptions to preclusion of trade barriers for the purpose of environmental protection); Richard H. Steinberg, *Judicial Lawmaking at the WTO*: *Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 252 (2004) (examining the circumstances under which an Article XX exception may be invoked).

237. *See* PERCIVAL ET AL., *supra* note 213, at 1089 (examining the three-part test used to determine the applicability of Article XX exceptions); *see also* Miller & Croston, *supra* note 234, at 91 (analyzing the requirements necessary for GATT Article XX exceptions to be applicable); Steinberg, *supra* note 236, at 252 (discussing GATT Article XX obligations and requirements for invoking exceptions).

238. *See* Agreement Establishing the World Trade Organization, art. 1, Apr. 14, 1994, 33 I.L.M 1125, 1143–44 (stating the commitment of the WTO to promoting development through trade while respecting the objectives of sustainable development); *see also* Bradly Condon, *Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?*, 9 TULSA J. COMP. & INT'L 533, 565–66 (2002) (discussing the principles of sustainable development incorporated in the Preamble to the WTO); Lana Martin, *World Trade Organization and Environmental Protection: Reconciling the Conflict*, 9 CURRENTS: INT'L TRADE L.J. 69, 73 (2000) (analyzing the effectiveness of the environmental protection principles in the WTO).

> their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living . . . while allowing for the optimal use of the world's resources in accordance with the objectives of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[239]

However, the WTO Secretariat has also stated that it "is not an environmental protection agency" and "[i]ts competence in the field of trade and the environment is limited to trade policies and to trade related aspects of environmental policies which have a significant effect on trade."[240] It is also significant to note that in all WTO/GATT decisions involving environmentally-related disputes, only once has a panel ruled in favor of an environmentally protectionist measure.[241]

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239. *See* Eric L. Richards & Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. COLO. L. REV. 295, 311–14 (2000) (examining the WTO's commitment to increasing trade without exploiting or destroying the environment); *see also* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 358–59 (1999) (discussing the WTO's main focus of promoting economic development through trade with protection of the environment as a secondary focus); WORLD TRADE ORG., TRADE AND ENVIRONMENT AT THE WTO, at 4–5, *available at* http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/trade_env_e.pdf (last visited Mar. 8, 2006) [hereinafter TRADE AND ENVIRONMENT AT THE WTO] (stating the obligation of WTO members to raise standards of living through trade while following the principles of sustainable development).

240. *See* Elaine Hartwick & Richard Peet, *Rethinking Sustainable Development: Neoliberalism and Nature: The Case of the WTO*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 188, 193 (2003) (acknowledging that WTO is limited in aspects of environmental protection but may encourage trade policy that benefits the environment); *see also* Martin, *supra* note 238, at 73–74 (criticizing the WTO for only being willing to protect the environment when damage is caused by international trade); TRADE AND ENVIRONMENT AT THE WTO, *supra* note 239, at 6 (discussing the WTO's ability to protect the environment only through trade and environmental polices with a significant impact on trade).

241. *See* Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R/ (Sept. 18, 2000) (stating that the sale, manufacture, import, processing, and domestic marketing of asbestos fibers or of any products containing asbestos are prohibited for the protection of workers and consumers); *see also* Joseph N. Eckhardt, Note, *Balancing Interests in Free Trade and Health: How the WHO's Framework Convention on Tobacco Control Can Withstand WTO Scrutiny*, 12 DUKE J. COMP. & INT'L L. 197, 210 (2002) (alleging that until 2000, when the WTO upheld the French ban on asbestos trade, the WTO had never ruled in favor of a health/environmental protectionists' measure that restricted international trade); Julie H. Paltrowitz, Comment, *A "Greening" of the World Trade Organization? A Case Comment on the Asbestos Report*, 26 BROOK. J. INT'L L. 1789, 1789 (2001) (claiming that in the asbestos case the WTO allowed a WTO member to impose a ban on the import of asbestos for the first time under Article XX(b) of the GATT). *See generally* Environmental Backgrounder, *supra* note 229 (expressing that WTO members have realized that there is a close relationship between international trade and the environment and asserting that they have chosen to pursue economic development while simultaneously caring for the protection and preservation of the environment).

The only case ever upheld by GATT/WTO in favor of environmental protection involved the risk to human health and safety posed by asbestos fibers.[242] On the other hand, the WTO rejected similar claims of risk to human health posed by cigarettes and by air pollution caused by the consumption of gasoline.[243] Similar measures aimed at conservation of exhaustible natural resources have been rejected in cases concerning: tuna stocks, salmon and herring, dolphins, petroleum, clean air, and sea turtles.[244]

Another problem with the WTO approach is finding a way for the downstream riparian states to access the forum. The downstream states can only do so if there is a trade-related aspect to their complaint.[245] The downstream states could themselves enact a trade restriction that is somehow related to the preservation of exhaustible natural resources or the protection of

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242. *See* Report of the Panel, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶3.4, WT/DS135/R (Sept. 18, 2000) [hereinafter *Measures Affecting Asbestos and Asbestos-Containing Products*] (holding that the decree for the ban of asbestos is justified under Article XX(b) of the GATT); *see also EU/Canada: WTO Confirms Canadian Asbestos Ban Defeat,* EUROPEAN REP., July 29, 2000, at 1 (discussing the WTO decision upholding the asbestos ban and noting that it is the first time in 202 WTO panels that a trade restrictive measure has been upheld in light of health concerns by the WTO); Environmental Disputes in GATT/WTO, *available at* http://www.wto.org/english/tratop_e/envir_e/edis00_e.htm (last visited Mar. 8, 2006) (presenting all the cases involving environmental disputes that the WTO has decided and establishing that only in the asbestos case was a trade restriction permitted based on heath considerations).

243. See John J. Emslie, *Labeling Programs as a Reasonably Available Least Restrictive Trade Measure under Article XX's Nexus Requirement*, 30 BROOK. J. INT'L L. 485, 509 (2005) (stating that the U.S. prohibition of conventional gasoline for the reduction of air pollution was not upheld by the WTO because it did not meet the Article XX(b) requirements); Paltrowitz, *supra* note 241, at 1789 (mentioning that the Thai measure to ban importation of some tobacco products was rejected by the WTO because it was found not to be necessary to protect the health of its citizens). *See generally Measures Affecting Asbestos and Asbestos Containing-Products*, *supra* note 242 (asserting that in the cigarette and gasoline cases the WTO ruled against the trade restrictive measures because Thailand and the U.S. respectively had not met their burden under Article XX(b) of the GATT).

244. *See* Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW (June 15, 2001) (maintaining that the U.S. measure to prohibit imports of shrimp harvested in a way that harmed sea turtles violated Article XI.1 of the GATT and was thus struck down); *see also* Carrie Wofford, Note, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563, 565 (2000) (listing the WTO environmental decisions from 1989 to 1999 among which are the salmon, shrimp, gasoline, and tuna decisions and noting that the restrictive measures taken in the above cases were struck down). *See generally Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 242 (laying out Articles III and XX of the GATT as interpreted in the tuna case where the ban on importation of tuna caught in a way that caught and killed dolphins as well was not upheld).

245. *See* Leah Sandbank, Note, *Dirty Laundry: Why International Measures to Save the Global Clean Water Supply Have Failed*, 13 FORDHAM ENVTL. L.J. 165, 176 (2001) (stating that the WTO is strictly concerned with international trade in goods, that water is not considered to be a tradable good and that if it were an exportable good it would be governed by the GATT/WTO). *See generally* Dan Tarlock, *How Well Can International Water Allocation Regimes Adapt to Global Climate Change?*, 15 J. LAND USE & ENVTL. L. 423 (2000) (asserting that riparian rights are governed by tort law and implying that international and environmental law standards are not applicable because water is not considered to be a scarce resource); Tarlock, *International River Ecosystems*, *supra* note 138 (discussing the Gabcikovo-Nagymaros Dam decision and asserting that the decision shows there is a hope that international and environmental law will recognize the riparian states' right to protection of their riverine systems from actions of other states).

human, animal, or plant life being threatened by the Chinese dams.[246] A possibility would be to enact restrictions on the trade of energy generated from the Chinese hydropower plants.[247] The question then comes to mind whether such a restriction would be deemed "necessary" by the WTO. Moreover, even if the downstream states do enact a trade restriction, China may still not lodge a complaint with the WTO.[248] China would likely try to sell its energy elsewhere, rather than try lodging a complaint with the WTO and risk having its Mekong hydropower development policy scrutinized.[249]

On a more positive note, the WTO has commented that its aversion to upholding environmentally-based trade restrictions might be different in a situation in which a complaint lodged with the WTO is coupled with a violation of an applicable principle of a multina-

246. *See* Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 278 (2000) (stating that the WTO recognizes the right of governments to restrict trade based on Article XX in order to protect the environment, scarce sources, endangered species, health, and safety of its citizens); *see also* Sandbank, *supra* note 245, at 176 (asserting that water disputes have never come before the WTO and maintaining that a national measure relating to use, production, or consumption of water that somehow restricts trade may violate the GATT or SPS agreements and thus get into the WTO forum); Daniel T. Griswold & William H. Lash III, *WTO Report Card II: An Exercise or Surrender of U.S. Sovereignty?*, *available at* http://www.freetrade.org/pubs/briefs/tpb-009es.html (last visited Mar. 8, 2006) (expressing that the WTO charter allows members to enact restrictions based on the exemptions of Article XX for reasons of national security, public safety and health, environmental protection, and conservation of exhaustible resources).

247. *See* Laura Thoms, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design*, 41 COLUM. J. TRANSNAT'L L. 795, 827–41 (2003) (discussing the trade restrictions that were imposed on imports of aerosol and other controlled substances that deplete the ozone). *See generally* Barbara K. Bucholtz, *Coase and the Control of Transboundary Pollution: The Sale of Hydroelectricity under the United States—Canada Free Trade Agreement of 1988*, 18 B.C. ENVTL. AFF. L. REV. 279 (1991) (maintaining that trade restrictions may be imposed on energy if they are necessary to prevent depletion of an energy source thus lending support to the claim that trade restrictions can be imposed when there is a danger of depletion of scarce resources); Jacqueline Peel, *Confusing Product with Process: A Critique of the Application of Product–Based Tests to Environmental Process Standards in the WTO*, 10 N.Y.U. ENVTL. L.J. 217 (2002) (stating that countries may refuse to import certain goods that do not meet the required and desired health, safety, and environmental standards thus giving support to the argument that restrictions may be imposed on the trade of the energy produced by the Chinese hydropower plants).

248. *See* General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna (November 1991), 30 I.L.M. 1594 (laying out the prongs of the test for approving a restriction on trade under Article XX, one of which requires that the restriction be "necessary to protect human, animal or plant life or health"); *see also* Thomas J. Schoenbaum, *Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 721 n.56 (1992) (providing that Article XX of the GATT says that, "nothing in this agreement shall be construed to prevent" the parties from enacting or taking measures "necessary to protect human, animal or plant life or health"); David Llorito, *Total Incineration Ban May Violate Three GATT Provisions, Principles*, BUS. WORLD, May 13, 1999, at 20 (arguing that the party invoking Article XX must prove by means of scientific evidence that the ban on imports is necessary to achieve the policy objectives of the party imposing the trade restrictions).

249. *See* Perlez, *China's Reach*, *supra* note 3, at A1(indicating that China has a strong interest in hydroelectric power for its growth, but also indicating that the nations downstream have learned to deal with China); *see also China, S.E. Asian Nations to Discuss Economy, Ecology in Mekong,* ASIAN ECON. NEWS (Japan), July 5, 2005 (showing that upstream nations, such as China, send energy downstream); *China Urged to Cooperate on Mekong Water Management, supra* note 83, ¶ 3 (exemplifying that China has placed energy as a top priority through the Mekong hydropower dam).

tional environmental agreement.[250] This means that if the downstream states could find a violation of a provision of a multinational environmental agreement to which both they and China were parties, their chances of succeeding before a WTO panel would improve. Unfortunately, China was one of only three nations that opposed the United Nations Convention on the Law of International Watercourses.[251] China's antipathy towards the Watercourses Convention can probably be explained by its status as the upstream state in the ongoing Mekong controversy.[252] The downstream states might have better luck under UNCLOS, as discussed above.

C. U.S. Federal Courts

Another avenue to consider is to invoke the jurisdiction of United States Federal Courts under the Alien Tort Claims Act.[253] The downstream riparian states could possibly bring a human rights claim, asserting that there is an international norm providing for the right to a healthy environment with which the construction of the Chinese dams is interfering.[254] Three problems emerge here as well. The first and most glaring problem is that because of

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250. *See* PERCIVAL ET AL., *supra* note 213, at 1089 (referring to how the issue regarding the tuna/dolphin decisions might have been different had they been presented in conjunction with a multilateral environmental agreement); *see also* Environmental Backgrounder, *supra* note 229 (referring to trade restrictions and multinational environmental agreements). *See generally* Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335 (1997) [hereinafter Osofsky, *Environmental Human Rights*] (showing various conventions that nations are part of that have included environmental human rights provisions).

251. *See* McCaffrey & Sinjela, *supra* note 190, at 105 (mentioning that China was one of three nations that voted against the Convention); *see also* Liebman, *supra* note 2, at 281 (stating that China was one of three nations not to endorse the Watercourses Convention); *Russia Worried over Chinese Threat to Siberian River,* BBC MONITORING Int'l Rep., Sept. 18, 2005, at 1 (indicating that China has not signed on to the convention avoiding obligations to inform downstream neighbors of its activities).

252. *See* Hirsch, *supra* note 5, at 407 (indicating that China has more to lose by joining the Convention than other nations); s*ee also* McCaffrey & Sinjela, *supra* note 190, at 105 (emphasizing that China's negative votes to the Convention is probably due to its status as an upstream nation); Liebman, *supra* note 2, at 281 (reflecting that China was one of three nations to vote against the Convention).

253. *See* 28 U.S.C. § 1350 (2006) (citing the alien's action for tort); *see also* Osofsky, *Environmental Human Rights*, *supra* note 250, at 336–37 (showing that indigenous victims abroad have used the Alien Tort Statute to bring environmental suits in U.S. Federal Court). *See generally* Osofsky, *Learning from Environmental Justice*, *supra* note 203 (implicating that there may be a possible avenue for future Alien Tort Statute claims for environmental harm).

254. *See* Osofsky, *Environmental Human Rights*, *supra* note 250, at 340 (claiming that under the Alien Tort Statute nations could bring potential environmental human rights causes of action against those multinational corporations causing the harm); *see also* Rix, *supra* note 4, at 103–04 (showing examples of environmental threats to the Mekong Basin, including China's hydropower reliance). *But see* Roda Mushkat, *Globalization and the International Environmental Legal Response: The Asian Context*, 4 ASIAN-PACIFIC L. & POL'Y J. 3, 3 n.176 (2003) (indicating that because of China's "dominating" status and investment power downstream countries might fear bringing human rights violations against China because of the hydropower dams along the Mekong River).

the Foreign Sovereign Immunity Act,[255] plaintiffs cannot sue states directly under the Alien Tort Statute, except in very specific instances.[256]

Assuming that a plaintiff could get around issues of foreign sovereign immunity or find another responsible party or official over whom U.S. Federal Courts could assert jurisdiction, the second problem that would be encountered is to actually bring Chinese officials into a U.S. courtroom.[257] Such an attempt would likely result in nothing more than a futile, yet symbolic, exercise in the pursuit of justice.[258] For example, when Beijing's Mayor Liu Qi arrived in the San Francisco airport, en route to attend the 2002 Winter Olympics in Salt Lake City, Utah, he was served with papers for a lawsuit filed under the Alien Tort Claims Act of 1789 and the Torture Victims Protection Act of 1992, for letting

255. *See* 28 U.S.C. § 1603 (2006) (citing to definitions relevant to the Foreign Sovereign Immunity Act); *see also* Michael Rosetti, Note, *Terrorism As a Violation of the Law of Nations after Kadic v. Karadzic*, 12 ST. JOHN'S J. LEGAL COMMENT. 565, n.48 (1997) (indicating that the Foreign Sovereign Immunities Act regulates jurisdiction over foreign states and the United States). *See generally* Osofsky, *Learning from Environmental Justice*, *supra* note 203 (stating that except in very limited circumstances can plaintiffs sue states directly under the Alien Tort Statute).

256. *See* Elizabeth Defeis, *The Foreign Sovereign Immunities Act and Human Rights Violations,* 8 ILSA J. INT'L & COMP. L. 363, 364 (2002) (indicating the limited circumstances in which suits can be brought against foreign states in the United States); *see also* Osofsky, *Learning from Environmental Justice*, *supra* note 203, at 121 (stating narrow exceptions where plaintiffs can sue states directly under the Alien Tort Statute). *But see* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 493 n.7 (citing to the case of Von Dardel v. USSR, 623 F. Supp. 246 (D.D.C. 1985), where jurisdiction was found under both the Alien Tort Statute and the Foreign Sovereign Immunities Act).

257. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (1980) (alleging that deliberate torture violates international law where jurisdiction can be asserted when the alleged torturer is found and served with process within our borders); *see also* Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 513–15 (2003) (stating that in some countries international treaties and conventions take precedence over constitutions, helping to assert jurisdiction over foreign nationals). *But see* Osofsky, *Environmental Human Rights*, *supra* note 250, at 341 (holding that since the case of Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the Alien Tort Statute has become an important aid for human rights victims struggling to find a tribunal to obtain relief).

258. *See* Elizabeth Defeis, *Litigating Human Rights Abuses in United States Courts: Recent Developments*, 10 ILSA J. INT'L & COMP. L. 319, 320 (2004) (showing that even when a defendant defaults and judgment is entered in favor of the plaintiff, efforts to collect on that judgment are often futile); *see also* Eric Gruzen, Comment, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?*, 14 TRANSNAT'L LAW. 207, 222 (2001) (indicating the weakness of the Alien Tort Statute and its mere symbolism). *See generally* Hurwitz, *supra* note 257 (holding that human rights law is seen as weak because when the violations are committed by governments, the law must be enforced by other actors).

grave abuses surrounding the Tiananmen Square massacre go unchecked.[259] China's Foreign Ministry denounced the lawsuit as "a nasty trick"[260] and Mayor Liu Qi has yet to appear for his day in court.[261]

In the remote event that a plaintiff is able to overcome jurisdictional problems and actually bring a Chinese official before a U.S. federal court, the third hurdle they will have to overcome is to argue that an international norm providing for the right to a healthy environment actually exists.[262] In its recent decision in *Sosa v. Alvarez-Machain*, the U.S. Supreme Court narrowly defined the "law of nations" prong of the Alien Torts Statute when it stated:

> Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under [the Alien Tort Statute], we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international norm with less definite content and accep-

259. *See* Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 475 (2002) (detailing how Falun Gong practitioners have served several Chinese government officials with complaints alleging violations of the Alien Tort Claims Act of 1789 and the Torture Victims Protection Act of 1992); *see also* Mark J. Leavy, Note, *Discrediting Human Rights Abuse As an "Act of State": A Case Study on the Repression of the Falun Gong in China and Commentary on International Human Rights Law in U.S. Courts*, 35 RUTGERS L.J. 479, 764–65 (2004) (outlining the allegations made in the complaint filed against Liu Qi, noting that Plaintiff Jane Doe I alleged that she was beaten in Tiananmen Square, detained without charge, and during her detainment tortured and interrogated); John Pomfret, *Fight over Banned Chinese Sect Moves to U.S.: Falun Gong Activists Irk Beijing by Filing Human Rights Lawsuits in American Courts,* WASH. POST, Mar. 12, 2002, at A15 (reporting that Beijing's Mayor Liu Qi was served at San Francisco International Airport while waiting to board a flight to Salt Lake City where he was to attend the 2002 Winter Olympics as head of the Chinese delegation).

260. *See* Claudia Rosett, *Will Chinese Repression Play in Peoria? Beijing's Campaign Against an "Evil Cult" Comes to America*, WALL ST. J., Feb. 21, 2002 (quoting a portion of the statement submitted by China's Foreign Ministry in response to the lawsuit filed against Liu Qi). *See generally* Doe v. Liu Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (characterizing the Falun Gong's filing of lawsuits within the U.S. as unwarranted and the charges asserted against Liu Qi as malicious and groundless); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004) (characterizing the Chinese government's response to the lawsuit filed against Liu Qi as furious and noting the Chinese government's assertion that the litigation would result in irreparable damage to existing relations between the United States and China).

261. *See Doe*, 349 F. Supp. at 1334 (entering a default judgment against Liu Qi). *See generally* Rosett, *supra* note 260 (noting that as of the date of the article's publication Liu Qi had not yet responded to the lawsuit).

262. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 166–67 (5th Cir. 1999) (concluding that Beanal did not establish an actionable claim under the Alien Tort Statute as he failed to establish that Freeport-McMoran, in causing environmental destruction, committed environmental torts or abuses under international law); *see also* Richard Desgagne, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263, 264 (1995) (outlining the difficulties involved in establishing the existence of an international right to a healthy environment); Richard L. Herz, *Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 555, 580–81 (1995) (acknowledging the complexities involved in proving an international right to a healthy environment under the Alien Tort Statute and arguing that "international law recognizes a right to a healthy environment based on, although independent from, the rights to life, health and security of the person").

> tance among civilized nations than the historical paradigms familiar when [the Alien Tort Statute] was enacted.[263]

Persuading a U.S. federal court that a recognized international norm of the right to a healthy environment exists may be especially difficult. This was seen in *Beanal v. Freeport-McMoran, Inc.,* where the Fifth Circuit stated that:

> [i]t is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation under the [Alien Tort Statute]. Thus the ATS only "applies to shockingly egregious violations of universally recognized principles of international law."[264]

However, Principle 21 of Rio Declaration proclaims that, "[h]uman beings are . . . entitled to a healthy and productive life in harmony with nature."[265] Additionally, Principle 1 of the Stockholm Declaration states that, "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and

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263. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (holding that courts should require any claim under the Alien Tort Statute to rest upon a norm that is internationally recognized, accepted, and defined with a degree of specificity comparable to the historical paradigms recognized at the statute's inception); *see also* Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F. L. REV. 167, 215 (2005) (acknowledging the limiting nature of the definition of the "law of nations" established in Sosa v. Alvarez-Machain); Osofsky, *Learning from Environmental Justice*, *supra* note 203, at 128–29 (asserting that the court's narrow definition of the "law of nations" prong under the Alien Tort Statute in Sosa v. Alvarez-Machain makes environmental claims derived from the right to health and life "unlikely to succeed until new developments in customary international law occur").

264. *See Beanal*, 197 F.3d at 167 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980) and Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983)); *see also* Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 523–25 (S.D.N.Y. 2002), *aff'd,* 343 F.3d 140 (2d Cir. 2003) (finding that, "Beanal did not establish 'shockingly egregious' as an independent standard for determining what constitutes a violation of international law;" instead it "recognized that because universal acceptance is a prerequisite to a rule becoming binding as customary international law, only rules prohibiting acts that are 'shockingly egregious' are likely to attain status"); Lucien J. Dhooge, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3, 55 (2003) (discussing how the plaintiff in Beanal v. Freeport-McMoran, 197 F.3d 161, 167 (5th Cir. 1999), failed to provide sufficient evidence to establish an environmental tort claim under the Alien Tort Statute).

265. *See* Rio Declaration, *supra* note 135; *see also* Florencio J. Yuzon, *Deliberate Environmental Modification through the Use of Chemical and Biological Weapons: "Greening" the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 AM. U. J. INT'L L. & POL'Y 793, 800 (1996) (outlining several of the principles contained in the Rio Declaration on Environment and Development). *But see Flores*, 414 F.3d at 255 (finding that the Rio Declaration does nothing more than establish rights devoid of any discernable standards by which its violation should be judged and therefore cannot be deemed to constitute evidence of a customary international law).

well-being."[266] Furthermore, the right to a healthy environment is now embodied in the San Salvador Protocol.[267] Significantly, the emergence of environmental rights as a norm in inter-

266. See Stockholm Declaration, *supra* note 135; *see also* Sumudu Atapattu, *The Public Health Impact of Global Environmental Problems and the Role of International Law*, 30 AM. J.L. & MED. 283, 287 (2004) (noting that Principle 1 of the Stockholm Declaration indicates that an adequate environment is necessary for the exercise of other traditionally-recognized human rights). *But see* Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 293 (1997) (arguing that Principle 1 of the Stockholm Declaration does not establish a fundamental right to a clean environment).

267. *See* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "San Salvador Protocol," art. 11, O.A.S.T.S. No. 69 (Nov. 16, 1999), 28 I.L.M. 161, 165 ("[E]veryone shall have the right to live in a healthy environment."); *see also* Scott Holwick, *Transnational Corporate Behavior and its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, a Case Study*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 183, 218 (2000) (stating that the San Salvador Protocol's acknowledgment of the right to a healthy environment suggests an extension of the trend toward a collective recognition of an international environmental right); Osofsky, *Learning from Environmental Justice*, *supra* note 203, at 128 (positing that future litigation involving the environmental effects upon humans will probably rely, in part, on the right to a healthy environment declared in the San Salvador Protocol).

national law is evidenced in the constitutions of most Latin American countries,[268] some of

268. *See* Constitución Argentina [CONST. ARG.] [Constitution] art. 41 (guaranteeing Argentina's inhabitants the right to a clean, safe environment and declaring the government responsible for preserving the environment for future generations and ensuring the rational use of Argentina's natural resources); *see also* Constituição Federal [C.F.] [Constitution] tit. II, ch. I, art. 5 LXXIII [Braz.] (declaring that, "any citizen is a legitimate party to file a people's legal action with a view to nullifying an act injurious . . . to the environment . . . and the author shall, save in the case of proven bad faith, be exempt from judicial costs and from the burden of defeat"); Constitución Política de la República de Chile [Constitution] ch. III, art. 19, No. 8 (declaring all persons have the right to live in an environment free of contamination and stating it is the state's responsibility to ensure this right is not violated); Constitución Política de Colombia [Constitution] tit. I, ch. III, art. 79 (declaring everyone has the right to enjoy a safe, clean environment and stating it is the responsibility of the state to protect the diversity and integrity of the environment, to conserve areas of special ecological importance and to promote education in furthering these goals); Constitución Política de la República de Costa Rica [Constitution] *as amended*, tit. V, ch. 1, art. 50 (declaring everyone has the right to a safe, healthy environment and guaranteeing the state will act to defend and preserve this right); Constitución Política de la República de Cuba de 1976 [Constitution] ch. 1, art. 27 (proclaiming the state will protect the environment and natural resources of the country, that all government entities will act within this policy and that it is the responsibility of all citizens to contribute to protecting water, atmosphere, earth, and all types of natural resources); Constitución Política de la República de Ecuador de 1998 [Constitution] tit. III, ch. 2, art. 23, No. 6 (providing all citizens with the right to live in a clean, safe environment free of contamination and declaring that the laws of the nation will establish the restrictions required to protect the environment and preserve this right); Constitución Política de la República de El Salvador [Constitution] tit. V, art. 117 (declaring it is the state's responsibility state to protect natural resources and ensure ecological diversity and environmental integrity); Constitution of the Co-Operative Republic of Guyana ch. II, No. 25 (proclaiming all citizens have "a duty to participate in activities designed to improve the environment and protect the health of the nation"); Constitución Política de la República de Guatemala [Constitution] tit. II, ch. II, § 70, art. 97 (declaring the state, the municipalities, and the nation's inhabitants are obligated to promote social development, the economy, and technology in a manner that will prevent the contamination of the environment and maintain an ecological equilibrium and stating that the government will dictate all the norms necessary to guarantee land and water are used in a manner that avoids its deterioration); La Constitution de la République d'Haïti tit. I, ch. II, art. 52.1 (stating the government will respect and protect the environment); La Constitution de la La République d'Haïti tit. I, ch. II, arts. 253–58 (proclaiming that all practices that perturb the ecological integrity of the environment will not be tolerated and that economic development should be carried out in conformity with this objective); Constitución Política de la República de Honduras de 1982 [Constitution] tit. III, ch. VII, art. 145 (proclaiming that the nation will conserve the environment sufficiently to protect the health of all people); Constitución Política de la República de Honduras de 1982 [Constitution] tit. III, ch. VIII, arts. 172–73 (proclaiming that all natural reserves and resources will be protected by the state to promote the health of its inhabitants); Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, tit. I, ch. I, art. 4, 5 de Febrero de 1917 (Mex.) (declaring everyone has the right to a clean environment that will sustain human development and well-being); Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. IV, ch. III, art. 60, La Gaceta [L.G.] 9 January 1987 (stating people have the right to live in a clean, safe environment and that it is the state's obligation to preserve the environment and its natural resources); Constitución Política de la República de Panamá [Constitution] tit. III, ch. 7, arts. 114–15 (declaring it a fundamental responsibility of the state to guarantee its people live in a clean, safe environment free of contamination where the air water and agricultural produce meet the basic requirements for the development of adequate human life); Constitución de la República de Paraguay [Constitution] tit. II, ch. I, § II, art. 7 (guaranteeing all persons the "right to live in a healthy ecologically balanced environment" and stating that, "the preservation, recovery and improvement of the environment, as well as efforts to reconcile these goals with comprehensive human development" are objectives the government and its laws will seek to meet); Constitución de la República de Paraguay [Constitution] tit. II, ch. II, art. 38 (declaring everyone has a right to demand that public officials adopt policies that preserve the environment and public health); Constitución Política del Perú 1993 [Constitution] tit. I, ch. I, art. 2, No. 22 (proclaiming all inhabitants have a right "to enjoy an atmosphere balanced and adapted to the development of its life"); Constitución Política de la República Oriental del Uruguay de 1967 [Constitution] § II, ch. II, art. 47 (proclaiming it a fundamental human right that all persons have access to clean water and a healthy environment); Constitución de la República Bolivariana de Venezuela [Constitution] tit. III, ch. IX, art. 127 (proclaiming that it is the right and responsibility of every person to protect and maintain a healthy environment for the future and that the state will act to protect the environment, ecological diversity, and natural parks of the country); Thomas T. Ankersen, *Shared Knowledge, Shared Jurisprudence: Learning to Speak Environmental Law Creole (Criollo)*, 16 TUL. ENVTL. L.J. 807, 808–09 (2003) (noting that environmental rights have been recognized in the constitutions of most Latin American countries).

which have devoted whole chapters to such rights.[269] Prof. Thomas Ankersen suggests that this "phenomenon can be traced back to the [Stockholm Declaration] where the linkage between human rights and the environment began to evolve."[270]

Furthermore, the facts of *Beanal* differ in a significant way from the situation on the Mekong River. *Beanal,* similar to the Mekong situation, involved serious environmental degradation of a river ecosystem and the resultant effects on the human inhabitants of the river basin.[271] In *Beanal* the problems arose from polluted runoff from the operation of an open pit mine in the mountains of Irian Jaya, Indonesia.[272] The significant difference is that in *Beanal* the adverse environmental effects were entirely intrastate;[273] there were no transboundary

269. *See* C.F. [Constitution] tit. VIII, ch. VI, art. 225 [Braz.] (declaring that all persons have the right to a sound environment, outlining the governments' responsibilities in ensuring this right, and stating that legal recourse will be taken against those persons, corporations, or government entities who infringe upon this right); *see also* La Constitution de la République d'Haïti tit. I, ch. II, arts. 253–58 (outlining the responsibilities of the state in maintaining the environmental integrity of the nation and listing the environmental policy rationale to which the laws of the nation should conform); Ankersen, *supra* note 268, at 820 (comparing the United States' reluctance to amend its constitution to include an "environmental constitutional right" with Latin American countries who, having established such rights, are "building constitutional jurisprudence around it").

270. *See* Ankersen, *supra* note 268, at 820 (commenting on the evolution of constitutional environmental rights within Latin America); *see also* 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, 16–17 (2001) (discussing how the Stockholm Declaration, as the first international instrument to link human rights to environmental protection, spurred the debate over whether environmental rights should be recognized). *See generally* Andrea Wang, Comment, *Regulating Human Cloning within an Environmental Human Rights Framework*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 165 (2001) (stating that since the Stockholm Declaration there has been an official acknowledgment of environmental effects on humans and, in consequence, the constitutions of several states include provisions devoted to environmental integrity).

271. *See* Abadie, *supra* note 203, at 754 (stating that Freeport-McMoran's mining practices "hollowed several mountains, re-routed rivers, stripped forests, and increased toxic and non-toxic materials and metals in the river system"); *see also* Herz, *supra* note 262, at 548 (summarizing the environmental and social harms caused by Freeport-McMoran's mining operations); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 98–99 (1999) (listing the alleged environmental and human rights violations committed by Freeport-McMoran).

272. *See Beanal*, 197 F.3d at 163 (providing the factual and procedural history of the case); *see also* Anastasia Khokhryakova, Comment, *Beanal v. Freeport-McMoRan, Inc.: Liability of a Private Actor for an International Environmental Tort under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463, 472 (1998) (outlining the allegations made by the plaintiff in Beanal v. Freeport-McMoran, Inc.); Jean Wu, Note, *Pursuing International Environmental Tort Claims under the ACTA: Beanal v. Freeport-McMoRan*, 28 ECOLOGY L.Q. 487, 496–97 (2001) (summarizing the facts of Beanal v. Freeport McMoran, Inc.).

273. *See Beanal*, 197 F.3d at 167 n.6 (holding that Beanal did not claim that the mining activities affected countries other than Indonesia); *see also* Arlow, *supra* note 184, at 130–31 (asserting that in *Beanal*, the complainant claimed that Freeport-McMoran, Inc., operated mines in Indonesia, which were changing the course of rivers causing deforestation, and released toxic metal into waterways, which ultimately caused pollution, health problems, and starvation); Wu, *supra* note 272, at 496–97 (describing that Beanal claimed that the mining practices were destroying the mountains, rivers and forests, and altering the topography within Indonesia).

effects outside of Indonesia.[274] This distinction seems to have greatly influenced the outcome of the case. For instance, the *Beanal* court noted:

> federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that the environmental policies of the United States do not displace environmental policies of other governments. Furthermore, the argument to abstain from interfering in a sovereign's environmental practices carries persuasive force especially when the alleged environmental torts and abuses occur within the sovereign's borders and do not affect neighboring countries.[275]

From the language of the opinion it appears that the court's decision may have been different if there was a transboundary nexus to the problem. For example, the *Beanal* court went on to state:

> Although Beanal cites the Rio Declaration to support his claims of environmental torts and abuses under international law, nonetheless, the express language of the declaration appears to cut against Beanal's claims. Principle 2 . . . asserts that states have "the sovereign right to exploit their own resources pursuant to their environmental and developmental policies," but also have "the responsibility to ensure that activities within their jurisdiction

274. *See Beanal*, 197 F.3d at 167 (holding that the environmental abuses did not affect neighboring countries); *see also* Randi Alarcon, Recent Decision, Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999), 13 N.Y. INT'L L. REV. 141, 143 (2000) (discussing that the court in *Beanal* held that Beanal failed to show that Freeport's mining practices violated any universally-accepted environmental standards or norms, especially because the alleged tort or abuse did not affect the environmental conditions of neighboring countries); Nikki Tait, *World News: U.S. & Canada: Court Dismisses Mining Group Lawsuit,* FIN. TIMES (London), Dec. 2, 1999, at 4 (reporting that Beanal alleged that the environmental harm included damage to the local rain forest and the local rivers, which the Fifth Circuit rejected since he failed to show that there was an environmental tort or abuse under the international law).

275. *See Beanal*, 197 F.3d at 167 (holding that when the U.S. adjudicates cases of environmental international law, there needs to be caution so as not to displace other governments' policies, especially when the alleged environmental harms occur solely within the sovereign's borders); *see also* James Boeving, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT'L ENVTL. L. REV. 109, 122 (2005) (arguing that the Fifth Circuit in *Beanal* stressed that the U.S. federal courts should exercise extreme caution when hearing environmental claims under international law, especially in cases where the environmental torts and abuses occur only within the sovereigns' borders, as not to displace policies of other governments); Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 915 (1999) (commenting that in *Beanal*, the court held that the sovereign had a right to exploit its own resources, as long as the government refrains from regulating these practices to encourage foreign investment).

> or control do not cause damage to the environment or other States or areas beyond the limits of national jurisdiction." Beanal does not allege in his pleadings that Freeport's mining activities in Indonesia have affected environmental conditions in other countries.[276]

Although the *Beanal* court was not willing to recognize that the plaintiff had demonstrated that wholly intrastate degradation of the human and natural environment is a "wrong . . . of mutual and not merely several, concern, by means of express international accords," it is clear that significant transboundary environmental harm to an international watercourse that supports the livelihood and existence of 60 million people, such as the Mekong, is a "shockingly egregious violation . . . of [a] universally recognized principle . . . of international law," and thus actionable under the Alien Tort Claims Act.[277]

Further evidence that this is a universally recognized principle of international law can be found in the ICJ's holding in the *Gabčíkovo-Nagymaros* case, in which it revisited its holding in *Nuclear Weapons*,[278] which expressed the obligation of causing no significant harm, and the principle of protecting the environment generally:

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276. *See Beanal*, 197 F.3d at 167 n.6 (holding that Beanal cites the Rio Declaration to support his claims of his environmental torts and abuses under international law; but that seems to cut against his claims, especially because there is no claim that other countries are affected by these environmental harms); *see also* Abadie, *supra* note 203, at 787 (stating that the district court in *Beanal* may have reached a different conclusion if the environmental damages had been "transboundary," because prohibition of significant cross-border environmental damage is customary in international law); Dhooge, *supra* note 264, at 55 (asserting that the Fifth Circuit in the *Beanal* case held that while U.S. law provided discernable standards to address environmental violations, the court declined to displace standards in other states, especially when the abuses occurred entirely within Indonesia and did not affect neighboring states).

277. *See* Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (holding that the ATCA was limited to the standard of "shockingly egregious violations of universally recognized principles of international law"); *see also* Peggy Rodgers Kalas, *The Implications of Jota v. Texaco and the Accountability of Transnational Corporations*, 12 PACE INT'L L. REV. 47, 72 (2000) (explaining that the international community increasingly is extending application to the fundamental right to a healthy environment to situations concerning life-threatening environmental risks and states having an affirmative duty to prevent situations in their jurisdictions that may threaten human life). *See generally* Stephen McCaffrey, *Biotechnology: Some Issues of General International Law*, 14 TRANSNAT'L LAW. 91 (2002) (arguing that the obligation to prevent transboundary environmental harm has developed as customary international law, though contrary to the Stockholm Declaration, Principle 2 of the 1992 Rio Declaration, the ICJ's Advisory Opinion in the *Nuclear Weapons* case, and the ICJ's judgment in *Gabčíkovo-Nagymaros*).

278. *See* Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 1343, 1349 (1996) (holding that though current international law does not specifically prohibit the use of nuclear weapons, there are important environmental factors that are properly taken into account when implementing the principles and rules of armed conflict); *see also* G.F. Maggio, *Inter/intra-generational Equity: Current Applications Under International Law for Promoting the Sustainable Development of Natural Resources,* 4 BUFF. ENVTL. L.J. 161, 220–21 (1997) (claiming that the *Nuclear Weapons Advisor Opinion* recognized the catastrophic effects of nuclear weapons on the environment for future generations, arguing that avoidance of this environmental harm is already customary international law); Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons,* 91 AM. J. INT'L L. 417, 422 (1997) (reporting that in the ICJ *Nuclear Weapons Annual Report,* the court held that there is a general obligation for states to control activities within their own jurisdiction and respect the environment of other neighboring states, which is not part of the international law relating to the environment).

> The court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for all of mankind:
>
> the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[279]

Therefore, the downstream riparian states have a basis for an argument that the construction of the dams on the upper Mekong is a violation of a recognized norm of customary international law that is actionable under the Alien Tort Claims Act.[280] As noted earlier, however, the problems of getting past the Foreign Sovereign Immunity Act and actually hailing Chinese officials into a U.S. federal court remain.

Conclusion

China is likely in violation of its international legal obligations in its dam construction program on the Mekong. Alas, recalling Minister Tanglim's remark, "[w]hat can we do?," the downstream riparian states have limited legal recourse. It remains to be seen, however, whether powerful upstream China will offer some much needed transparency and flexibility in its hydropower scheme, and whether the reluctant downstream riparian states will take action in opposition. On a final note, it will be interesting to follow developments in the next decade in the Mekong crisis to see if a tragic story of unyielding assertion of sovereignty in the face of severe transboundary environmental degradation continues, or whether an exemplary instance of international cooperation towards sustainable development unfolds.

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279. See Gabcikovo–Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 92 (Sept. 25, 1997) (holding that there is a need to respect the environment for states and for all of mankind as there are the general obligations of states to control the activities within their jurisdiction and to respect the environments of other states and areas beyond national control); *see also* Paul R. Williams, *International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabčíkovo and Nagymaros Dams*, 19 COLUM. J. ENVTL. L. 1, 51 (1994) (asserting that there is a need for states to ensure that the use of their own natural resources does not adversely affect the environment of neighboring states); Sonia Boutillon, Note, *The Precautionary Principle: Development of an International Standard,* 23 MICH. J. INT'L L. 429, 454 (2002) (explaining that the ICJ in *Gabčíkovo–Nagymaros*, acknowledging the need for prevention as a fundamental feature of environmental protection as a result of the irreversible nature of the damage that results, stresses the need for precaution). Additionally, in his separate opinion, Judge Weeramantry makes a persuasive argument that sustainable development is a customary norm of international law. While this article does not directly address the status of sustainable development as it applies to China's legal obligations, it is nonetheless relevant and many of the same concerns are implicated. *See generally* John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law,* 25 COLUM. J. ENVTL. L. 283 (2000) (explaining that the ICJ's decision in *Gabčíkovo–Nagymaros* stressed the importance of new environmental norms and the necessity for states to consider these new norms, even though these norms are not obligatory).

280. *See* Natalie L. Bridgeman, *Human Rights Litigation under the ATCA as a Proxy for Environmental Claims,* 6 YALE HUM. RTS. & DEV. L.J. 1, 41 (2003) (asserting that the most severe cases of environmental destruction will be considered under the ATS as they clearly violate customary international law as it is in the interest of all nations that the environment be protected from irreparable harm). *See generally* Steven L. Kass & Jean M. McCarroll, *Environmental Law: After 'Sosa': Claims under the Alien Tort Claims Act–Part 2,* N.Y. L.J., Oct. 26, 2004 (describing that transboundary pollution that is "willful and the direct cause of serious harm in a neighboring state" has been recognized as a violation of customary international law under the Act when it meets the high standard of clear and convincing evidence of serious damage).

The Availability of Damages to Foreign Nationals for Violation of the Consular Relations Treaty

David Sweis*

Introduction

On September 27, 2005, the U.S. Court of Appeals for the Seventh Circuit ruled that Article 36 of the Vienna Convention on Consular Relations (VCCR) creates an individual right and provides a civil cause of action for its violation.[1] *Jogi v. Voges* presents several interesting issues of international law, the most groundbreaking being the possibility of civil damages to individuals for Article 36 violations of VCCR.[2]

Background

Tejpaul Jogi emigrated from India to the United States in 1990, at the age of fourteen.[3] Champaign, Illinois, police charged Jogi with aggravated battery, and Jogi turned himself in on October 18, 1995.[4] The investigative report by Timothy Voges noted that Jogi was a male born

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1. *See* Jogi v. Voges, 425 F.3d 367, 385 (7th Cir. 2005) (holding that Jogi is entitled to a civil cause of action based on a violation of his rights under Article 36 of the Vienna Convention on Consular Relations (VCCR)); *see also* VCCR art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (requiring a state to notify all detained foreign nationals, without delay, of their consular rights); Reyes-Sanchez v. Kingston, No. 04-C-1021, slip op. at 6 (E.D. Wis. Feb. 2, 2006) (reiterating the holding of the Seventh Circuit that there is a right of private action under the Vienna Convention).

2. Appellees moved for a rehearing *en banc*. The Seventh Circuit has yet to rule on the motion. *See* Alvarez v. Gonzales, 155 F. App'x 393, 397 (10th Cir. 2005) (reflecting on the uniqueness of a verdict in this area of international law); *see also* People v. Sanchez, 362 Ill. App. 3d 1093, 1105 (App. Ct. 2005) (reviewing the Seventh Circuit's recent decision and its effects on Article 36 of the Vienna Convention); Patrick J. Cotter, *Vienna Convention: A Law Without Remedy,* CHI. DAILY L. BULL., Jan. 4, 2006, at 6 (reporting on the decision by the Seventh Circuit as the most recent word on an individual right of action). *See generally Voges*, 425 F.3d 385 (resulting in the appellees moving the court for a rehearing *en banc*; the Seventh Circuit has yet to rule on the motion).

3. *See Voges*, 425 F.3d at 370 (reciting the facts of the case that led to the cause of action); *see* also Brief of Plaintiff-Appellant Tejpaul S. Jogi at 4, Jogi v. Voges, No. 01–1657 (7th Cir. Apr. 2, 2003), *available at* 2003 WL 22733926 [hereinafter Jogi Brief] (stating the resident status of the plaintiff in the case); *Seventh Circuit Holds Vienna Convention Confers Private Right of Action*, *available at* http://www.mayerbrownrowe.com/news/article.asp?id=2388&nid=5 (last visited Mar. 21, 2006) (mentioning the background information of the case that formed the foundation of the action).

4. *See Voges*, 425 F.3d at 370 (noting the criminal charges that caused the plaintiff to bring this current suit); *see also* Patricia Manson, *Right to Contact Consulate Also Grounds for Suit: Panel*, CHI. DAILY L. BULL., Sept. 27, 2005, at 1 (remarking on the surrounding events behind the litigation); David Ziemer, *Seventh Circuit Rules Foreign National Not Advised of Right to Contact Consulate; Can Sue for Damages*, WIS. L.J., Oct. 5, 2005 (explaining the circumstances that led up to the decision in the case).

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in India.[5] Mr. Voges informed Jogi of his Miranda rights, but did not inform Jogi of his right to have the Indian Consulate notified under Article 36 of VCCR.[6] Jogi pled guilty to a charge of aggravated battery in the Sixth Judicial Circuit in Champaign County, Illinois.[7] On May 15, 2000, Jogi filed suit in the District Court for the Central District of Illinois, seeking compensatory and punitive damages for a violation of his rights.[8] Jogi served six years of a twelve-year sentence before being deported back to India.[9]

The district court dismissed the complaint for a lack of subject matter jurisdiction.[10] Jogi used the Alien Tort Statute (ATS) as a jurisdictional vehicle; however, the court held that Jogi failed to plead a tort under ATS.[11] The district court applied a "shockingly egregious" standard when it held that ATS applies to "shockingly egregious violations of universally recognized

5. *See Voges*, 425 F.3d at 370 (proving that the plaintiff was entitled to his consular rights); *see also* Jogi Brief, *supra* note 3, at 4 (highlighting the defendant's awareness that the plaintiff was not a citizen); Ziemer, *supra* note 4 (focusing on the denial of the plaintiff's rights under the Convention).

6. *See* Cevallos-Bermeo v. Hendricks, No. Civ. 04-1469, slip op. at *7 (D. N.J. Jan. 10, 2006), *available at* 2006 WL 54026 (centering on the failure of police to inform the plaintiff of his rights); *see also* Ann K. Wooster, Annotation, *Construction and Application of Vienna Convention on Consular Relations (VCCR), Requiring that Foreign Consulate Be Notified When One of Its Nationals Is Arrested*, 175 A.L.R. FED. 243, § 24 (2006) (remarking on the refusal to notify the plaintiff that he could contact the Indian consulate); Manson, *supra* note 4, at 1 (highlighting the defendant's delinquency in not notifying the plaintiff of his Convention rights).

7. *See* People v. Jogi, 317 Ill. App. 3d 532, 534 (App. Ct. 2000) (summarizing the plaintiff's plea of guilty to criminal charges that led to this suit); *see also* Jogi Brief, *supra* note 3, at 5 (recounting the past events that created the plaintiff's cause of action); Ziemer, *supra* note 4 (commenting on the historical background of the litigation).

8. *See* Jogi v. Piland, 131 F. Supp. 2d 1024, 1024 (C.D. Ill. 2001), *rev'd sub nom*. Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005) (documenting the plaintiff's initiation of the suit); *see also* Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 758 (2004) (enumerating the requirements that were necessary in order for there to be a violation); Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA As a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 33 (2003) (explaining the history of the action).

9. *See* Manson, *supra* note 4, at 1 (analyzing the plaintiff's criminal sentence and its significance in creating the present violation); *see also* Ziemer, *supra* note 4 (recounting the deportation of the plaintiff after he pled guilty); *In re First Impression, Seventh Circuit Holds that Vienna Convention on Consular Relations Creates Individual Rights Which May Form Basis of Civil Actions Independently of Criminal Proceedings*, INT'L L. UPDATE, Oct. 2005 (breaking down the time the plaintiff spent in prison as a result of his guilty plea).

10. *See Piland*, 131 F. Supp. 2d at 1026 (discussing how the court refused to hear the case because of a lack of subject matter jurisdiction); *see also* Manson, *supra* note 4, at 1 (looking at the initial complaint that was denied); Brad P. Rosenberg, Tejpaul S. Jogi v. Tim Voges, Ron Carper, David Madigan, John C. Piland and the United States of America, *available at* http://www.mayerbrownrowe.com/probono/projects/article.asp?id=1558&nid=3163 (last visited Feb. 21, 2006) (conceding the initial problems with subject matter jurisdiction that the plaintiff faced).

11. *See Piland*, 131 F. Supp. 2d at 1026 (dismissing the case for failure to state a claim); *see also* Nancy Morisseau, *Seen but Not Heard: Child Soldiers Suing Gun Manufacturers Under the Alien Tort Claims Act*, 89 CORNELL L. REV. 1263, 1295 (2004) (comparing the plaintiff's complaint and the nature of the tort he alleged to other plaintiffs' who have sued under the same tort); Rosenberg, *supra* note 10 (describing the initial problems the plaintiff experienced at the onset of the action).

principles of international law."[12] Therefore, the district court understood a tort under ATS to be only an act amounting to a "shockingly egregious" violation of international law.[13]

Jogi later appealed to the U.S. Court of Appeals for the Seventh Circuit.[14] After both parties submitted their briefs, the Seventh Circuit suspended all proceedings and certified six questions to the litigants:[15] (1) Is ATS purely a jurisdictional statute or does it create an independent claim?[16] (2) Is there a private right of action for violations of Article 36 of VCCR?[17] (3) Is it true, or if not true, relevant, that Jogi can show no concrete harm from the Vienna Convention violation?[18] (4) If there is a private right of action, what is the appropriate remedy in cases where the government violates the Vienna Convention?[19] (5) Under *Heck v. Humphrey*,[20] must Jogi get his conviction overturned before bringing this challenge to the Vienna Convention? Or is a Vienna Convention claim akin to Fourth Amendment claims of wrongful search or arrest that may succeed without undermining a conviction and are thus not implicated by *Heck*?[21] (6) Was the district court correct in applying the "shockingly egregious" standard for determining what constitutes a violation of international law under ATS? Do ATS claims based on treaty violations, rather than the law of nations, face such a high hurdle?[22]

This article analyzes an assortment of complex issues implicated in the *Jogi* decision. Part I discusses ATS as a jurisdictional statute creating a private cause of action and, in the alternative, the use of 28 U.S.C. § 1331 as a jurisdictional vehicle for bringing a VCCR claim. Part II discusses the district court's application of a "shockingly egregious" standard for claims brought under ATS. Part III addresses VCCR, examining its self-executing character, the right given to foreign nationals under Article 36, as well as a private cause of action under VCCR

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12. *See* 28 U.S.C.S. § 1350 (2006) (stating the law that the standard is used to evaluate); *see also* Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (creating the "shockingly egregious" standard that is cited by the court); *Piland*, 131 F. Supp. 2d at 1027 (quoting the standard that applies to ATS).

13. *See* 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3661.1 (3d ed. 2005) (illustrating the flaw in the plaintiff's argument); *see also Decision of Interest*, NEW YORK L.J., July 24, 2002, at 24 (dictating the standard of review that the court uses); *Decision of the Day,* NEW YORK L.J., Sept. 12, 2003, at 18 (looking at the analysis that the district court went through in its decision of plaintiff's initial claim).

14. *See Voges*, 425 F.3d at 371 (reviewing *de novo,* the district court's dismissal of Jogi's claim for lack of subject matter jurisdiction); *see also Piland*, 131 F. Supp. 2d at 1027 (granting the defendant's motion to dismiss because Jogi had failed to sufficiently plead a tort under the Alien Tort Claims Act); Morisseau, *supra* note 11, at 1295 (commenting that the district court dismissed Jogi's complaint because he alleged a violation that did not constitute a "tort" under the Alien Tort Claims Act).

15. *See* Jogi Brief, *supra* note 3, at 3 (directing six questions to the litigants).

16. *See id.* (questioning the nature of the ATS).

17. *See id.* (inquiring as to whether there is a private right of action for violations of the VCCR).

18. *See id.* (asking what kind of showing is required to establish harm).

19. *See id.* (probing for the appropriate remedy for violations of the VCCR).

20. *See* Heck v. Humphrey, 512 U.S. 477, 477 (1994) (holding that in order to recover damages under § 1983, plaintiff must prove that conviction has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by federal court's issuance of writ of habeas corpus).

21. *See* Jogi Brief, *supra* note 3, at 3 (asking whether the plaintiff's conviction must be overturned before challenging the VCCR).

22. *See id.* (questioning whether the district court erred when it applied the "shockingly egregious" standard).

and the appropriate remedy. Part IV explains why *Heck* is not a barrier to Jogi's claim from the perspective of a 42 U.S.C. § 1983 analysis, and how much harm Jogi must show to recover under § 1983. A brief discussion about Miranda rights and how the Seventh Circuit handled whether Article 36 violations can be analogized to Miranda violations will conclude this article.

Analysis

I. Alien Tort Statute[23]

The first issue presented was whether ATS is a purely jurisdictional statute or whether it creates an independent claim.[24] ATS, 42 U.S.C. § 1350, arose out of the Judiciary Act of 1789.[25] The Statute reads: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[26]

ATS gives district courts jurisdiction over actions brought by aliens implicating the law of nations or treaties to which the United States is a party.[27] When interpreting ATS, the central concern is whether courts have the power to mold and shape international law, a power normally delegated to the legislature.[28] This concern raises the issue of the fundamental powers of

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23. *See* Alien Tort Claims Act, 28 U.S.C.S. § 1350 (2006) (vesting original jurisdiction in district courts over alien tort claims).

24. *See* Jogi v. Voges, 425 F.3d 367, 372 (7th Cir. 2005) (examining the analysis used by the *Sosa* court to decide whether the ATS was solely a jurisdictional grant, or whether it also created a new cause of action for torts in violation of international law); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 713–14 (2004) (addressing conflicting interpretations of the purpose of ATS); Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute—Trajano v. Marcos*, 27 CORNELL INT'L L.J. 387, 405 (1994) (recognizing that the question of whether ATS creates a private cause of action is surrounded by controversy).

25. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (informing that through the Judiciary Act of 1789, the First Congress established original district court jurisdiction over actions brought by aliens alleging a violation of the law of nations); *see also* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 222 (1996) (reporting that ATS was passed as the Alien Tort Clause, a provision in § 9 of the Judiciary Act of 1789); Jason Jarvis, Comment, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 673 (2003) (announcing that the Alien Tort Claims Act was enacted as part of the Judiciary Act of 1789).

26. Alien Tort Claims Act, 28 U.S.C.S. § 1350 (2006).

27. *See* 3 C.J.S. *Aliens* § 178 (2005) (detailing the nature and scope of jurisdiction created by the Alien Tort Claims Act); *see also* Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350), Providing for Jurisdiction Over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387, § 1(a) (1993) (remarking that ATS gives aliens alleging a violation of international law access to the U.S. District Courts); 3C AM. JUR. 2D *Aliens and Citizens* § 2123 (2005) (clarifying that the Alien Tort Claims Act grants both a private cause of action and a federal forum to aliens claiming a violation of international law).

28. *See Alvarez-Machain*, 542 U.S. at 713 (stressing that ATS was a jurisdictional grant, and did not convey the "power to mold substantive law"); *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (listing a number of factors for a court to apply when confronted with the political question doctrine); David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 WASH. & LEE L. REV. 1219, 1239 (2005) (suggesting that a possible limitation to an ATS suit would be deference to the political branches when foreign policy concerns are implemented, and discussing situations where the defendant is a corporation as such a case).

the judicial branch of government.[29] If the courts are able to make decisions that effectively promulgate substantive international law, then they are essentially exercising their will and not their judgment.[30] Alexander Hamilton observed in Federalist Number 78: "The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body."[31]

Sosa is the seminal authority on ATS.[32] *Sosa* involved an agent who allegedly operated under the control of the Drug Enforcement Agency to kidnap Alvarez-Machain so that he could stand trial in the United States for the murder of a federal agent in Mexico.[33] In *Sosa*, the Supreme Court addressed the issue of whether ATS is more than a jurisdictional statute.[34]

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29. *See Alvarez-Machain*, 542 U.S. at 733 n.21 (citing the South African apartheid litigation case as an example of a limitation to an ATS suit); *see also* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 689 (2002) (opining that a narrow interpretation of the jurisdiction conferred by the ATS contradicts the statute's text and historical context); Pia Zara Thadhani, Note, *Regulating Corporate Human Rights Abuses: Is UNOCAL the Answer?*, 42 WM. & MARY L. REV. 619, 636 (2000) (arguing that the "beneficial side effects" that result from using the Alien Tort Claims Act to regulate private corporations "do not justify the use of the legal system to impose indirect sanctions," and that it is "a role that properly belongs to the political branches, not the courts").

30. *See* Donald J. Kochan, *No Longer Little Known but Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 120–21 (2005) (warning that allowing a discretion-based framework in ATS cases may result in lower courts exercising discretion to serve their own personal interpretations of international law); *see also* Ivan Poullaos, Note, *The Nature of the Beast: Using the Alien Tort Claims Act to Combat International Human Rights Violations*, 80 WASH. U. L.Q. 327, 329 (2002) (alleging that some scholars take issue with modern interpretations of the ATCA "on the grounds that it politicizes American courts, and that issues deserve a more controlled response instead of haphazard litigation"); *Alvarez-Machain*, 542 U.S. at 729 (stating that, when confronted with ATS claims, "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today").

31. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (expressing that courts must use their judgment when they interpret the law).

32. *See* Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 112 (2004) (emphasizing that the Supreme Court's decision in *Sosa* settled the debate with regard to the purpose and scope of the ATS); *see also* Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105, 105 (2005) (noting that *Sosa* preserved the power of federal courts under the ATS to hear claims by plaintiff aliens alleging violations of international law); Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 818 (2005) (noting that *Sosa* was the first Supreme Court decision interpreting the ATS).

33. *See Alvarez-Machain*, 542 U.S. at 698 (expressing that the abduction plan was approved by the DEA after negotiations with the Mexican government "proved fruitless"); *see also* United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992) (rejecting Alvarez-Machain's challenge to the lawfulness of his abduction as it related to the criminal proceedings); James Boeving, Note, *Half Full . . . Or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT'L ENVTL. L. REV. 109, 130 (2005) (highlighting the purpose behind the abduction of Alvarez-Machain was to bring him to the United States for trial).

34. *See Alvarez-Machain*, 542 U.S. at 713 (introducing the issue of the jurisdictional character of the ATS); *see also* Abiola v. Abubakar, 408 F.3d 877, 883 (7th Cir. 2005) (explaining that the court in *Sosa* discussed the issue of whether the ATS was purely jurisdictional); Igor Fuks, Note, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 120–21 (2006) (providing that in *Sosa,* the Supreme Court decided whether the ATS was merely jurisdictional).

The Judiciary Act of 1789 was exclusively concerned with the composition and jurisdiction of the federal courts, and § 9 of the Act, which sets forth the exclusive jurisdiction of the district courts, later became ATS.[35] The relevant language stated that the district courts "shall also have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[36] One year before the enactment of the Judiciary Act, Alexander Hamilton wrote Federalist Number 81 in which he used the terms "cognizance" and "jurisdiction" interchangeably.[37] Thereby, the Supreme Court concluded that ATS is jurisdictional because it enabled "the courts to entertain cases concerned with a certain subject."[38]

However, *Sosa* also raised the issue of whether ATS was a "stillborn" law or whether it was intended to act as more than a jurisdictional statute.[39] The Supreme Court concluded that ATS is more than jurisdictional because "torts in violation of the law of nations would have been recognized within the common law of the time."[40] Furthermore, the Supreme Court did

35. *See Alvarez-Machain*, 542 U.S. at 712–13 (emphasizing that § 9 of the Judiciary Act of 1789 was the precursor to the ATS); *see also* Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 13 (D.C. Cir. 2005) (asserting that the ATS was initially enacted as part of the Judiciary Act of 1789); Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001, 1009–10 (2001) (affirming that the ATS originated from § 9 of the Judiciary Act of 1789).

36. *See* Judiciary Act of 1789 § 9 (1789), *available at* http://www.constitution.org/uslaw/judiciary_1789.htm (last visited Apr. 13, 2006) (establishing the powers of the courts of the United States).

37. *See* THE FEDERALIST NO. 81, at 509 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (using "cognizance" and "jurisdiction" interchangeably); *see also* Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 50 N.C. L. REV. 421, 485 (1991) (acknowledging that the language of the Federalist Number 81 used the terms "cognizance" and "jurisdiction" interchangeably); Norman R. Williams, *The Failing of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 817–18 (2004) (assessing Hamilton's language in Federalist Number 81 in addressing the court's jurisdiction).

38. *See Alvarez-Machain*, 542 U.S. at 714 (reasoning that the ATS is jurisdictional because it allowed the courts to hear cases on certain subjects); *see also* Abdullahi v. Pfizer, Inc., 2005 U.S. Dist. LEXIS 16126, at *22 (S.D.N.Y. Aug. 9, 2005) (quoting the court in *Sosa* as to why the ATS has jurisdiction); Beth Stephens, *Sosa v. Alvarez-Machain "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 544 (2004) (citing the court's conclusion as to why the ATS is jurisdictional).

39. *See Alvarez-Machain*, 542 U.S. at 714 (raising the question of whether the ATS carries more than jurisdictional value, or if it was merely "stillborn"); *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 936 (2004) (detailing that the court in *Sosa* considered whether or not the ATS was "stillborn," or was intended to be more than merely jurisdictional); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 677 (2005) (recognizing that the court in *Sosa* reviewed whether the ATS was purely jurisdictional).

40. *See Alvarez-Machain*, 542 U.S. at 714 (concluding that the ATS also provides for a private right of action because torts in violation of the law of nations were established in common law); *see also* Jogi v. Voges, 425 F.3d 367, 372 (7th Cir. 2005) (indicating that the court in *Sosa* concluded that the ATS was more than jurisdictional because a violation of the law of nations would have been recognized in common law); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1177 (C.D. Cal. 2005) (recognizing that the court in *Sosa* was persuaded by the position that a violation of international law would have been acknowledged by the common law of the time).

not intend ATS "to be a jurisdictional convenience to be placed on the shelf."[41] In arriving at this conclusion, the court did not look to the legislative debates concerning ATS because no legislative debates existed on the matter.[42] Instead, they looked to the history of the law of nations during the founding of the United States.[43]

In the early years of the United States, the law of nations consisted of two principle elements: The first dealt with "general norms governing the behavior of national states with each other"[44] and the second dealt with a "more pedestrian element."[45] The first element fell more properly in the sphere of the executive and legislative branches.[46] To evidence the second element, the court pointed to the development of the "law merchant" as customary international

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41. *See Alvarez-Machain*, 542 U.S. at 719. The court stated:

> First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. *Id.*

42. *See Alvarez-Machain*, 542 U.S. at 718 (stating that no legislative debates exist on whether the ATS was intended to create private remedies); *see also* Salinas v. Southern Peru Copper Corp., 343 F.3d 140, 148 (2d Cir. 2003) (stressing that the intended meaning of the ATS is not ascertained from its legislative history); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 179 (2004) (maintaining the ATS lacks legislative history that reveals its purpose).

43. *See Alvarez-Machain*, 542 U.S. at 719 (arguing that despite the lack of legislative history, support for the contention that the ATS was more than jurisdictional can be found in the law of nations during the early years of the United States); *see also* Kontorovich, *supra* note 32, at 121 (concluding that although there is a lack of legislative history, the court in *Sosa* assessed the law of nations at the time of the country's founding to decide that the ATS was more than purely jurisdictional); Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Torts Claims Act and International Law,* 26 U. PA. J. INT'L ECON. L. 193, 245 (2005) (recognizing that the *Sosa* court looked to the law of nations to ascertain the purpose of the ATS).

44. *See Alvarez-Machain*, 542 U.S. at 714 (noting that the law of nations included two main elements); *see also* MONSIEUR DE VATTEL, LAW OF NATIONS 49 (Joseph Chitty ed., 1982) (defining the law of nations as encompassing the rights and obligations between states); Stephens, *supra* note 38, at 544 (referring to the law of nations during the late 18th century as including the law that governed the relations between states).

45. *See Alvarez-Machain*, 542 U.S. at 714 (remarking that the law of nations included two elements during the time of independence, the second of which is a more "pedestrian" element); *see also* John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579, 659 (2005) (illustrating that the court in *Sosa* highlighted that the law of nations included a "pedestrian" element); Stephens, *supra* note 38, at 545–46 (reiterating that the court addressed the existence of a more "pedestrian" element to the law of nations other than the relationship and norms between state actors).

46. *See Alvarez-Machain*, 542 U.S. at 714 (indicating that the norms which control the behavior among states fall to the legislative and executive branches); *see also* JEFFERY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 36 (Erwin Chemerinsky et al. eds., 2002) (positing that states enter into treaties to control relationships amongst themselves). *See generally* Kal Raustiala, *Form and Substance in International Agreements,* 99 AM. J. INT'L L. 581 (2005) (acknowledging that congressional–executive agreements are legally binding and create obligations to other state actors).

law.[47] This "pedestrian" element fell within the ambit of the judicial branch as the common law developed to regulate civil disputes of international commerce between traders.[48]

These two spheres overlapped in situations where the norms of state-to-state relations resulted in a benefit for the individual.[49] Examples of this hybrid sphere included criminal violations of safe conducts, infringing the rights of ambassadors, and piracy.[50] The Continental Congress struggled with the inability to "cause infractions of treaties, or of the law of nations to be punished."[51]

In 1781 Congress called upon the states to punish "the violation of safe conducts or passports . . . and infractions of treaties and conventions to which the United States are a party [sic]."[52] Ultimately, the Supreme Court concluded that the history surrounding the promulgation and enactment of ATS supported two propositions. The first was that Congress did not

47. *See Alvarez-Machain*, 542 U.S. at 715 (recognizing that the law of merchants emerged as a form of customary international law over time); *see also* Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2226–27 (2004) (outlining the court's claim that mercantile common law grew out of the common practices of traders); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1232 (2005) (demonstrating that the law of mercantile trading evolved through customary international law).

48. *See Alvarez-Machain*, 542 U.S. at 715 (providing that private mercantile law developed under the judicial branch); *see also* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1206–07 (1998) (remarking that courts applied customary international law, including the law merchant); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1830 (1998) (acknowledging that the law of merchants was applied by federal and state courts).

49. *See Alvarez-Machain*, 542 U.S. at 715 (stating that the two elements of international law overlap when state relations benefit the individual); *see also* Nelson P. Miller, Steven W. Fitschen, & William Wagner, *Federal Courts Enforcing Customary International Law: The Salutary Effect of Sosa v. Alvarez Machain on the Institutional Legitimacy of the Judiciary*, 3 REGENT J. INT'L L. 1, 21 (2005) (expressing that the two spheres of international law overlap to form customary international law); Trnavci, *supra* note 43, at 218 (defining a third element of the law of nations that occurs when the first two elements overlap).

50. *See Alvarez-Machain*, 542 U.S. at 714 (citing BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)); *see also* Peter Bowman Rutledge & Nicole L. Angarella, *An End of Term Exam: October Term 2003 at the Supreme Court of the United States*, 54 CATH. U. L. REV. 151, 223 (2004) (acknowledging that the court in *Sosa* underscored three violations that gave rise to a private right of action under the ATS); Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 COLUM. HUM. RTS. L. REV. 1, 14 (2005) (indicating that the paradigms recognized when the ATS was enacted included piracy, safe conduct, and the laws protecting ambassadors).

51. *See Alvarez-Machain*, 542 U.S. at 716 (citing James Madison's remarks made about the Continental Congress); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) (noting scholars' reliance on James Madison's notes to make the point that a key defect of the Confederation was the government's inability to punish breaches of international law); Jorge Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by The United States,* 23 COLUM. HUM. RTS. L. REV. 315, 334 (1992) (relying on James Madison and Edmund Randolph's comments to argue that the Confederation was incapable of assuring proper state compliance with international law).

52. *See Alvarez-Machain*, 542 U.S. at 716 (referencing the congressional resolution of 1781 that recommended to the states that they commit to enforcing the law of nations). *See generally* Martinez-Aguero v. Gonzalez, 2005 WL 388589 (W.D. Tex. Feb. 2, 2005) (expounding on the theory that Blackstone's reference to violations of safe conduct triggers issues of international law); *In re* The Amiable Isabella, 19 U.S. 1 (1821) (discussing Blackstone's mention of the offence of violating passports, or safe conducts).

intend the statute to serve any purpose until the legislature took further action to define what constituted violations of the law of nations.[53] The second was that there were a few causes of action that existed at the time ATS was enacted for which the statute provided jurisdiction.[54] Therefore, ATS is more than just a jurisdictional vehicle for which violations of the law of nations may be brought.[55]

The Seventh Circuit analyzed Alvarez-Machain's claim before distinguishing it from Jogi's claim under Article 36 of VCCR.[56] The Supreme Court in *Sosa* guides the lower courts in future analyses of ATS by requiring that, "any claim based on the present-day law of nations [must] rest on a norm of international character comparable to . . . 18th-century paradigms."[57] The Seventh Circuit distinguished the *Sosa* case by observing that Alvarez-Machain did not set forth a violation of a treaty.[58] Alvarez-Machain used the Universal Declaration of Human Rights[59] and the International Covenant on Civil and Political Rights[60] to establish norms that

53. *See Alvarez-Machain*, 542 U.S. at 718 (stating that the first of two propositions be that Congress not pass the ATS to create an immediate cause of action). *See generally* M. Christie Helmer et al., *Litigation Claims Under the Alien Tort Statute After Sosa v. Alvarez-Machain*, 721 PLI/LIT 121 (2005) (quoting the *Sosa* decision to support the proposition that the ATS was intended to have no effect until further action by Congress). *But see* Nicola Carpenter, Recent Decision, *Sosa v. Alvarez-Machain,* 124 S. Ct. 2739 (2004), 18 N.Y. INT'L L. REV. 179, 187 (2005) (summarizing that the court left it up to district courts to decide what causes of action would be upheld under the ATS).

54. *See Alvarez-Machain*, 542 U.S. at 720 (stating that the second proposition that can be derived from the history of the ATS is that the causes of actions intended to be created were few); *see also* Helmer et al., *supra* note 53, at 129 (discussing that the second inference to be drawn is that Congress intended only for a modest number of causes of action to be established); Carpenter, *supra* note 53, at 183 (summarizing Congress' intentions to create a small number of causes of action).

55. *See Alvarez-Machain*, 542 U.S. at 694 (concluding that some causes of action are permissible under the ATS). *See generally* Helmer et al., *supra* note 53 (declaring that the ATS is jurisdictional only). *But see* Carpenter, *supra* note 53, at 185 (stating that the court held the ATS was merely jurisdictional).

56. *See* Jogi v. Voges, 425 F.3d 367, 372 (7th Cir. 2005) (asserting that the starting point for the court's analysis was the Supreme Court's decision in *Sosa). See generally* Vienna Convention on Consular Relations, *supra* note 1 (stating the language that governs communication and contact with nationals of the sending state); *Alvarez-Machain,* 542 U.S. 692 (summarizing Alvarez-Machain's claims).

57. *See Alvarez-Machain*, 542 U.S. at 725 (stating that courts should require "any claim based on the present-day law of nations to rest on the norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court] has recognized"); *see also* Enahoro v. Abubakar, 408 F.3d 877, 884 (7th Cir. 2005) (referring to the language of *Sosa* that discusses the 18th-century paradigms); *Voges*, 425 F.3d at 372 (citing the language of *Sosa* referring to the 18th-century paradigms).

58. *See Voges*, 425 F.3d at 372–73 (distinguishing the *Sosa* case because the decision was based on customary international law instead of a treaty); *see also Alvarez-Machain*, 542 U.S. at 733–34 (analyzing the case under customs and usages of civilized nations). *See generally* The Paquete Habana, 175 U.S. 677 (1900) (stating that when there is no treaty, the analysis is properly done by relying on customary international law).

59. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 9, U.N. Doc. A/810 (1948), *available at* http://www1.umn.edu/humanrts/instree/b1udhr.htm (last visited Feb. 28, 2006) (stating that, "[n]o one shall be subjected to arbitrary arrest, detention or exile").

60. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 9, U.N. Doc. A/6316 (1966), *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm (last visited Mar. 8, 2006) (stating that, "[n]o one shall be subjected to arbitrary arrest or detention").

qualify as the law of nations.[61] The Supreme Court held these documents to be unenforceable in a United States court.[62] As a result, the court dismissed Alvarez-Machain's claim for lack of subject matter jurisdiction under ATS because Alvarez-Machain failed to plead a violation of the law of nations or of a United States treaty.[63]

The Seventh Circuit did not find it necessary to engage in a *Sosa*-like analysis to determine whether a federal court has subject matter jurisdiction to hear Jogi's claim because Jogi pled a violation of a United States treaty, instead of a violation of the law of nations, to trigger the court's jurisdiction.[64] Therefore, jurisdiction under ATS for Jogi's purposes does not depend "on a norm of international character comparable to . . . 18th-century paradigms."[65]

The court also noted that jurisdiction would be proper under 28 U.S.C. § 1331,[66] which grants the district courts jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States."[67] Although the "amount in controversy" requirement is neces-

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61. *See Alvarez-Machain*, 542 U.S. at 735 (explaining Alvarez-Machain's attempt to support his contention that arbitrary arrest is a violation of customary international law); *see also* Virginia Monken Gomez, Note, *The Sosa Standard: What Does It Mean for Future ATS Litigation*?, 33 PEPP. L. REV. 469, 485–86 (2006) (discussing that the *Sosa* court looked at Alvarez-Machain's citing of the Declaration and the ICCPR in support of his contention that there was a recognized norm against arbitrary arrest). *See generally* Laura E. Little, *Transnational Guidance in Terrorism Cases,* 38 GEO. WASH. INT'L L. REV. 1 (2006) (stating that the right to be free from arbitrary detention is part of customary international law).

62. *See Alvarez-Machain*, 542 U.S. at 734–75 (concluding that the propositions made by Alvarez are unpersuasive to the court in this case); *see also Voges*, 425 F.3d at 373 (discussing the *Sosa* court's conclusion that neither of the two instruments submitted by Alvarez were relevant to the court's decision). *See generally* Igartua-De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005) (explaining that the Universal Declaration of Human Rights does not create legal obligations).

63. *See Alvarez-Machain*, 542 U.S. at 697 (holding that both of Alvarez's claims fail). *But cf.* Borchien Lai, Comment, *The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?,* 26 NW. J. INT'L L. & BUS. 139, 140–41 (2005) (announcing that the holding was still seen as a victory by human rights advocates despite the claim being dismissed in *Sosa). See generally* Ehren J. Brav, Recent Development, *Opening the Courtroom Doors to Non-Citizens: Cautiously Affirming Filartiga for the Alien Tort Statute*, 46 HARV. INT'L L.J. 265 (2005) (stating that the court disagreed with the Circuit Court in holding that Alvarez was not entitled to a remedy).

64. *See Voges*, 425 F.3d at 384 (distinguishing the case from *Sosa,* based on the fact that the plaintiff-appellant relied on a treaty for his claim). *See generally* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1996) (stating that the ATS does not generally supply a cause of action). *But see* Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (holding that jurisdiction is lacking under the ATS, which only applies to "egregious violations of universally recognized principle of international law").

65. *See Alvarez-Machain*, 542 U.S. at 725 (stating that courts should require "any claim based on the present-day law of nations to rest on the norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court] has recognized"); *see also* Enahoro v. Abubakar, 408 F.3d 877, 884 (7th Cir. 2005) (referring to the language of *Sosa* that discusses the 18th-century paradigms); *Voges*, 425 F.3d at 372 (citing the language of *Sosa* referring to the 18th-century paradigms).

66. *See* 28 U.S.C.S. § 1331 (2006) (stating that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

67. *See Voges*, 425 F.3d at 373 (referencing the relevant statute that sets forth district court jurisdiction). *See generally* 28 U.S.C.S. § 1331 (2006) (elaborating on the situations in which the district court may have original jurisdiction); 28 U.S.C.S. § 1350 (2006) (recognizing jurisdiction in the federal district courts where the plaintiff is the victim of a tort committed in violation of a United States treaty).

sary to trigger jurisdiction under § 1331,[68] the term "treaty" is understood to be the same kind of "treaty" referred to in ATS.[69] Moreover, Jogi only used ATS to establish jurisdiction.[70] Jogi argued VCCR confers an individual right and a private cause of action, and the Seventh Circuit agreed with him.[71] Therefore, whether ATS is more than a jurisdictional statute is of marginal relevance for purposes of bringing action for a violation of Article 36 because Jogi is only using ATS to establish jurisdiction in federal court.[72]

Jogi's case depends on the enforceability of VCCR in U.S. courts.[73] Jogi claimed that a violation of Article 36 is actionable and damages may be awarded pursuant to its violation.[74] In order for a treaty to confer rights enforceable by a private individual, it must be self-executing, meaning no legislation is required to give it effect.[75] Thus, Jogi had the burden of establishing

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68. *See Voges*, 425 F.3d at 373 (noting the "amount in controversy rule" attached to the general federal question jurisdiction statute prior to 1976*). See generally* 28 U.S.C.S. § 1331 (2006) (specifying the amounts required for federal jurisdiction and the gradual restriction of such); 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3561.1 (3d ed. 2005) (describing the gradual elimination of the "amount in controversy" requirement for federal court jurisdiction).

69. *See Voges*, 425 F.3d at 373 (identifying the type of "treaty" to which the court was referring); *see also* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining a "treaty" as an "agreement formally signed, ratified, or adhered to between two nations or sovereigns; an international agreement concluded between two or more states in written form and governed by international law"). *See generally* 28 U.S.C.S. § 1350 (2006) (setting forth the term "treaty" in various contexts).

70. *Alvarez-Machain*, 542 U.S. at 730–31 (illustrating the history of jurisdictional bounds in the federal courts of the United States); *see also Voges*, 425 F.3d at 370 (relying primarily on the "ATS" for jurisdictional inquiries). *See generally* 28 U.S.C.S. § 1350 (2006) (describing federal jurisdiction in various contexts).

71. *See Voges*, 425 F.3d at 370–75 (demonstrating how the court is applying the Vienna Convention guidelines, which maintain individual rights for nationals of each specific consulate); *see also* Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (conferring legitimacy upon Article 36 of the Vienna Convention and restating its purpose of providing a private right of action to individuals detained by foreign officials). *See generally* VCCR arts. 5, 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (identifying individual rights).

72. The Seventh Circuit may rehear the Jogi case en banc. If it were to reconsider holding that VCCR provides for a private cause of action, then Jogi would have to request to amend his complaint to show; in the alternative, ATS provides for a private cause of action. *See Voges*, 425 F.3d at 370 (detailing Jogi's usage of ATS to establish jurisdiction in Federal Court only); *see also Alvarez-Machain*, 542 U.S. at 724–25 (showing the various types of methods of obtaining federal jurisdiction); Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980) (demonstrating how the federal courts are to be precluded from hearing certain types of claims brought under mere extensions of the ATS).

73. *See* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (specifying that the convention be given full effect in order for it to be effective and serve its purpose); *see also Alvarez-Machain*, 542 U.S. at 694 (describing the enforceability of the ATS upon its enactment); Kristen E. Ferris, Comment, *International Law—Violation of Vienna Convention on Consular Relations Does Not Warrant Suppression of Evidence*, 28 SUFFOLK TRANSNAT'L L. REV. 369, 372–73 (2005) (addressing the courts' reluctance in granting redress for Article 36 violations).

74. *See Voges*, 425 F.3d at 370 (pointing out the nominal and punitive damages sought in *Jogi*); *see also Standt*, 153 F. Supp. 2d at 429 (detailing a decision denying the remedy of damages for a violation of Article 36 of the VCCR); Sorensen v. City of New York, Nos. 98 Civ. 3356(HB), 98 Civ. 6725(HB), 2000 WL 1528282, at *6 (S.D.N.Y. Oct. 16, 2000) (holding that the treaty does not provide for money damages).

75. *See* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985) (indicating that treaties of the United States do not provide the basis for private lawsuits unless they are clearly intended to be "self-executing"); *see also* Correctional Services Corp. v. Malesko, 534 U.S. 61, 67–68 (2001) (giving examples of cases where the decision to create a private right of action is better left to legislative judgment); Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (striking down the notion of a federal "general" common law).

that VCCR is self-executing, confers a right to the individual, and provides for a civil cause of action.[76]

II. Applying a "Shockingly Egregious" Standard

The District Court for the Central District of Illinois applied a "shockingly egregious" standard to claims brought under ATS.[77] The Seventh Circuit disagreed with the rationale of the district court for two reasons.[78] First, the actions in both *Zapata* and *Kardic* were brought under the "law of nations" portion of ATS.[79] Second, the district court's decision came down before the Supreme Court addressed claims brought under the "law of nations" portion of ATS in *Sosa*.[80] The *Sosa* court held the standard to be whether the claim is analogous to "norms of international character . . . comparable to 18th-century paradigms."[81] Therefore, the "shockingly egregious" standard does not apply to ATS.[82]

Looking to the treaty portion of ATS, the Seventh Circuit noted that, "treaties and statutes have been held by the Supreme Court to be 'on the same footing' with each other under the Constitution."[83] Therefore, treaty-based claims should be understood in the same manner

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76. *See* United States v. Cisneros, 397 F. Supp. 2d 726, 730–31, (E.D. Va. 2005) (explaining how the VCCR is a "self-executing" treaty that does not need further legislation); *see also* Breard v. Pruett 134 F.3d 615, 622 (4th Cir. 1998) (reiterating that the Vienna Convention is a self-executing treaty, which provides rights to individuals); Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1134–35 (1992) (addressing the individual's right of enforcing a constitutional, statutory or treaty provision).

77. *See* Jogi v. Piland, 131 F. Supp. 2d 1024, 1027 (C.D. Ill. 2001), *rev'd sub nom. Voges*, 425 F.3d 367 (citing Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983)); *see also* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (recognizing three extreme standards for claims brought under the ATS); *Filartiga*, 630 F.2d at 890 (carving out an extreme standard for claims brought under the ATS).

78. *See Voges*, 425 F.3d at 370 (recognizing the district court's decision as contrary to recent decisions); *see also Alvarez-Machain*, 542 U.S. at 725 (extending the ATS's application to personal liability claims); 28 U.S.C.S. § 1350 (2006) (specifying "original jurisdiction over any civil action").

79. *See Voges*, 425 F.3d at 384 (illustrating how certain cases used the "law of nations" aspect of the ATS instead of the "treaty" aspect to bring their claims). *See generally* Zapata v. Quinn, 707 F.2d 691 (2d Cir. 1983) (providing an example of a case in which an action brought under the "law of nations" portion of the ATS was struck down for being too frivolous); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995) (describing the "law of nations" aspect of the ATS).

80. *See Voges*, 425 F.3d at 370 (concluding that the district court did not have the benefit of the later-decided case of *Sosa*); *Alvarez-Machain*, 542 U.S. at 692–94 (recognizing a claim brought under the "law of nations" portion of the ATS). *See generally* 28 U.S.C.S. § 1350 (2006) (setting forth the general "law of nations" terminology in the original statute).

81. *See Alvarez-Machain*, 542 U.S. at 725 (acknowledging the international standard premised upon 18th-century norms).

82. *See* Enahoro v. Abubakar, 408 F.3d 877, 883–84 (7th Cir. 2005) (stating that the court should not use too much discretion when deciding whether to recognize a new cause of action); *see also* Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 13 (D.D.C. 2005) (declaring the standard under which all new claims must arise); Doe v. Saravia, 348 F. Supp. 2d 1112, 1144 (E.D. Cal. 2004) (explaining the standard by which federal common law recognized international law violations).

83. *See* United States v. Chaparro-Alcantara, 226 F.3d 616, 621 (7th Cir. 2000) (elaborating that the rights embodied by the Vienna Convention are similar to rights protected by a statute).

as claims brought under federal statutes: "if there is an implied private right of action, the claimant can go forward."[84] When concluding that Jogi's use of ATS for jurisdiction was proper, the Seventh Circuit did not address whether there exists a threshold requirement under the treaty portion of ATS.[85]

III. VCCR and a Private Cause of Action

In determining whether Article 36 of VCCR creates a private right of action, the Seventh Circuit first determined the purpose behind Article 36 of the Convention.[86] Second, the court analyzed whether the Convention is self-executing in nature.[87] Third, the court looked to the language of the Convention and the *traveaux preparatoires* (drafting history) to determine if the Convention creates an individual right.[88] Lastly, the Seventh Circuit decided whether the Convention creates a private cause of action.[89] A private cause of action arising out of a treaty will not exist if the treaty itself is not self-executing.[90]

Article 36 of VCCR is one of two Articles in the Convention that refers to private individuals and their rights.[91] The preamble to the Convention states in part:

> Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems. Realizing that the purpose . . . *is not* to benefit individuals but to

84. *See Voges*, 425 F.3d at 384 (explaining why treaty-based claims should be analyzed in a manner analogous to statutory claims).

85. *See* Kochan, *supra* note 30, at 112–13 (stating that there is no definitively delineated requirement for jurisdiction under the ATS); *see also* Stephen C. Kolocotronis, *International Law—Alien Tort Statute Confers Federal Subject Matter Jurisdiction Over Extraterritorial Tort Claims Involving Official Torture,* 27 SUFFOLK U. L. REV. 282, 290–91 (1993) (explaining that having too many requirements could render the statute meaningless). *See generally* Short, *supra* note 35 (noting that the ATS does not have a specific provision for venue jurisdiction).

86. *See Voges*, 425 F.3d at 375–76 (detailing the first step the court took in its final determination).

87. *See id.* at 376–78 (discussing the self-executing nature of the VCCR).

88. *See id.* at 378–84 (detailing the third step the court took in its final determination).

89. *See id.* at 384–85 (concluding that the VCCR does create a private cause of action).

90. *See id.* (explaining that for a private cause of action to exist, a treaty must be self-executing); *see also* Stephen H. Legomsky, *Immigration Law and Human Rights: Legal Line Drawing Post-September 11,* 25 B.C. THIRD WORLD L.J. 161, 187–88 (2005) (explaining how a private cause of action arises out of a treaty); Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with Bowers v. Hardwick,* 58 ALB. L. REV. 725, 766–67 (1995) (declaring that if the treaty is announced to not be self-executing, there will be no private cause of action).

91. *See* Alan W. Clarke et al., *Does the Rest of the World Matter? Sovereignty, International Human Rights Law and the American Death Penalty,* 30 QUEENS L.J. 260, 310 n.118 (2004) (stating that Article 36 gives individual rights); *see also* Jeffrey L. Green, *International Law: Valdez v. State of Oklahoma and the Application of International Law in Oklahoma,* 56 OKLA. L. REV. 499, 514 (2003) (declaring that Article 36 was violated when the LaGrands were denied their individual rights); Stephanie Baker, Note, *Germany v. United States in the International Court of Justice: An International Battle Over the Interpretation of Article Thirty-Six of the Vienna Convention on Consular Relations and Provisional Measures Orders*, 30 GA. J. INT'L & COMP. L. 277, 288 (2002) (indicating that individual rights are derived from Article 36).

> ensure the efficient *performance of functions* by the consular posts on behalf of their respective States.[92]

The preamble makes clear that the primary purpose of the Convention is to ensure consular function.[93] In Article 5, the Convention lays out a list of some of the functions the consul is to perform.[94] The most germane to Jogi is sub-section (e), which states the consul should be "helping and assisting nationals."[95] Sub-section (i) sheds light on the form of help and assistance that individuals may receive.[96] The sub-section states that consular functions include "representing or arranging appropriate representation for nationals of the sending State . . . for the purpose of obtaining . . . provisional measures for the *preservation of the rights and interests* of these nationals."[97] Therefore, the consul is to uphold and protect the rights of their nationals.[98] There is also an additional consular function mentioned in sub-section (g) that, "safeguard[s] the interests of nationals . . . in cases of succession *mortis causa*."[99] Thus, through Article 5, the Convention alludes to consular functions that protect the various rights and interests of their nationals in foreign territories.[100]

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92. *See* VCCR, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (elaborating on the purpose of having an international convention on consular relations).

93. *See* Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relation to International Law,* 88 AM. J. INT'L L. 728, 729 (1994) (describing the United States' desire to adhere to the purposes of the VCCR and develop consular services with Vietnam); *see also* Linda Jane Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention of Consular Relations,* 14 GEO. IMMIGR. L.J. 185, 189 (1999) (stating that the purpose of the VCCR is to ensure consular functions)*;* John Paul Truskett, Note, *The Death Penalty, International Law, and Human Rights,* 11 TULSA J. COMP. & INT'L L. 557, 568 (2004) (detailing the three main functions of the VCCR).

94. *See* Catherine W. Brown, *Consular Law and Practice,* 90 AM. J. INT'L L. 178, 179 (1996) (stating that Article 5 of the VCCR lays out the consular functions to be performed); *see also* Valerie Epps, *Violations of the Vienna Convention on Consular Relations: Time for Remedies,* 11 WILLAMETTE J. INT'L L. & DISP. RES. 1, 9 (2004) (laying out functions of section 5(e) of the VCCR); Springrose, *supra* note 93, at 213 n.3 (noting that the list of consular functions is contained in Article 5).

95. *See* Vienna Convention on Consular Relations art. 5(e), *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (setting forth the consular functions).

96. *See* Epps, *supra* note 94, at 9 (describing the functions reserved by section 5(i)); *see also* Sarah M. Ray, Note, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations,* 91 CAL. L. REV. 1729, 1746 (2003) (describing a case where Article 5(i) was violated); Springrose, *supra* note 93, at 213 n.3 (quoting Article 5(i)).

97. *See* VCCR art. 5(i), *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (stating that consular functions are subject to the practices and procedures of the receiving states).

98. *See* Epps, *supra* note 94, at 9 (describing obligations and rights under the VCCR); *see also* John Quigley*, Death Penalty and International Law: Suppressing the Incriminating Statements of Foreigners*, 13 WM. & MARY BILL RTS. J. 339, 340 (2004) (listing requirements of the VCCR); Ray, *supra* note 96, at 1734 (discussing a debate that occurred at the convention).

99. *See* VCCR art. 5(g), *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (delineating safeguarding the interests of nationals as a consular function).

100. *See* Epps, *supra* note 94, at 9 (describing duties of the consul under the VCCR); *see also* Quigley, *supra* note 98, at 340 (detailing the protection provided a foreigner under the VCCR); Ray, *supra* note 96, at 1734 (discussing procedures to be adhered to under the VCCR).

Article 36 illustrates a function of the consul that is designed to assist an individual upon being arrested in a foreign state.[101] More specifically, Article 36(1)(b) states: "Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay."[102] The question for the court was for what purpose was this Article included?[103] The floor debates reveal that the purpose of this provision was to protect the rights of the individual.[104] The Seventh Circuit referred to the words of Mr. Woodberry, the delegate from Australia, announcing "there was no need to stress the extreme importance of not disregarding, in the present or any other international document, the rights of the individual."[105] Mr. Perez Hernandez, the delegate from Spain, added, "The right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country . . . was one of the most sacred rights of foreign residents in a country."[106] Mr. Hernandez referred to the International Law Commission's draft of Article 36 when making his statement.[107]

These statements were made in response to a proposed amendment by Venezuela that would have eliminated the creation of an individual right as understood in the language of

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101. *See* Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 SANTA CLARA L. REV. 101, 134 (2003) (noting that Illinois follows the procedures set up in the VCCR); *see also* Quigley, *supra* note 98, at 340 (listing the protections a foreigner is entitled to); Ray, *supra* note 96, at 1734 (stating that the consul of a foreigner arrested should be notified immediately).

102. *See* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (mentioning procedures regarding communicating and contacting nationals of the sending state).

103. *See* Jogi v. Voges, 425 F.3d 367, 373 (7th Cir. 2005) (posing the question: for what purpose does the Vienna Convention include Article 36?).

104. *See* Medellin v. Dretke, 125 S. Ct. 2088, 2096 (2005) (O'Connor, J., dissenting) (arguing that Article 36 "guarantees open channels of communication between detained foreign nationals and their consulates in signatory countries"); *see also* LaGrand Case (Germany v. United States), 2001 I.C.J. 466, 492 (June 27) (finding that Article 36 of the treaty confers individual rights); *U.S. Withdrawal from VCCR Protocol Is Step Backwards*, *available at* http://www.amnestyusa.org/abolish/flashcards/flashcard_march.html (last visited Mar. 10, 2006) (declaring that, "[u]nquestionably, the timely access to consular assistance safeguarded under the Vienna Convention serves to protect the human rights of foreign detainees worldwide").

105. *See Voges*, 425 F.3d at 375 (quoting United States v. Li, 206 F.3d 56, 73 (1st Cir. 2000) (*en banc*)); *see also* United Nations Conference on Consular Relations, Mar. 4–Apr. 22, 1963, *Vienna Convention on Consular Relations*, ¶ 34, U.N. Doc A/Conf.25/6 (Mar. 14, 1963) [hereinafter Conference on Consular Relations] (referencing the Australian delegate's comments that the rights of the individual should not be disregarded in any international document); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 613 n.203 (1997) (citing further comments by the Australian delegate that individual rights were "all important, and were embodied in the principle upon which the United Nations was based").

106. *See* Conference on Consular Relations, *supra* note 105, at ¶¶ 35–36 (quoting the Spanish delegate, advocating for individual rights to consular contact); *see also* Kadish, *supra* note 105, at 598, 613 n.197 (referring to the words of the Spanish delegate as support for the idea that it was concern for individual rights and "free will" that ultimately prevailed at the debates). *See, e.g.*, *Dretke*, 125 S. Ct. at 2096 (stating that the dismissal of certiorari of a claim for violation of Article 36 right to notification of consular contact was violated by the state of Texas was improvident, given that such questions are likely to recur, foreign nationals are often subjected to state courts, and that while Article 36 grants an individual right, noncompliance by states has been a "vexing problem").

107. *See* Conference on Consular Relations, *supra* note 105, at ¶¶ 35–36 (quoting Mr. Perez Hernandez, who referred to the International Law Commission's establishment of a right to consular contact). *But see* Kadish, *supra* note 105, at 613 n.197 (citing the Indian delegate's disagreement that the International Law Commission meant to establish a new right for individuals).

Article 36(1)(a).[108] In response to Spain's protest, the delegate from Kuwait believed that individual rights "were irrelevant to the convention under discussion."[109] Therefore, the United Nations knew Article 36(1)(a) created an individual right and the debates reflect an effort to come to an understanding as to the proper purpose Article 36 is to serve.[110] Mr. Das Gupta, the Indian delegate, summarized the ultimate conclusion by saying, "the right given to the consulate implied a right for the national."[111] Venezuela eventually withdrew the proposed amendment.[112]

Concerning sub-section (b), an amendment proposed by the United States sheds light on the purpose of Article 36.[113] Mr. Blakinship said, "[t]he object of the amendment was to pro-

108. *See* Kadish, *supra* note 105, at 596, 613 n.195 (discussing the Venezuelan amendment, which granted the right to contact the detained foreign national to the consulate, rather than granting the right to the individual to contact the consulate); *see also* Shana F. Marbury, *Recent Developments: Breard v. Greene: International Human Rights and the Vienna Convention on Consular Relations*, 7 TUL. J. INT'L & COMP. L. 505, 507–08 (1999) (stressing the importance of individual rights as, "[t]he right to communicate with and have access to the foreign national as presented in Article 36[1][a] is crucial because all other consular protective duties are built upon this communication and access."); Ray, *supra* note 96, at 1734 (referencing the fundamental discrepancy between the preamble to the treaty, which expressly disclaims a grant of individual rights, and the final version of Article 36).

109. *See* Conference on Consular Relations, *supra* note 105, at ¶ 37 (quoting the Kuwaiti delegate, indicating that the rights of foreign nationals were important, but not in regard to the current discussion).

110. *See Li*, 206 F.3d at 73 (Tourrella, C.J., concurring in part, dissenting in part) (commenting on the "extensive and divisive debates" surrounding Article 36). *But see* United States v. de la Pava, 268 F.3d 157, 165 n.7 (2d Cir. 2001) (declaring that the debates on Article 36 reflect an emphasis on the rights of states and their consular functions, rather than individuals); United States v. Minjares-Alvarez, 264 F.3d 980, 986 (10th Cir. 2001) (characterizing the existence of individual rights to consular contact under Article 36 as "an open question" among the U.S. federal courts).

111. *See* Conference on Consular Relations, *supra* note 105, at ¶ 50 (quoting the delegate from India, stating that he believed that the International Law Commission had established a new right for individuals).

112. *See* Conference on Consular Relations, *supra* note 105, at ¶ 2 (referring to the record of the debates surrounding Article 36); *see also* Kadish, *supra* note 105, at 596–97 (mentioning the strong opposition that preceded the withdrawal of the Venezuelan proposal). *But see* Patrick Dervishi, Comment, *No Remedies for Violation of the Foreign Nationals' Right to Consular Notification:* United States v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002), 15 FLA. J. INT'L L. 645, 646 (2003) (discussing a case in which Venezuela handed over a Columbian citizen to his own government for prosecution, in contrast to Venezuela's former position during the debates that detained foreign nationals were entitled to no rights under Article 36).

113. *See, e.g.,* Michael Fleishman, Note, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. L. 359, 365 (2003) (discussing the role of Article 36 as a "compromise between strict mandatory notification and no notification"); Ray, *supra* note 96, at 1734 (emphasizing the United States' concern that Article 36 should supplement, rather than replace, existing rights to consulate access by individuals, because the United States considered Article 36 to be a less potent form of the guarantees already embodied in various bilateral treaties to which the United States was a party). *But see* Kathryn F. King, *The Death Penalty, Extradition, and the War Against Terrorism: U.S. Responses to European Opinion About Capital Punishment*, 9 BUFF. HUM. RTS. L. REV. 161, 175 (2003) (highlighting the United States' history of consistent abuses of Article 36 rights of foreign nationals on U.S. soil, despite the United States' initial concern that Article 36 did not afford enough protection to individuals arrested in foreign countries).

tect the rights of the national concerned."[114] Under the amendment, the receiving state would not have to notify the consular post unless the sending state's national so requested.[115] The amendment implies the decision to notify the consul is personal to the individual.[116] The final draft of Article 36 is clearly consistent with the purpose of the United States' proposed amendment. Not only does the final version reflect that the right to consular notification is personal to the individual, but the arresting authorities must "notify the individual of his rights."[117] Therefore, the purpose of Article 36 is to exercise a consular function under Article 5 for the benefit of the individual.[118] However, this proposition is of minimal relevance to Jogi's case if the Convention itself is not self-executing.

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114. *See* Conference on Consular Relations, *supra* note 105, at ¶ 39 (quoting Mr. Blankinship, who said that, in the interest of protecting the national, his delegation's amendment provided that the state would not need to notify the home country if the foreign national did not want it to do so); *see also* Kadish, *supra* note 105, at 598, 613 n.24 (discussing the concern, shared by the United Kingdom, that Article 36 must ensure rights of the individual); Edith Brown Weiss et al., *The ILC'S State Responsibility Articles: Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 814 (2002) (citing Germany v. United States ("the LaGrand case") wherein the ICJ found the existence of Article 36 individual rights, entitling the individual to raise a diplomatic protection claim before the court).

115. *See* Conference on Consular Relations, *supra* note 105, at ¶ 39 (relying on the record of Article 36 debates); *see also* United States v. Rodriguez, No. 04-13148, 2006 U.S. App. LEXIS 321, at *8 (11th Cir. Jan. 4, 2006) (holding that, because the detained foreign national chose not to contact his consul after being told of his right to do so, the American authorities had no obligation to take further action on his behalf). *But see* United States v. Duarte-Acero, 296 F.3d 1277, 1281–82 (11th Cir. 2002) (finding that although the detained foreign defendant requested contact with his consul on several occasions, and that his requests were completely ignored by the authorities, this violation of Article 36 gave him no remedy at law, and his indictment was affirmed).

116. *See* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (providing that the consular post of the sending state is to be notified *if* a foreign national so requests (emphasis added)); *see also* LaGrand Case (Germany v. United States), 2001 I.C.J. 466, 493 (June 27) (discussing Germany's claim that Article 36 gives the detainee the right to decide whether to contact the consul). *But see* United States v. de la Pava, 268 F.3d 157, 165 n.7 (2d Cir. 2001) (arguing that the emphasis of the debates on Article 36 centered not on a test between state rights and individual rights, but rather on the rights of states who wished to be informed of every detention of one of their nationals by a foreign government, and those that wanted to be notified only if the detainee so requested).

117. *See* Conference on Consular Relations, *supra* note 105, at ¶ 1(b) (comparing the debate record to the final adopted amendment); *see also* United States v. Li, 206 F.3d 56, 74 (1st Cir. 2000) (noting that the final approved version of the amendment, submitted by the United Kingdom, required the custodial nation to inform the detained foreigner of his or her right to contact the consul of the home country); Kadish, *supra* note 105, at 598 (finding the amendment proposed by the United Kingdom was an effort to come to a compromise on the controversial Article 36).

118. *See* Kadish, *supra* note 105, at 573, 593 (asserting that Article 36 "unequivocally" grants the right to the individual and noting that the Ninth Circuit court found that Article 36 benefits the individual as a corollary of consular efficiency); *see also* Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1117 (2000) (supporting the contention that Article 36 does not confer an individual right as such, but rather extends to individuals a right conferred on states, given that U.S. courts have not found the existence of a remedy for violation of Article 36 rights); Cara S. O'Driscoll, Comment, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. ST. L.J. 323, 343 (2000) (referring to the preamble to Article 36, which states that its terms are provided "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State").

The Seventh Circuit listed three ways a treaty may not be self-executing.[119] First, an agreement may not be self-executing if it provides for the implementation of legislation.[120] Second, an agreement is not self-executing if the Senate, in giving advice and consent, calls for legislation to give the treaty effect or if Congress requires so by resolution.[121] Third, an agreement may not be self-executing if implementing legislation is required by the Constitution.[122] The court developed factors to determine the intent of the parties to the agreement.[123] The first factor is to look to the language and purposes of the agreement as a whole.[124] The second factor is to examine the circumstances surrounding the execution of the agreement.[125] Third, the nature of the particular obligation imposed by the part of the agreement under consideration must be examined.[126] Yet, the Seventh Circuit noted that if the parties' intent is clear from the treaty's language, courts will not inquire into the remaining factors.[127]

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119. *See* Jogi v. Voges, 425 F.3d 367, 376 (7th Cir. 2005) (citing the RESTATEMENT (THIRD) OF THE FOREIGN REL. L. OF THE U. S. § 111 [4] [1987], which provides three different ways in which a treaty might be non-self-executing).

120. *See id.* at 377 (announcing that an agreement is self-executing if it can be given effect without further legislation or analogous domestic measures); *see also* Seguros Comercial America v. Hall, 115 F. Supp. 2d 1371, 1378 (M.D. Fla. 2000) (recognizing that American courts will give effect to international agreements of the United States, except that non-self-executing agreement will not be given effect as law in the absence of necessary legislation); Thornton, *supra* note 90, at 766–67 (explaining the differences between self-executing and non-self-executing treaties, in that the latter does not have immediate effect in the domestic legal system of the United States).

121. *See* Torres v. Mullin, 540 U.S. 1035, 1039 (2003) (indicating that lower courts have held the Vienna Convention to be self-executing at least in the sense that its provisions automatically become part of the law of the United States without additional congressional legislation); *see also* Cook v. United States, 288 U.S. 102, 119 (1933) (noting that a treaty is self-executing if no legislation is required to authorize executive action pursuant to its provisions); Peter E. Quint, *The Border Guard Trials and the East German Past—Seven Arguments*, 48 AM. J. COMP. L. 541, 554 (2000) (describing that a treaty is not self-executing and thus its provisions do not take effect on domestic law until they have been transformed into domestic law by federal statute).

122. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."); *see also* Missouri v. Holland, 252 U.S. 416, 433 (1920) (stressing that, "acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(4) (1986) (clarifying that an international agreement of the United States is not self-executing if implementing legislation is constitutionally required).

123. *See Voges*, 425 F.3d at 377 (detailing the factors the court has looked to in the past to discern the intent of the parties to the treaty).

124. *See id.* (suggesting that in order for a court to determine the intent of the parties to the agreement, it is helpful to look first at the language and purposes of the agreement as a whole).

125. *See id.* (discussing that in order for a court to determine the intent of the parties to the agreement, it is helpful to examine the circumstances surrounding the execution of the agreement).

126. *See id.* (listing the nature of the particular obligation to be imposed by the agreement as a factor in discerning the intent of parties to a treaty).

127. *See id.* (citing Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985)) (reiterating that if the parties' intent is clear from the treaty's language, then the courts will not inquire into the remaining factors).

Deputy Legal Adviser J. Edwards Lyerly of the State Department testified that the Convention is "entirely self-executive and does not require any implementing or complementing legislation."[128] The State Department's website notes the Convention's self-executing character by stating there is no need for implementing legislation because local, state, and federal authorities can implement the procedures called for in Article 36 through the use of their "existing powers."[129] Concerning the implementation of Article 36, "the obligations of consular notification and access are binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause in Article VI of the Constitution."[130] The United States, in an *amicus curiae* brief, noted that VCCR has been "the source of judicially enforced individual rights."[131] Furthermore, several courts have held that the Convention is self-executing.[132] Given that judicial construction of the Convention and all statements rele-

128. *See* United States v. Li, 206 F.3d 56, 74 (1st Cir. 2000) (citing to S. EXEC. REP. NO. 91-9, at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser, State Dept.) (commenting on the testimony of J. Edward Lyerly from the Committee on Foreign Relations).

129. *See* Maharaj v. Sec'y for the Dep't of Corr., 432 F.3d 1292, 1306 (11th Cir. 2005) (referring to the well-recognized principle of international law that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of [a] treaty in that State"); *see also* Adrienne M. Tranel, Comment, *The Ruling of the International Court of Justice in Avena and Other Mexican Nationals: Enforcing the Right to Consular Assistance in U.S. Jurisprudence*, 20 AM. U. INT'L L. REV. 403, 410 (2005) (explaining that in order to enforce international obligations on the national level, Article 36(2) of the Vienna Convention provides that the enumerated rights "shall be exercised in conformity with the laws and regulations of the receiving State"); CONSULAR NOTIFICATION AND ACCESS, PART 5: LEGAL MATERIAL, *Article 36: Communication and Contact with Nationals of the Sending State*, *available at* http://www.travel.state.gov/law/consular/consular_744.html (last visited Mar. 2, 2006) (revealing that the obligations of consular notification and access are not codified in any federal statute and that implementing legislation is not necessary).

130. *See* Breard v. Greene, 523 U.S. 371, 376 (1998) (holding that, "[a]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply"); *see also* United States v. de la Pava, 268 F.3d 157, 163–64 (2d Cir. 2001) (reporting that Article 36(1)(b) of the Vienna Convention provides that the authorities of a "receiving state" shall, without delay, inform any detained foreign national of his right to have the "consular post" of a "sending state" notified of his detention); Tranel, *supra* note 129, at 412–13 (expressing that all treaties and federal statutes remain a step subordinate to the Constitution because the U.S. Constitution occupies the top tier of the legal hierarchy).

131. *See* Medellin v. Dretke, 544 U.S. 660, 687–89 (2005) (O'Connor, J., dissenting) (suggesting that the United States interprets such statements to mean that the political branches did not contemplate a role for the treaty in ordinary criminal proceedings). *But see* United States v. Villa-Ortega, Case No. 03-40079-JAR, 2005 U.S. Dist. LEXIS 28234, at *10–*11 (D. Kan. Nov. 9, 2005) (positing that while the Supreme Court has stated in dicta that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest," the Supreme Court has not resolved this issue and the question remains unclear in the circuit courts); Tranel, *supra* note 129, at 449–50 (emphasizing that state and federal courts in the United States have refused to decide whether Article 36 creates such judicially enforceable individual rights).

132. *See* Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998), *rev'd on other grounds sub nom.* Breard v. Greene, 523 U.S. 371 (1998) (announcing that the Vienna Convention is a self-executing treaty that provides rights to individuals rather than merely setting out the obligations of signatories); *see also* United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 932 (C.D. Ill. 1999) (recognizing two distinct meanings of a self-executing treaty—a treaty that does not need implementing legislation and a treaty that creates private rights of action); Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (holding that the VCCR requires an arresting government to notify a foreign national who has been arrested, imprisoned or taken into custody or detention of his right to contact his consul).

vant to the United States' intent point to the self-executing nature of the Convention, the Seventh Circuit concluded it is intended to be self-executing.[133]

After concluding the Convention is self-executing, the Seventh Circuit reached the question of whether the Convention creates an individual right.[134] The preamble states that the Convention is "not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."[135] Despite this language, Article 36 of VCCR allows for consular notification, "if [the arrestee] so requests."[136] Most importantly, Article 36(1)(b) states in the last sentence that, "[t]he said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."[137]

There has been much conflict among courts in deciding this issue for two reasons. First, only criminal defendants have invoked violations of Article 36.[138] Second, the remedies sought by these various criminal defendants challenged the validity of their convictions.[139] The United States Supreme Court never expressly decided this issue, but made note of it in *Breard v. Greene*.[140]

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133. *See* Jogi v. Voges, 425 F.3d 367, 377 (7th Cir. 2005) (citing that, "the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action").

134. *See id.* at 370 (holding that the defendant had an individual right to consular notification under the Vienna Convention).

135. *See* VCCR, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States . . . .").

136. *See* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (mandating that the authorities of the receiving state shall inform the consular post of the sending state if the arrestee so requests); *see also* People v. Corona, 108 Cal. Rptr. 2d 210, 212 (Cal. Ct. App. 2001) (arguing that Article 36 requires the authorities of the receiving state to notify the consular post of the sending state of any national arrested if the arrestee so requests); Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1743–44 (1998) (reiterating that Article 36 of the Vienna Convention requires the arresting authorities to contact the consular of an arrestee if the arrestee so requests).

137. *See* VCCR art. 36, *supra* note 1, U.S.T. 77, 596 U.N.T.S. 261 (stating that, "[t]he said authorities shall inform the person concerned without delay of his rights under this sub-paragraph").

138. *See* United States v. de la Pava, 268 F.3d 157, 164 (2d Cir. 2001) (concluding that even if the defendant had judicially enforceable rights under the Vienna Convention, the government's failure to comply with the consular notification provision is not grounds for dismissal of the indictment); *see also* United States v. Emuegbunam, 268 F.3d 377, 394 (6th Cir. 2001) (asserting that the Vienna Convention does not create a right for a detained foreign national to consult with the diplomatic representatives of his nation that the federal courts can enforce); United States v. Jimenez-Nava, 243 F.3d 192, 198 (5th Cir. 2001) (declaring that Article 36 does not create judicially enforceable rights of consultation between a detained foreign national and his consular office).

139. *See de la Pava*, 268 F.3d at 165 (holding that the VCCR has no remedy with regard to dismissing indictments); *see also* United States v. Lawal, 231 F.3d 1045, 1048 (7th Cir. 2000) (holding the Exclusionary Rule is not a remedy under Article 36); United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000) (suppressing evidence is not an appropriate remedy for Article 36); United States v. Ademaj, 170 F.3d 58, 67 (1st Cir. 1999) (ruling the VCCR provides no judicial remedy for violations).

140. *See* Breard v. Greene, 523 U.S. 371, 377 (1998) (finding that neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions).

In *Breard*, the petitioner appealed his murder conviction and requested a stay of execution because officials never informed him of his "rights" under the Convention.[141] The court ruled that the petitioner's failure to raise the claim in state court barred him from raising the claim on federal habeas review.[142] Yet, the court noted that, "[t]he Vienna Convention . . . arguably confers on an individual the right to seek consular assistance following arrest."[143] More recently, Justice O'Connor stated in dicta, "[i]f Article 36(1) conferred no rights on the detained individual, its command to 'inform' the detainee of 'his rights' might be meaningless."[144]

The Fifth and Sixth Circuits, in addressing whether the Convention confers an individual right, rely heavily on the preamble of the Convention.[145] The Fifth Circuit reasoned that the preamble precludes any possibility that the Convention creates an individual right and the State Department never intended to create individual rights under the Convention.[146] The

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141. *See id.* at 373–74 (noting that the petitioner requested a stay of execution, and argued that his conviction and sentence should be overturned due to violations of the VCCR); *see also* State v. Issa, 752 N.E.2d 904, 930 (Ohio 2001) (stating that Breard filed a motion for habeas relief, and argued that the arresting officials never told him about his rights under the Convention); Dervishi, *supra* note 112, at 648 (reporting that Breard argued in his motion for habeas relief that the arresting officials violated his rights under the Convention).

142. *See Greene*, 523 U.S. at 375–76 (declaring that the petitioner's failure to assert his Vienna Convention claim in state court prohibited him from raising the claim on federal habeas review); *see also* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977) (finding that the prisoner's failure to timely object before trial to the admission of incriminating statements prevented direct federal review by habeas corpus); United States *ex rel*. Sheppard v. Roth, 762 F. Supp. 190, 194 (N.D. Ill. 1991) (indicating that if petitioner's Sixth Amendment claim was not fairly presented at the state court level, that claim may be prohibited under the doctrines of exhaustion or procedural default from federal habeas review).

143. *See Greene*, 523 U.S. at 376 (maintaining that the Vienna Convention provides an individual the right to consular assistance after an arrest); *see also* Maharaj v. Sec'y for the Dep't of Corr., 432 F.3d 1292, 1304 (11th Cir. 2005) (affirming that the Vienna Convention provides that a foreign national has the right to consular assistance from his home country upon arrest and that arresting officials must notify the detainee of that right); United States v. Villa-Ortega, Case No. 03-40079-JAR, 2005 U.S. Dist. LEXIS 28234, at *5 (D. Kan. Nov. 9, 2005) (explaining that under the Vienna Convention, arresting authorities shall immediately notify a detained foreign national of his right to contact the consular of his home country, and the detainee may receive visits and legal representation by consular officers).

144. *See* Medellin v. Dretke, 125 S. Ct. 2088, 2103 (2005) (O'Connor, J., dissenting) (opining that if the Convention did not confer individual rights on a detainee, there might be no purpose to its assertion that the detainee be informed of his rights).

145. *See* Jogi v. Voges, 425 F.3d 367, 382 (7th Cir. 2005) (highlighting that both the Fifth and Sixth Circuits relied on the Preamble in making its conclusion that Article 36 confers individual rights on detained nationals); *see also* United States v. Emuegbunam, 268 F.3d 377, 392 (6th Cir. 2001) (depending on the preamble of the Convention to determine whether the Convention creates individual rights); United States v. Jimenez-Nava, 243 F.3d 192, 196 (5th Cir. 2001) (citing the preamble of the Convention as a means of establishing its purpose and its role with respect to individual rights).

146. *See Jimenez-Nava*, 243 F.3d at 196–97 (determining that the preamble of the Convention illustrates that the Convention does not create individual rights and the U.S. State Department has continuously declared that the Convention does not create individual rights); *see also* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in Mexico v. United States (Avena) Speaks Emphatically to the Supreme Court of the United States about the Fundamental Nature of the Right to Consul*, 36 GEO. J. INT'L L. 1, 14 (2004) (stressing that the Convention's preamble prevented the Convention from establishing individual rights); Brittany P. Whitesell, Note, *Diamond in the Rough: Mining Article 36(1)(B) of the Vienna Convention on Consular Relations for an Individual's Right to Due Process*, 54 DUKE L.J. 587, 599–600 (2004) (emphasizing that the Fifth Circuit found that the Convention's preamble indicates that the Convention does not confer enforceable individual rights).

Sixth Circuit reasoned that because the preamble states, "the purpose of such privileges and immunities is not to benefit individuals, but to ensure . . . performance by consular posts," the "rights" under Article 36 are a means to implement the treaty obligations "as between States."[147]

The only United States case that addressed this precise issue and held in the affirmative is *Standt v. City of N.Y.*[148] In *Standt*, the plaintiff sought to avoid summary judgment on his Article 36 claim brought through 42 U.S.C. § 1983.[149] The court looked to the language of the preamble and read it in the context of the treaty as a whole, ruling that the term "individuals" referred to consular officials and not citizens.[150] Assuming *arguendo* the preamble did refer to private individuals, Article 36 would create ambiguity and force the court to look at outside resources, such as the *traveaux preparatiores*.[151] Upon examining the *traveaux preparatiores*, the court concluded that individual rights were the subject of much debate among the signatories,[152] and the proposed amend-

147. *See Emuegbunam*, 268 F.3d at 392 (asserting that the privileges and immunities mentioned under the Convention's preamble are to guarantee the performance of consuls on behalf of their respective states, and not to provide rights or benefits to individuals); *see also* Alison Duxbury, *Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights*, 31 CAL. W. INT'L L.J. 141, 146 (2000) (commenting that the goal of the privileges and immunities granted is not for individuals, but is to guarantee proper performance by consular posts); Kadish, *supra* note 146, at 14 (remarking that the Sixth Circuit concluded that international treaties do not create private rights, and the remedies for failure to carry out the treaty's obligations are diplomatic, political or exist between states).

148. *See* Standt v. City of New York*,* 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) (holding that the plain language of the Vienna Convention, its legislative history, and subsequent operation indicate that Article 36 of the Convention provides a private right of action for individual detainees).

149. *See id.* at 421 (reporting that the plaintiff sought summary judgment on his Article 36(1) of the VCCR claim); *see also* Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?*, 25 HOUS. J. INT'L L. 1, 95 (2002) (observing that Standt's suit for violation of his rights under the Convention could be brought under 42 U.S.C. § 1983); William M. Carter, Jr., *The Mote in Thy Brother's Eye: A Review of Human Rights as Politics and Idolatry,* 20 BERKELEY J. INT'L L. 496, 505 (2002) (book review) (acknowledging that the court denied the defendants' motion for summary judgment on Standt's § 1983 claim for violation of his rights under the Convention).

150. *See* Standt,153 F. Supp. 2d at 425 (providing that the court depended on the Preamble to conclude that the term 'individuals' referred to consular officials, rather than civilians); *see also* Amanda E. Burks, *Consular Assistance for Foreign Defendants: Avoiding Default and Fortifying a Defense*, 14 CAP. DEF. J. 29, 41 (2001) (affirming that the term 'individuals' in the preamble means individuals in their consular capacity, and not in their civilian capacity); Whitesell, *supra* note 146, at 601 (clarifying that the Convention's consular relations rights were meant for the states, and had no effect on the rights of individual foreign nationals).

151. *See* United States v. Stuart, 489 U.S. 353, 373 (1989) (asserting that courts have found it suitable to resort to outside materials only when a treaty provision is ambiguous); *see also* Standt, 153 F. Supp. 2d at 425 (specifying that if the preamble established individual rights, Article 36 would create ambiguity and courts would have to look at outside sources for clarity); Croll v. Croll, 229 F.3d 133, 136 (2d Cir. 2000) (outlining that courts may look to extraneous sources of interpretation when a text is ambiguous).

152. *See* Jogi v. Voges, 425 F.3d 367, 375 (7th Cir. 2005) (pronouncing that the debates during the drafting of the Convention mainly concerned the question of the individual's right to consular notification); *see also* Rocha v. State, 16 S.W.3d 1, 26 (Tex. Crim. App. 2000) (declaring that the debate on Article 36 of the Convention focused on individual rights of a foreign detainee); Springrose, *supra* note 93, at 190 (describing that the debates during the Convention's preparatory committee meetings involved an individual detainee's right to consular notification).

ments by Venezuela and the United States led the court to conclude that Article 36 is intended to create an individual right.[153]

The proposed amendment referred to in the *Standt* case, submitted by Mr. Perez-Chiriboga, addressed a concern with sub-section 1(a) of Article 36.[154] Mr. Perez-Chiriboga objected to the language in the sub-section that the individual has the right to communicate with the consulate.[155] Specifically, the delegate stated that such language was "inappropriate in a convention on consular relations."[156] Furthermore, "[t]he Government of Venezuela considered that foreign nationals in the receiving state should be under the jurisdiction of that state and should not come within the scope of a convention on consular relations."[157] Mr. Perez-Chiriboga withdrew the proposed amendment at the next meeting on Article 36.[158]

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153. *See Standt*, 153 F. Supp. 2d at 426 (stressing that the legislative history of the treaty supports the conclusion that Article 36 establishes an individual right on foreign nationals); *see also* State v. Martinez-Rodriguez, 33 P.3d 267, 282–83 (N.M. 2001) (highlighting that the records of the debates during the drafting of the Convention suggest that Article 36 creates individual rights); Epps, *supra* note 94, at 22 (holding that the language of the Vienna Convention, its legislative history, and subsequent operation suggest that Article 36 provides rights for individual detainees).

154. *See* United States v. Li, 206 F.3d 56, 73–74 (1st Cir. 2000) (reporting that the Venezuelan delegate proposed an amendment to Article 36(1)(a)); *see also Standt*, 153 F. Supp. 2d at 425–26 (accentuating that the Venezuelan delegate's proposed amendment dealt with the individual right of consular notification); Brief for Mid-Atlantic Innocence Project et al. Amici Curiae Supporting Petitioner at 12, Bustillo v. Johnson, 2005 WL 3597705 (U.S. Sup. Ct. Dec. 23, 2005) (No. 05-51) [hereinafter Mid-Atlantic Brief] (relaying that the Venezuelan delegate proposed an amendment to the language of the Convention, which concerned the individual right of consular communication).

155. *See Standt*, 153 F. Supp. 2d at 425–26 (mentioning that the Venezuelan delegate wanted to eliminate the language in the Convention that gave an individual the right of consular communication); *see also* Kadish, *supra* note 105, at 596–97 (pointing out that Venezuela's proposed amendment to Article 36(1)(a) removed individual rights to consular communication); Rebecca E. Woodman, *International Miranda? Article 36 of the Vienna Convention on Consular Relations*, 70 J. KAN. B. ASS'N 41, 44 (2001) (stressing that the Venezuelan delegate wanted to get rid of the reference to the individual right to consular notification).

156. *See* Germany v. United States (LaGrand Case), 2001 ICJ 466, 521 (June 27) (stating that the Venezuelan delegate found the language giving an individual right to consular communication inappropriate under the Convention); *see also* Memorial of the Federal Republic of Germany (Sept. 16, 1999), *available at* http://www.icj-cij.org/icjwww/idocket/igus/iguspleadings/iGUS_ipleading_Memorial_Germany_19990916_Complete.htm (last visited Mar. 2, 2006) (noting that the Venezuelan delegate, Mr. Perez-Chiriboga, argued that the drafted Convention was not the appropriate forum to establish rights of nationals); Brief for Petitioner Moises Sanchez-Llamas at 21, Sanchez-Llamas v. Oregon, 2005 WL 3598178 (U.S. Sup. Ct. Dec. 22, 2005) (No. 04-10566) (remarking that the Venezuelan delegate found that it was inappropriate for a consular convention to give effect to the rights of nationals).

157. *See LaGrand Case*, 2001 ICJ at 521 (detailing that during the preparatory sessions of Article 36, the Venezuelan delegate argued that foreign nationals should be under the jurisdiction of the receiving state and not under the Convention); *see also* Separate Opinion of Vice-President Shi at ¶ 8, *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_separate_shi_20010627.htm (last visited Mar. 2, 2006) (affirming that the Venezuelan delegate believed that foreign nationals should be under the receiving state's jurisdiction and not within the scope of a convention on consular relations). *See generally* Woodman, *supra* note 155 (discussing Venezuela's proposed amendments to Article 36).

158. *See* Jogi v. Voges, 425 F.3d 367, 382 (7th Cir. 2005) (recognizing that Venezuela withdrew its proposed amendment after it received opposition from other states); *see also* Mid-Atlantic Brief, *supra* note 154, at 12 (explaining that the Venezuelan delegate withdrew his amendment after strong opposition by other nations); Ziemer, *supra* note 4 (admitting that the Venezuelan delegate received a lot of opposition for his amendment and withdrew the proposal accordingly).

The International Court of Justice ("The ICJ") has addressed the issue of individual rights under VCCR in two cases, *Germany v. U.S.*[159] *and Mexico v. U.S.*[160] *The LaGrand* case involved two German nationals who were convicted of armed robbery of a bank and the murder of the bank manager.[161] The ICJ interpreted the plain language of Article 36 as conferring an individual right.[162] The court reasoned that sub-section 1(b) sets forth the obligations of the receiving state regarding consular notification subsequent to the arrest of a foreign national.[163] Moreover, the receiving state is required to inform the sending state's consul "without delay."[164] The last sentence of subsection 1(b) states, "[t]he said authorities shall inform the person concerned without delay of his rights under this sub-paragraph."[165] The ICJ read this sub-section in conjunction with sub-section 1(c), which limits the exercise of these obligations "if [the foreign national] expressly opposes such action."[166]

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159. *See LaGrand Case*, 2001 ICJ at 493 (discussing human rights and the VCCR relating to the execution of two German nationals).

160. *See In re* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ 12, 31 (Mar. 31) (commenting on whether consular notification is a human right and a question of the interpretation of the Vienna Convention regarding the pending executions of 52 Mexican nationals).

161. *See LaGrand Case*, 2001 ICJ at 475 (detailing the accusations against Karl and Walter LaGrand, two German Nationals, in connection with an armed bank robbery in Marana, Arizona); *see also* Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, 35 GEO. J. INT'L L. 547, 574 (2004) (noting the interplay of the VCCR and U.S. federal law in the conviction and sentencing of foreign felons); Sandra J. Weiland, *The Vienna Convention on Consular Relations: Persuasive Force or Binding Law?*, 33 DENV. J. INT'L L. & POL'Y 675, 681 (2005) (remarking on the impact of the VCCR and its operation in the United States).

162. *See LaGrand Case*, 2001 ICJ at 494 (presenting the court's interpretation of the VCCR's imposed obligations on the state); *see also* Malvina Halberstam, *LaGrand and Avena Establish a Right, but Is There a Remedy?: Brief Comments on the Legal Effect of LaGrand and Avena in the U.S.*, 11 ILSA J. INT'L & COMP. L. 415, 415 (2005) (emphasizing the lasting effect of the rulings in *LaGrand* and *Avena*); Weiland, *supra* note 161, at 681 (characterizing the case for recognition of individual rights in *LaGrand*).

163. *See LaGrand Case*, 2001 ICJ at 494 (quoting the court's reading of the VCCR's consular notification requirement); *see also* Sandy Ghandhi, *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004*, 54 INT'L & COMP. L.Q. 779, 782 (2005) (explaining the varying meanings of the Article 36 "without delay" requirement); Reynaldo Anaya Valencia et al., *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World*, 23 YALE L. & POL'Y REV. 455, 486–87 (2005) (commenting on the U.S. procedural default rule preventing the U.S. from giving full effect to the VCCR Article 36 rights).

164. *See LaGrand Case*, 2001 ICJ at 494 (noting the court's reading of "without delay"); *see also* Linda E. Carter, *Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L L. 259, 261 (2005) (reporting on the VCCR's effect on consular relations and capital cases); Ghandhi, *supra* note 163, at 782 (commenting on the U.S.'s violation of Article 36 by failing to inform the state's consular).

165. *See* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (describing the interpretation of this provision).

166. *See LaGrand Case*, 2001 ICJ at 494 (defining the state's obligation to provide consular assistance to a detainee); *see also* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (detailing communication and contact with nationals of the sending state); Valencia et al., *supra* note 163, at 489 (explaining the ICJ's interpretation of Article 36, paragraph 1).

Avena involved the separate arrests of 54 Mexican nationals.[167] Some of the nationals had their consul informed of their detention in as little as 40 hours and, in one instance, as long as 18 months passed before consular notification.[168] The issues presented to the ICJ required an interpretation of the words "without delay" in sub-section 1(b), and involved the issue of state action by Mexico, in addition to its right of consular protection of its detained nationals.[169] Regarding Article 36, the ICJ made clear that an individual right exists under the Article: "Article 36, paragraph 1 [of the Vienna Convention], creates individual rights for the national concerned, which . . . may be invoked in this court by the national State of the detained person."[170]

The Seventh Circuit rejected a reading of the Convention that placed ambiguity on Article 36.[171] The court said, "[i]t is a mistake . . . to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists.[172] Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous."[173] The Seventh Circuit then turned to case law and secondary authorities in support of the proposition that the text of Article 36 should control over the preamble.[174] The Supreme Court buttresses the Seventh Circuit's position by arguing that treaties are to be construed liberally and "even

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167. *See In re* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ 12, 19 (Mar. 31) (citing the violation of international legal obligations regarding 54 Mexican nationals on death row); *see also* Jennifer Goodman, Recent Development, *Avena & Other Mexican Nationals (Mex. v. U.S.): The International Court of Justice Deems U.S. Actions in 52 Death Penalty Cases as Violations of International Law*, 13 TUL. J. INT'L & COMP. L. 379, 390 (2005) (citing Mexico's argument that placing 54 Mexican nationals on death row is a violation of international law); Weiland, *supra* note 161, at 683 (discussing the arrests of the Mexican nationals).

168. *See Avena*, 2004 ICJ at 42 (referring to the periods of detention of various nationals prior to notification); *see also* Ghandhi, *supra* note 163, at 779–80 (analyzing the operation of Article 36, paragraph 1(b) of the VCCR in *Avena*); Dinah L. Shelton, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 98 AM. J. INT'L L. 559, 562 (2004) (outlining the particular facts of the Mexican nationals in *Avena*).

169. *See* Henry S. Clarke, III, Note, *Determining the Remedy for Violations of Article 36 of the VCCR: Review and Reconsideration and the Clemency Process after Avena*, 38 GEO. WASH. INT'L L. REV. 131, 140 (2006) (commenting on Mexico's assertion that the U.S. breached Article 36, paragraph 1); *see also* Ghandhi, *supra* note 163, at 779–80 (emphasizing the consular notification requirement of Article 36); Goodman, *supra* note 167, at 389–90 (informing of the court's response to the meaning of "without delay").

170. *See Avena*, 2004 ICJ at 49 (discussing the private rights created by Article 36 of the Vienna Convention).

171. *See* Jogi v. Voges, 425 F.3d 367, 381 (7th Cir. 2005) (alleging the failure of law enforcement officials to inform Indian citizen of his rights under the ATS and VCCR).

172. *See id.* (declaring that the language of a preamble should not be as vague and unclear as to create doubts).

173. *See id.* (citing to Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 483 (2001)); *see also* Goswami v. Am. Collections Enter., 395 F.3d 225, 227 (5th Cir. 2004) (stating that, absent ambiguity, the court must not look beyond the plain meaning of a statute); Garrison v. United States, 30 Ct. Cl. 272, 283 (Ct. Cl. 1895) (explaining the purpose of consulting the preamble to a treaty).

174. *See Voges*, 425 F.3d at 381 (citing to Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 483 (2001)). *See generally* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (noting that language of the preamble is not definitive in First Amendment dispute); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47:04 (Norman Singer ed., 6th ed. 2000) (explaining that the preamble cannot control the enacting part of a statute where that part is expressed in explicit terms).

where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging . . . the more liberal interpretation is to be preferred."[175]

Applying this reasoning to Article 36, VCCR is designed to facilitate communication between consular officials,[176] and at the same time, it safeguards the rights of nationals abroad.[177] The former is illustrated in the preamble to VCCR and the latter is found in the plain language of Article 36.[178] The foregone maxims of treaty construction tend to point to an interpretation of Article 36 as conferring rights upon the individual.[179] This is the position taken by the Seventh Circuit.[180] The court recognized that international treaties typically do not confer individual rights,[181] but the language found in *Sosa* reveals that international law may do so on occasion.[182]

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175. *See* United States v. Stuart, 489 U.S. 353, 368 (1989) (noting that a treaty should be construed liberally); *see also* Bacardi Corp. of Am. v. Domenech, 311 U.S. 150, 163 (1940) (stating that a treaty should be generously interpreted); Pillsbury Co. v. United States, 368 F. Supp. 2d 1319, 1332 (Ct. Int'l Trade 2005) (stressing the liberal interpretation of a treaty's language).

176. *See* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (explaining freedom of communication and access to detainees by consular officers). *See generally* Goodman, *supra* note 167 (affirming the communication right in Article 36 of the VCCR). *But see* United States v. Emuegbunam, 268 F.3d 377, 392 (6th Cir. 2001) (holding that the VCCR does not create in a detained foreign national a right of consular access to a diplomatic representative of his nation and that the preamble to the VCCR disclaims creation of any individual rights).

177. *See* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (describing the reciprocal rights of communication and access to nationals of the sending state); *see also* Goodman, *supra* note 167, at 382 (acknowledging the VCCR's commitment to protect rights of nationals). *See generally* AMNESTY INTERNATIONAL, *United States of America: A Time for Action-Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty* 1, 4 (Aug. 22, 2001), *available at* http://web.amnesty.org/library/pdf/AMR511062001ENGLISH/$File/AMR5110601.pdf (last visited Mar. 25, 2006) (highlighting that the main purpose of Article 36 is "to safeguard the due process rights of arrested foreign nationals").

178. *See* VCCR art. 36, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (illustrating the rights of detained nationals to communicate with state consular officers); *see also* Wooster, *supra* note 6, at 243 (emphasizing the notification and communication rights offered by the VCCR). *But see* Cardenas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005) (holding that consular notification provisions of the VCCR do not allow foreign nationals any private, judicially-enforceable right to consult with consular officials following their arrest).

179. *See* Epps, *supra* note 94, at 18–20 (discussing principles of treaty interpretation and their relation to Article 36); *see also* Emily Deck Harrill, *Criminal Procedure: Exorcising the Ghost: Finding a Right and a Remedy in Article 36 of the Vienna Convention on Consular Relations*, 55 S.C. L. REV. 569, 575–78 (2004) (discussing how to interpret a treaty in reference to interpreting Article 36 as granting individual rights); Whitesell, *supra* note 146, at 604–07 (explaining how the plain language and history of Article 36 indicates that an individual right exists).

180. *See* Jogi v. Voges, 425 F.3d 367, 382 (2005) (holding that Article 36 confers individual rights on detained nationals).

181. *See id.* (stating that international treaties as a rule do not create individual rights); *see also* Ferris, *supra* note 73, at 372 (noting that courts have been hesitant to grant relief for Article 36 violations because generally international treaties do not convey individual rights); Whitesell, *supra* note 146, at 604–07 (stating that treaties do not generally create individual rights).

182. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714–16 (2004) (discussing the history of international law governing the conduct of individuals); *see also Voges*, 425 F.3d at 382 (stating that *Sosa* recognized that international law and treaties can occasionally create individual rights); Whitesell, *supra* note 146, at 604–07 (stating that self-executing treaties are an exception to the general rule that treaties do not grant rights to individuals).

The Seventh Circuit next turned its attention back to the Fifth and Sixth Circuit cases that focused on the language of the preamble when concluding that Article 36 is not meant to confer individual rights.[183] The Seventh Circuit rejects the reasoning of its sister courts for two principle reasons. First, both the Fifth and Sixth Circuits interpreted Article 36 in the context of criminal cases where the defendant argued that Article 36 provided a way to challenge the validity of their convictions.[184] Second, both cases came before *Sosa*.[185] Furthermore, the *Jogi* decision offers authority pointing to liberal construction of treaties, and in applying that maxim, the unambiguous language of Article 36 will not be made ambiguous by the preamble to VCCR.[186]

The Department of Justice and the State Department provide additional support to the proposition that Article 36 grants an individual right.[187] "The meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight."[188] The Code of Federal Regulations (C.F.R.) states:

> (a) This statement is designed to establish a uniform procedure for consular notification where nationals of foreign countries are arrested by officers of this Department on charges of criminal violations. It conforms to practice under international law and in particular, implements obligations undertaken by the United States pursuant to treaties with respect to the arrest and

183. *See Voges*, 425 F.3d at 382 (discussing the arguments relied on by the Fifth and Sixth Circuits); *see also* United States v. Emuegbunam, 268 F.3d 377, 392 (2001) (stating that the preamble of Article 36 expressly precludes the creation of any individual rights); U.S. v. Jimenez-Nava, 243 F.3d 192, 196 (2001) (discussing how the preamble of Article 36 appears to preclude any possibility that individuals may benefit from the Article when they travel abroad).

184. *See Voges*, 425 F.3d at 382 (rejecting the conclusions of the other circuits because they were addressing a criminal enforcement argument under Article 36); *see also Emuegbunam*, 268 F.3d at 394 (stating that Article 36 does not create a right enforceable by the federal courts for a detained foreign national to consult with his diplomatic representative); *Jimenez-Nava*, 243 F.3d at 198 (discussing Jimenez-Nava's arguments that Article 36 conferred an individual right that he may enforce in court).

185. *See Alvarez-Machain*, 542 U.S. at 692 (decided in 2004); *see also Voges*, 425 F.3d at 382 (rejecting the positions of the other circuits because the decisions predated *Sosa*). *See generally Emuegbunam*, 268 F.3d 377 (relying on the *Page* decision, which held that there is no right in a criminal prosecution to have evidence excluded or an indictment dismissed due to a violation of Article 36); *Jimenez-Nava*, 243 F.3d 192 (stating that the Supreme Court has yet to decide whether the Vienna Convention created individually enforceable rights).

186. *See* United States v. Stuart, 489 U.S. 353, 368 (1989) (stating that a treaty should be construed liberally); *see also Voges*, 425 F.3d at 381–82 (discussing the precedent for interpreting a treaty liberally and not allowing the general language of a preamble to create an ambiguity in the text of the treaty). *See generally* 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.04, at 146 (Norman Singer ed., 5th ed. 1992) (stating that the preamble cannot control the enacting part of the statute in the cases where the enacting part is expressed in clear, unambiguous terms").

187. *See* Daniel J. Lehman, *The Federal Republic of Germany v. The United States of America: The Individual Right to Consular Access*, 20 LAW & INEQ. J. 313, 315–16 (2002) (stating that the Justice Department affirmatively acknowledges that notification of consular rights is required of its agents); *see also* Ray, *supra* note 96, at 1738 (noting that the State Department's non-litigation position suggests that they believe Article 36 creates individual rights); Whitesell, *supra* note 146, at 607–08 (discussing how the actions of the State Department and the U.S. government in general indicate they are acting under the belief that Article 36 creates individual rights).

188. *See* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) (stating that the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight).

> detention of foreign nationals. Some of the treaties obligate the United States to notify the consular officer only upon the demand or request of the arrested foreign national. On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not the arrested person requests such notification.
>
> (1) In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney.[189]

The Department of State sends regular notices, instructional videos, and reference cards to state and local authorities to remind those authorities of their obligations under Article 36.[190] Upon identifying the detainee as a foreign national, the procedures call for the detaining authority to say to the foreign national: "[a]s a non-U.S. citizen who is being arrested or detained, you are entitled to have [the authorities] notify your country's consular officers here in the United States of your situation."[191] Thus, state and local authorities have notice as to what the foreign national is entitled to and as to their obligations under Article 36 of VCCR.[192]

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189. *See* 28 C.F.R. § 50.5 (2006); *see also* United States v. de la Pava, 268 F.3d 157, 164 (2001) (discussing the Justice Department's code in relation to the rights of a foreign national under Article 36); Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227, 237–38 (2000) (discussing and listing the C.F.R.).

190. *See* Kadish, *supra* note 105, at 599–600 (noting that the Department of State has periodically sent notices to state and local officials reminding them of their obligations under the treaty); *see also* Trainer, *supra* note 189, at 239 (noting that the Department of State has issued periodic notices to local governments and has issued a handbook detailing the requirements of the Vienna Convention); Nancy Serano Smartt, Note & Comment, *What Breard and Its Progeny Mean for Avena and Other Mexican Nationals*, 19 TEMP. INT'L & COMP. L.J. 163, 183–84 (2005) (detailing the steps that the State Department takes to promote Vienna Convention compliance among state and local authorities).

191. *See* Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 151 (1999) (discussing the rights of detained foreign nationals under Article 36); *see also* Trainer, *supra* note 189, at 239 (reciting the instructions set forth in the Department of State bulletin to local law enforcement); Chad Thornberry, Comment, *Federalism v. Foreign Affairs: How the United States Can Administer Article 36 of the Vienna Convention on Consular Relations Within the States*, 31 MCGEORGE L. REV. 107, 134–35 (1999) (describing the State Department's consular notification procedures).

192. *See generally* Epps, *supra* note 94 (stating that the federal government had made far-reaching efforts to ensure that state government officials comply with the VCCR obligations); Ferris, *supra* note 73 (noting that the United States has taken measures to ensure that law enforcement officials are aware of their duties under the VCCR); Trainer, *supra* note 189 (discussing the steps that the State Department and Department of Justice have taken to notify state and local authorities of their obligations under Article 36).

Before concluding on this point, the Seventh Circuit gave "respectful consideration" to the ICJ opinions in *LaGrand* and *Avena*.[193] In both cases, the ICJ held that Article 36 confers a right upon the individual.[194] Jurisdiction in the ICJ is proper under the Optional Protocol Concerning the Compulsory Settlement of Disputes.[195] The Bush Administration withdrew from the Protocol shortly after the ICJ decided *Avena*.[196] The Seventh Circuit interpreted the withdrawal only as a prospective action because the president directed state courts to follow *Avena*.[197]

The ICJ decisions to which the United States are a party under the Protocol are binding.[198] However, "this proposition is controversial in some circles."[199] The Supreme Court has not expressly acknowledged the proposition, but it observed that courts "should give respectful consideration to the interpretation of an international treaty rendered by an international court

193. The other federal courts ruling on Article 36 made their rulings before *Avena*. *See* Jogi v. Voges, 425 F.3d 367, 382 (2005) (stating that, "we therefore confine ourselves to giving the 'respectful consideration' to the ICJ's decisions in *LaGrand* and *Avena* that Breard calls for").

194. *See In re* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ 12, 36 (Mar. 31) (discussing how the ICJ has recognized that Article 36 creates individual rights); *see also* LaGrand Case (Germany v. United States), 2001 ICJ 466, 494 (June 27) (holding that the text of Article 36 creates individual rights); Whitesell, *supra* note 146, at 592–93 (discussing the holdings in *Avena* and *LaGrand*).

195. *See* VCCR, Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice . . . ."); *see also* Medellin v. Dretke, 544 U.S. 660, 682–84 (2005) (discussing the United States' obligations to submit to the ICJ's jurisdiction); Alan Macina, Comment, *Avena & Other Mexican Nationals: The Litmus for LaGrand & the Future of Consular Rights in the United States*, 34 CAL. W. INT'L L.J. 115, 123 (2003) (discussing how the Optional Protocol gave compulsory jurisdiction to the ICJ over disputes arising out of the interpretation of the Vienna Convention).

196. *See* Nicole L. Aeschleman, Comment, *The Vienna Convention on Consular Relations: Quo Vadis, America?*, 45 SANTA CLARA L. REV. 937, 963 (2005) (noting that the United States withdrew from the Optional Protocol less than two weeks after the president issued the order requiring state courts to give effect to the *Avena* decision); *see also* Clarke, *supra* note 169, at 156 (stating that because President Bush withdrew the United States from the Optional Protocol shortly after the *Avena* decision, the United States will no longer be required to resolve disputes under the VCCR through the ICJ); Valencia et al., *supra* note 163, at 466 (discussing the United States' withdrawal from the Optional Protocol in response to the *Avena* judgment).

197. *See* Aeschleman, *supra* note 196, at 960–61 (discussing President Bush's order declaring that state courts give effect to the decision in *Avena*); *see also* Carter, *supra* note 164, at 273–74 (discussing the legal effect of President Bush's order directing state courts to abide by *Avena*); John R. Crook, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: U.S. Strategy for Responding to ICJ's Avena Decision*, 99 AM. J. INT'L L. 489, 489 (2005) (noting that President Bush directed that state courts give effect to the ICJ judgment as a matter of comity).

198. *See* Jogi v. Voges, 425 F.3d 367, 383–84 (7th Cir. 2005) (holding that from the time in which the United States was a party under the Optional Protocol Concerning the Compulsory Settlement of Disputes, until the executive action withdrawing from the Protocol, the decisions of the ICJ are binding); *see also* United States *ex rel.* Madej v. Schomig, No. 98 C 1866, 2002 WL 31386480, at *1 (N.D. Ill. Oct. 22, 2002) (stating that it would be an imprudent decision to ignore the fact that by the terms of the Protocol, the interpretations of the ICJ in that area are binding upon those who were parties at the time of the decision); Goodman, *supra* note 167, at 381 (reinforcing that because the Protocols are a treaty, and because under the United States Constitution a treaty is the supreme law of the land, any decision made by the ICJ while the United States remained a party to the treaty is binding on the United States).

199. *See Voges*, 425 F.3d at 384 (confirming that it is controversial that as a result of the United States' consent to the jurisdiction of the ICJ, it automatically became bound by the court's holdings).

with jurisdiction to interpret [it]."[200] Thus, the Seventh Circuit confined itself only to respectful consideration of ICJ decisions.

The question concerning whether an individual right is granted under Article 36 is independent of the issue of whether it creates an enforceable right of action.[201] Treaty-based claims are similar to statutory claims because the Supremacy Clause makes treaties and statutes the "supreme law of the land."[202] Therefore, if Jogi can establish a private cause of action under Article 36, his claim may go forward. The approach used to determine whether a statute provides for a private cause of action is governed by the intent of Congress.[203]

Accordingly, the Seventh Circuit looked to the drafters' intent to determine whether Article 36 is privately enforceable.[204] Giving consideration to the various countries that are signatories to VCCR and the plethora of legal systems whose approach to private actions vary, the Seventh Circuit found it "unremarkable" that VCCR does not express the proper procedures for enforcement.[205] Nevertheless, Article 36 contains a proviso that implies that countries are to give effect to Article 36. Article 36(2) states: "[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State,

200. *See* Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam) (suggesting that domestic courts address the interpretation of a treaty by a international court with jurisdiction over the treaty); *see also Dretke*, 544 U.S. at 689–90 (mentioning that, even if a decision of an international court with jurisdiction over a treaty is not binding on the Supreme Court, it would be wise to review the decision of the international court with jurisdiction). *See generally* Curtis Bradley et al., *Discussion:* Medellin v. Dretke*: Federalism and International Law*, 43 COLUM. J. TRANSNAT'L L. 667 (2005) (restating that the ICJ has jurisdiction to interpret the VCCR).

201. *See* Alexander v. Sandoval*,* 532 U.S. 275, 284 (2001) (noting the distinction between federal law conferring private rights and a private cause of action); *see also* Standt v. City of New York, 153 F. Supp. 2d, 417, 423 (S.D.N.Y. 2001) (explaining that under Article 36 an individual can exercise the right that is granted therefrom); Lehman, *supra* note 187, at 338 (reemphasizing precedent holding that this particular treaty is self-executing and that the right granted by the treaty created a cause of action in United States' courts).

202. *See* U.S. CONST. art. VI, cl. 2 (establishing the supremacy of treaties over other laws); *see also Greene*, 523 U.S. at 376 (positing that rules of procedural default apply both to treaties and the Constitution because they are both the supreme law of the land); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that a treaty is placed on the same level as the Constitution and must be given the same deference).

203. *See Voges*, 425 F.3d at 384 (pronouncing that the intent of Congress governs whether a private cause of action exists pursuant to a treaty); *see also Sandoval*, 532 U.S. at 286 (determining that private causes of action to enforce federal law, like substantive federal law, must be created by Congress); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979) (concluding that the central and most indispensable inquiry pursuant to whether or not a private cause of action exists is Congressional intent to establish one).

204. *See Voges*, 425 F.3d at 384 (questioning whether the drafters of the treaty intended to make it, or part of it, privately enforceable); *see also* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979) (determining that the ultimate question in a federal statutory case is whether Congress intended to create a private cause of action); Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (holding that, although Congress' intent to create a private cause of action need not always be explicit, in order to create a private cause of action Congress must intend it).

205. *See* VCCR art. 3, § 2, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (containing no express method of enforcement); *see also Voges*, 425 F.3d at 384 (lamenting that the VCCR does not set out express procedures for enforcement); *Implementation of Avena Decision by Oklahoma Court*, 98 AM. J. INT'L L. 581, 583 (Sean D. Murphy, ed.) (2004) (noting that there are over 100 signatories to the VCCR).

subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."[206] Therefore, a country which is a party to this treaty must provide a way for an individual to vindicate the rights accorded to him in Article 36.[207]

As previously noted, the only individuals who have sought relief under VCCR have sought a criminal remedy.[208] Since there is an absence of administrative remedie, and alternative remedies have been consistently rejected, the Seventh Circuit concluded that "a damages action is the only avenue left."[209]

IV. *Heck* and § 1983 Claims

The Seventh Circuit also addressed the issue of whether *Heck v. Humphrey*[210] bars Jogi's action.[211] In *Heck*, the Supreme Court held that when a 42 U.S.C. § 1983 claimant seeks to recover damages for an allegedly unlawful conviction or other harm "caused by actions whose unlawfulness would render a conviction or sentence invalid, [he] must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254."[212] The Supreme Court

206. *See* VCCR art. 36, § 2, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261.

207. *See* VCCR art. 36, § 2, *supra* note 1, 21 U.S.T. 77, 596 U.N.T.S. 261 (mandating that a signatory provide a means whereby an individual can assert his rights under Article 36); *see also* Carter, *supra* note 164, at 264–65 (claiming that the ICJ has required that the United States meaningfully recognize the rights under the VCCR); Clarke, *supra* note 169, at 147 (detailing the ICJ's ruling that the United States provide a way to comply with the VCCR).

208. *See* United States v. de la Pava, 268 F.3d 157, 159–60 (2d Cir. 2001) (finding that the VCCR provides no remedy to dismiss the indictment); *see also* United States v. Lawal, 231 F.3d 1045, 1046 (7th Cir. 2000) (analyzing VCCR for a Nigerian man who was arrested on a drug possession with the intent to sell); United States v. Chaparro-Alcantara, 226 F.3d 616, 618 (7th Cir. 2000) (concluding the exclusionary rule is not a remedy under VCCR); United States v. Li, 206 F.3d 56, 57 (1st Cir. 2000) (holding that suppression of evidence is not an appropriate remedy under Article 36).

209. *See Voges*, 425 F.3d at 385 (asserting that under a treaty, when all other avenues are exhausted, a private right of damages is the sole remaining way of vindicating rights).

210. *See* Heck v. Humphrey, 512 U.S. 477 (1994) (maintaining that a prison inmate failed to meet the legal standard required to have a successful § 1983 action).

211. *See Voges*, 425 F.3d at 385–86 (holding that the petitioner was not barred from making a § 1983 claim because it would not implicate or affect his conviction or sentence).

212. *See Humphrey*, 512 U.S. at 486–87 (declaring the high standard that a claimant must meet to make a § 1983 case); *see also* Wilson v. City of Ponchatoula, 353 F. Supp. 2d 745, 746 (E.D. La. 2004), *aff'd,* 2006 U.S. App. LEXIS 3405 (5th Cir. Feb. 13, 2006) (holding that an inmate failed to make out a § 1983 claim because he had not met the standard in *Heck*); Hand v. Young, 868 F. Supp. 289, 292 (D. Nev. 1994) (allowing an inmate to amend his complaint to allege that his conviction had been invalidated so he could have a claim under § 1983 and *Heck*).

previously held that § 1983 is not available to prisoners in state custody seeking to challenge the "fact or duration of [their] confinement."[213] More recently, the Court held that a § 1983 claim is proper if "a favorable judgment will not 'necessarily imply the invalidity of [the] conviction or sentence.'"[214]

Jogi's action is one for damages. If Jogi were to succeed on the merits of his case, his success would not "necessarily demonstrate the invalidity of confinement or its duration"[215] because Jogi's action is civil in nature and he served his sentence.[216] By parity of reason, the Seventh Circuit concluded that Jogi may seek relief under § 1983.[217] Moreover, the Seventh Circuit held that Jogi's claim is akin to Fourth Amendment claims that accrue upon their violation and are not barred by *Heck*.[218] Therefore, *Heck* is not implicated or applicable under these circumstances.[219]

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213. *See* Preiser v. Rodriguez, 411 U.S. 475, 489 (1973) (announcing that it did not matter whether the claimant was asserting a § 1983 challenge for the duration of imprisonment or for the fact of imprisonment itself); *see also* Shaw v. Briscoe, 526 F.2d 675, 676 (5th Cir. 1976) (per curiam) (applying principles from § 1983 to other causes of action where the existence of confinement or duration of confinement are issues); Lazarrus v. Shettle, No. S87-722, 1988 U.S. Dist. LEXIS 19366, at *5 (N.D. Ind. Feb. 8, 1988) (determining that a § 1983 claim is a proper claim when an individual is seeking redress over the length of his confinement).

214. *See* Wilkinson v. Dotson, 125 S. Ct. 1242, 1248 (2005) (citing Wolff v. McDonnell, 418 U.S. 539 (1974)) (determining that under *Heck*, a § 1983 action can lie on the implication of the invalidity of a conviction or sentence); *see also* James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 540 n.235 (2006) (expounding upon the notion that § 1983 does not bar injunctive or declaratory relief for which habeas corpus does not apply). *See generally* Charles H. Whitebread, *Going Out with a Whimper: A Term of Tinkering and Fine Tuning, The Supreme Court's 2004–2005 Term*, 27 WHITTIER L. REV. 77 (2005) (recapitulating the Supreme Court's holding in *Wilkinson*).

215. *See Wilkinson*, 125 S. Ct. at 1248 (citing Heck v. Humphrey, 512 U.S. 477 (1994)) (holding that because a § 1983 action is civil, its success does not render confinement in fact or duration *per se* invalid). *See generally* Whitebread, *supra* note 214 (illustrating the evolution of the standard for a § 1983 claim).

216. *See* 28 U.S.C.S. § 1350 (2006) (providing jurisdiction to district courts for any civil action by an alien for tort); *see also* Jogi v. Voges, 425 F.3d 367, 370 (7th Cir. 2005) (illustrating that Jogi's action is civil, rather than criminal). *See generally* BLACK'S LAW DICTIONARY 30 (8th ed. 2004) (defining civil action as "an action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation").

217. *See* 42 U.S.C.S. § 1983 (2006) (containing the Federal Rule for a civil action for a deprivation of rights); *see also Voges*, 425 F.3d at 386 (holding that § 1983 is an applicable remedy); Cotter, *supra* note 2, at 6 (stating that the Seventh Circuit held in *Jogi* that there is an independent cause of action under the Vienna Convention).

218. *See Voges*, 425 F.3d at 386 (noting that Jogi's civil claim will have no effect on his criminal charges because he already served his sentence conviction; hence, his claim is, in effect, similar to one based on a violation of the Fourth Amendment right); *see also* Haring v. Prosise, 462 U.S. 306, 316 (1983) (holding that a criminal conviction does not have a preclusive effect on a § 1983 action because the issues dealt with in the civil claim have no effect on the conviction). *See generally* Gonzalez v. Entress, 133 F.3d 551 (7th Cir. 1998) (supporting the argument that, regardless of the court's decision in *Heck*, a wrongful detention is actionable under the Fourth Amendment and the criminal conviction does not bar such claim).

219. *See Voges*, 425 F.3d at 386 (announcing that once a claimant has served his conviction, his Fourth Amendment claim will not be barred by *Heck*). *Compare* Wiley v. City of Chicago, 361 F.3d 994, 996–97 (7th Cir. 2004) (explaining that civil rights claims under the Fourth Amendment are ultimately governed by *Heck* because a successful challenge to a false arrest may impugn the validity of the conviction; for this reason, a claimant must wait until the conclusion of the criminal proceeding before commencing a civil rights claim) *with Entress*, 133 F.3d at 553–54 (indicating that regardless of the propriety of a criminal conviction, *Heck* will have no application on claimant's subsequent civil claim).

Section 1983 provides a civil claim for damages upon the deprivation of a legal right.[220] This type of claim is held to create a "species of tort liability."[221] Nominal damages are an "appropriate means of vindicating rights whose deprivation has not caused actual, provable injury."[222] Section 1983 reads:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[223]

Applying these principles to *Jogi*, an absence of concrete harm is of little significance in seeking damages under § 1983 because a claimant could claim only nominal damages and still

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220. *See* Heck v. Humphrey, 512 U.S. 477, 483 (1994) (proclaiming that the common law of torts provides the starting point in defining the elements needed for recovery under 42 U.S.C. § 1983); *see also* 42 U.S.C.S. § 1983 (2006) (conferring upon individuals a form of redress for violations or deprivations of the rights secured under the Constitution). *See generally* Tshaka v. Benepe, No. 02-CV-5580 (ILG), 2003 U.S. Dist. LEXIS 8229 (E.D.N.Y. Apr. 9, 2003) (defining and limiting the scope of recovery under § 1983 to civil claims arising out of violations of the rights protected under the Constitution and laws of the United States, as opposed to those arising out of violations of state laws).

221. *See Humphrey*, 512 U.S. at 483 (citing Memphis Community School Dist. v. Stachura, 477 U.S. 299, 305–06 (1986)) (describing the type of liability created by § 1983); *see also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305–06 (1986) (elaborating on the tort liability created by the provisions of § 1983); Schreiber v. Rowe, No. 04-2523, 2004 U.S. App. LEXIS 24239, at *5 (7th Cir. Nov. 5, 2004) (stressing that the tort liability implicated in a claim under § 1983 is premised on the principle that a claimant should be compensated for the violation of his or her legal rights).

222. *See* Kyle v. Patterson, 196 F.3d 695, 697 (7th Cir. 1999) (reasoning that where the deprivation or violation of a claimant's legal rights did not result in any form of actual injury, a nominal award of $1 is appropriate compensation); *see also* Schock v. Redman, Nos. 90-1462 & 90-1464, 1991 U.S. App. LEXIS 1790, at *5 (6th Cir. Feb. 5, 1991) (explaining that even in situations where actual injury is absent, the granting of nominal awards serve to give society the recognition that violations of constitutional rights are scrupulously observed); *cf.* Phillips v. Hust, No. CV. 01-1252-HA, 2004 U.S. Dist. LEXIS 19811, at *4 (D. Or. Sept. 29, 2004) (clarifying that a punitive award is available where the violation is premised on a malicious or intentional disregard of the constitutional rights, even if no actual injury is shown).

223. *See* 42 U.S.C.S. § 1983 (2006). The code was last amended on Oct. 19, 1996, to insert a provision relating to the immunity of judicial officers.

recover.[224] However, concrete harm could be shown by Jogi.[225] Jogi claimed that he was forced to spend the rest of his life thinking "what if" (i.e., had the authorities notified him of his right, then his situation may have played out differently), thereby causing him to suffer emotional distress.[226] Therefore, Jogi could show concrete harm, and in the alternative, if concrete harm could not be shown, it would be of little significance under a § 1983 civil action.

The Seventh Circuit avoided deciding whether *Miranda*[227] violations are analogous to violations under Article 36 of VCCR.[228] In *Dickerson v. U.S.*,[229] the Supreme Court held that *Miranda* is a "constitutional rule that Congress may not supersede legislatively."[230] Three years later the Supreme Court held that the failure to give *Miranda* warnings does not create grounds for a civil remedy under § 1983.[231] However, statements given in violation of *Miranda* are inadmissible at trial.[232] Whether violations of Article 36 are analogous

224. *See* Bernhardt v. County of Los Angeles, 279 F.3d 862, 872–73 (9th Cir. 2002) (remarking that by allowing a claimant to recover nominal damages, important civil and constitutional claims are exempt from dismissals grounded on mootness; in this way, the system serves to protect legal rights that cannot be valued solely in monetary terms); *see also* Amato v. City of Saratoga Springs, 170 F.3d 311, 317–18 (2d Cir. 1999) (proclaiming that because the rights under the Constitution are absolute and of significant value to the claimant and society, any violation may be actionable even without proof of actual injury); Baker v. Pennridge Sch. Dist., No. 01-3728, 2003 U.S. Dist. LEXIS 6615, at *12 (E.D. Pa. Mar. 24, 2003) (affirming that giving life to civil claims by means of nominal damages preserves the observance of important constitutional rights).

225. *See* Jogi v. Voges, 425 F.3d 367, 386 (7th Cir. 2005); *see also* Jogi Brief, *supra* note 3, at 34–35 (alleging a concrete injury of mental anguish and positing that the deprivation of consular access is inherently prejudicial to the detainee). *But see* Jogi v. Piland, 131 F. Supp. 2d 1024, 1027 (C.D. Ill. 2001), *rev'd sub nom.* (explaining how Jogi merely speculates as to the outcome that could have been, but does not discern any actual harm); *Voges*, 425 F.3d 367 (opining that Jogi's allegations of damages are speculative and, thus, fail to establish a tort claim for which redress can be sought in the courts).

226. *See* Jogi Brief, *supra* note 3, at 33–35 (asserting concrete harm due to the defendants' failure to advise Jogi on his right to consular access under the VCCR).

227. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (recognizing that the assistance of counsel in a criminal case is a constitutional mandate and is necessary in protecting defendant's legal rights).

228. *See Voges*, 425 F.3d at 385 (recognizing that there is a private right of action to enforce Article 36 of the VCCR, while at the same time refraining from deciding whether there can be a tort action for the deprivation of such right as analogous to that premised upon a violation of *Miranda* rights).

229. *See* Dickerson v. United States, 530 U.S. 428, 435 (2000) (positing that custodial interrogations are inherently coercive; therefore, law enforcement agencies must follow the constitutional guidelines known as the *Miranda* warnings in order to protect the detainee's Fifth Amendment right).

230. *See Dickerson*, 530 U.S. at 444 (refusing to overrule *Miranda*).

231. *See* Chavez v. Martinez, 538 U.S. 760, 772 (2003) (declaring that although *Miranda* is a prophylactic rule established to prevent violations of a protected constitutional right, it does not extend to give rise to a cause of action premised on a violation of the right; hence, it is not actionable under § 1983); *see also* Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (announcing that a fundamental purpose of the court's decision in *Miranda* is to protect an individual's right to speak or remain silent); Michigan v. Tucker, 417 U.S. 433, 444 (1974) (emphasizing that *Miranda* is a procedural safeguard and not a constitutional right).

232. *See* United States v. Patane, 542 U.S. 630, 640 (2004) (proclaiming that testimony given through coercive interrogation, hence, in violation of *Miranda*, cannot be used as evidence for the prosecution's case in chief); *cf.* Oregon v. Elstad, 470 U.S. 298, 307 (1985) (clarifying that although unwarned statements should be excluded from evidence under *Miranda*, they nevertheless can be used for impeachment purposes in cross-examination). *See generally* New York v. Quarles, 467 U.S. 649 (1984) (rationalizing that *Miranda* warnings serve to protect individual rights under the Fifth Amendment; therefore, statements given in the absence of a *Miranda* warning are inadmissible at trial).

to a failure to give a *Miranda* warning, thus making § 1983 unavailable to claimants, remains undecided.[233]

Conclusion

In *Jogi*, the Seventh Circuit held that ATS does provide for a private cause of action and that jurisdiction is proper under the treaty portion of ATS.[234] However, the court did not rule on whether claimants are required to meet a threshold to bring action under the treaty portion of ATS.[235] Furthermore, a "shockingly egregious" standard does not apply to claims brought under the law of nations portion of ATS.[236] Moreover, VCCR is a self-executing treaty that provides for an implied cause of action where Article 36 confers individual rights and damages for its violation.[237] Jogi's claim did not implicate the validity of his conviction.[238] Therefore, it was not barred by *Heck*. Finally, Jogi did not necessarily need to show concrete harm because § 1983 only requires a showing of nominal damages.[239]

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233. *Cf.* United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1125–26 (C.D. Ill. 1999) (refusing to equate a violation of Article 36 of the VCCR to a violation of *Miranda*, which would create a fundamental right under the Fifth Amendment granting suppression of statements given in the absence of consular notification); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 993–94 (S.D. Cal. 1999) (reporting that the Vienna Convention does not create a fundamental right and that remedies for the deprivation of the right to consular access does not call for the suppression of statements). *See generally* Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997) (arguing that whether or not the Vienna Convention creates an individual right, it does not create a constitutional right; and actual prejudice must be shown before obtaining a remedy for the violation).

234. *See* Jogi v. Voges, 425 F.3d 367, 373 (7th Cir. 2005) (reasoning that the ATS does confer upon the federal courts with jurisdiction to hear Jogi's case).

235. *See Voges*, 425 F.3d at 372–73 (concluding that Jogi's case is not premised upon a violation of the law of nations or customary international law, but rather, upon a violation of a treaty of the United States).

236. *See* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (declaring that only acts that are shockingly egregious meet the standard for violations of international law under the ATS); *cf.* Flores v. Southern Peru Copper Corp., 253 F. Supp. 2d 510, 523 (S.D.N.Y. 2002) (explaining that prior case law does not establish "shockingly egregious" as the standard for claims brought under the ATS; however, the "shockingly egregious" acts qualify under the ATS because they are easily viewed as violations of international law). *Contra* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (asserting that the ATS applies only to shockingly egregious violations of international law).

237. *See* United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999) (holding that the Vienna Convention confers an individual right to consular notification and that violation of it gives standing to seek remedy in the form of monetary damages, although not in the form of suppression of testimony). *Compare* United States v. Rodriguez, No. 04-13148, 2006 U.S. App. LEXIS 321, at * 8–*9 (11th Cir. Jan. 4, 2006) (claiming that the Vienna Convention does not confer enforceable individual rights because its preamble "disclaims any intent to create individual rights" and its purpose does not extend further than to ensure the efficient functioning of the consular posts) *with* Standt v. City of New York, 153 F. Supp. 2d 417, 424–31 (S.D.N.Y. 2001) (positing that the Vienna Convention confers an enforceable individual right and that, although the Convention itself lacks any provision for remedies, Article 36 specifies that the right "shall be exercised in conformity with the laws and regulations of the receiving State").

238. *See Voges*, 425 F.3d at 386 (explaining that Jogi's claim is analogous to a claim under the Fourth Amendment and will not necessarily affect his conviction, noting that his civil claim will have no effect on his conviction because he already served his sentence).

239. *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) (recognizing that deprivation of certain absolute rights are of such importance to society that they are actionable for nominal damages in absence of actual injury); *see also* Amato v. City of Saratoga Springs, 170 F.3d 311, 317 (2d Cir. 1999) (emphasizing that the purpose of § 1983 is to compensate individuals for deprivation of their constitutional rights, rendering any violation actionable for nominal damages as long as proof of the violation exists); Kyle v. Patterson, 196 F.3d 695, 697 (7th Cir. 1999) (announcing that an award of $1 in nominal damages is an appropriate means of vindicating the violation of civil rights where actual injury cannot be shown).

Occupational Jurisdiction: A Critical Analysis of the Iraqi Special Tribunal

Ryan Swift*

Introduction

On July 14, 2003, following the overthrow of Saddam Hussein's regime, the Iraqi Governing Council ("IGC") was established "to serve as an expression of the national Iraqi will."[1] Between September and December 2003, the Statute of the Iraqi Special Tribunal ("S.I.S.T.") was drafted and approved by the IGC and the Coalition Provisional Authority ("CPA").[2] The IGC approved a decree on December 9, 2003, establishing the Iraqi Special Tribunal ("IST").[3] On the same day, the CPA issued Order 48, which contained the aforementioned statute.[4] On

1. *See* Patrick E. Tyler, *After the War: Transition; Interim Leaders, Supported by U.S., Meet in Baghdad,* N.Y. TIMES, July 14, 2003, at A1 (reporting that after Saddam Hussein's fall, prominent Iraqis from a variety of political, ethnic and religious backgrounds declared themselves the interim government); *see also* Thomas Carothers, *It's Too Soon for Democracy,* WASH. POST, July 20, 2003, at B1 (stating that the governing council will gain credibility in democratizing Iraq by first taking on urgent state-building tasks); Casie Vanall, *Iraqi Governing Council Holds First Meeting*, Am. Forces Info. Service, *available at* http://www.defenselink.mil/news/Jul2003/n07142003_200307145.html (last visited Feb. 20, 2006) (quoting U.N. Secretary General Kofi Annan during a White House meeting with President George W. Bush).

2. *See* The Statute of the Iraqi Special Tribunal, 43 I.L.M. 231 (2004) (codifying the Statute of the Iraqi Special Tribunal (IST Statute)) [hereinafter S.I.S.T.]; *see also* M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 327, 345 (2005) (explaining that the IST Statute was approved by the Iraqi Governing Council (IGC) and the Coalition Provisional Authority (CPA)); Curtis F.J. Doebbler, *Another Useless Inquiry,* INDEP. ON SUNDAY (LONDON), Feb. 8, 2004, at 27 (criticizing the IST Statute for not standing up to the scrutiny of international law and for admitting that its system law is corrupt beyond repair).

3. *See* Bassiouni, *supra* note 2, at 345 (affirming that the Iraqi Special Tribunal (IST) was established on Dec. 9, 2003); *see also* Anne Applebaum, *The People v. Saddam Hussein,* WASH. POST, July 7, 2004, at A19 (quoting Saddam Hussein as calling the IST a "theater" to help Bush in his election campaign, in order to discredit his trial for war crime charges); IST, http://www.iraqispecialtribunal.org (last visited Feb. 20, 2006) (describing the history and authority of the tribunal).

4. *See* Bassiouni, *supra* note 2, at 345 (explaining that the CPA issued the statute within Order 48); *see also* Sean D. Murphy, Ed., *Contemporary Practice of the United States Relating to International Law: Use of Force and Arms Control: Coalition Laws and Transition Arrangements During Occupation of Iraq,* 98 AM. J. INT'L L. 601, 601 (2004) [hereinafter *Coalition Laws*] (reporting that on May 6, 2003, President Bush appointed L. Paul Bremer III as the civilian administrator of Iraq); Coalition Provisional Authority Order Number 48, Delegation Regarding an IST, http://www.iraqcoalition.org/regulations/index.html (last visited Feb. 20, 2006) (codifying CPA Order 48 which contained the IST Statute) [hereinafter C.P.A.O. Number 48].

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December 10, 2003, the CPA, led by Paul Bremer, signed the order.[5] After the statute was published in the CPA's Official Gazette, the IST became an official institution of the occupying power.[6]

In the following paragraphs, I will analyze and critique the IST. Section I will discuss the circumstances leading up to and the eventual formation of the IST. Section II will discuss the international legal issues raised by the IST, including whether it violates international law. Finally, Section III will analyze viable alternatives to the IST, including hybrid tribunals such as those formed in Sierra Leone and Kosovo.

I. The Formation of the Iraqi Special Tribunal

A. The United States As an Occupying Force

On March 19, 2003, a U.S.-led coalition invaded and occupied Iraq.[7] On May 1, 2003, President Bush announced the end of major combat operations, and the military occupation of Iraq began.[8] The United States and the United Kingdom announced the end of their formal occupation on June 30, 2004, pursuant to Security Council Resolution 1483.[9] This resolution

5. *See* Bassiouni, *supra* note 2, at 345 (asserting that C.P.A.O. Number 48 was signed on Dec. 10, 2003); *see also* Susan Sachs, *A Region Inflamed: The Occupation; Bremer Expects Rise in Violence as Iraq Builds Democracy,* N.Y. TIMES, Dec. 12, 2003, at A26 (reporting that Iraq political leaders are supposed to create a new legislative assembly by next spring and elect a provisional government by July 1, 2003); CPA, *available at* http://www.cpa-iraq.org/bremerbio.html (last visited Feb. 20, 2006) (describing the authority of the CPA and providing a biography of Paul Bremer).

6. *See* Bassiouni, *supra* note 2, at 345 (concluding that the IST became the official occupational government in Iraq); *see also Coalition Laws*, *supra* note 4, at 601 (asserting that by May 2003, the Department of Defense's Office of Reconstruction and Humanitarian Assistance ("ORHA") had been subsumed by the CPA, which promulgated numerous regulations concerning the occupation and development of Iraqi laws and institutions); David J. Scheffer, *Future Implication of the Iraq Conflict: Beyond Occupation Law,* 97 AM. J. INT'L L. 842, 859 (2003) (urging a need to develop a more legally acceptable means to respond to at-risk civilian populations or to those who seek participation in their country's political transformation into a more democratic form of government).

7. *See Coalition Laws*, *supra* note 4, at 601 (stating that military forces from the United States and the United Kingdom invaded Iraq, deposed the existing government of Saddam Hussein, and occupied the country in March 2003); *see also* Bassiouni, *supra* note 2, at 351 (stating that on Mar. 19, 2003, a U.S.-led coalition invaded and occupied Iraq); Tyler, *supra* note 1, at A10 (explaining that a new governing council will assume extensive executive powers under the American-British occupation).

8. *See* Bassiouni, *supra* note 2, at 351 (asserting that on May 1, 2003, President George W. Bush announced the end of major combat operations in Iraq, thus beginning an era of foreign military occupation); *see also* David E. Sanger, *Bush Declares 'One Victory in a War on Terror,'* N.Y. TIMES, May 2, 2003, at A1 (explaining how President Bush declared an end to the combat phase of the war in Iraq 43 days after invasion); Elisabeth Bumiller, *Bush Sees 'Good Progress' in Iraq but with Work to Do,* N.Y. TIMES, Aug. 9, 2003, at A6 (summarizing a report released by the White House that the United States was making good progress in Iraq).

9. *See* S.C. Res. 1483, U.N. SCOR, 58th Sess., U.N. Doc. S/RES 1483 (2003), 42 I.L.M. 1016 (codifying U.N. Resolution 1483, which ended the formal military occupation of Iraq under coalition forces) [hereinafter S.C. Res. 1483]; *see also* Scheffer, *supra* note 6, at 844 (asserting that S.C. Res. 1483 established an unprecedented basis for American and British occupation of Iraq); Neil MacFarquhar, *Arabs Assess U.S. Transfer of Authority to the Iraqis,* N.Y. TIMES, June 30, 2004, at A13 (reporting that Hamed Reza Asefi, the Iranian Foreign Ministry spokesman, called the transfer a step in the right direction, quoting, "[t]he interim government is expected to provide grounds for the restoration of full sovereignty, the real end of the occupation, and free and timely general elections").

affirmed the application of international humanitarian law and its binding obligations on the occupying power until the establishment of an interim government.[10]

In May 2003, a heated debate took place in the U.N. Security Council over the direction of post-conflict Iraq.[11] In the end, the United States retained its hold on international legal authority.[12] With the enactment of S.C. Res. 1483, the U.S.-led CPA became the internationally recognized transitional occupation government of Iraq.[13] The CPA occupation became subject to the international law of occupation, specifically The Hague Regulations of 1907 and the Geneva Conventions of 1949.[14]

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10. *See* Scheffer, *supra* note 6, at 844 (contending that the Council, acting under Chapter VII of the U.N. Charter, was obligated to comply with international law, specifically, the Geneva Conventions of 1949 and the Hague Regulations of 1907); *see also* Bassiouni, *supra* note 2, at 351 (stating that the CPA, whose legal authority was premised on international humanitarian law as the civilian administration of an occupying power, was recognized by the Security Council in S.C. Res. 1483 as exercising this role); Daphine Eviatar, *Free Market Iraq? Not As Fast,* N.Y. TIMES, Jan. 10, 2004, at B9 (asserting that S.C. Res. 1483, issued in May, explicitly instructs the occupying powers to follow the Hague Regulations and the Geneva Convention, but it also suggests that the coalition should play an active role in administration and reconstruction).

11. *See* Scheffer, *supra* note 6, at 851 (contending that the U.S. government strongly opposed the concept of a UN-authorized legal regime that would have reduced liabilities attached to U.S. forces by virtue of occupational status); *see also* Felicity Barringer, *U.N. Accepts Interim Iraq Council,* WASH. POST, Aug. 15, 2003, at A10 (stating that nearly five months after the deeply divided Security Council refused to authorize the U.S.-led war on Iraq, the occupation of the country by the United States and Britain remains a sensitive issue, especially for Arab nations); Christopher Marquis, *U.S. May Be Forced to Go Back to U.N. for Iraq Mandate,* N.Y. TIMES, July 19, 2002, at A1 (reporting that several nations have chafed at the idea of submitting their troops to American-British control, while others, which clashed with the United States and withheld support for a resolution authorizing war, have wanted to tweak Washington for disregarding them).

12. *See* David Ignatius, *A Step Toward Mission Accomplished,* WASH. POST, Dec. 15, 2003, at A31 (providing that the capture of Saddam Hussein shows the power of the U.S. military, whose competence many Iraqis had begun to doubt); *see also* Christian T. Miller, *Worries Raised on Handling of Funds in Iraq,* L.A. TIMES, June 22, 2005, at A8 (estimating that $12 billion in U.S. funds were spent on the Iraqi occupation from March 2003 till June 2004); Barringer, *supra* note 11, at A10 (noting the U.S. control of the Iraq reconstruction plan).

13. *See* S.C. Res. 1483, *supra* note 9 (codifying S.C. Res. 1483, which transferred authority to the CPA); *see also Coalition Laws*, *supra* note 4, at 601 (providing that the first CPA regulation, which established the organization's authority, was S.C. Res. 1483); Scheffer, *supra* note 6, at 844 (detailing that S.C. Res. 1483 replaced the existing "Oil-for-Food Plan" and certified the U.S. and U.K. as occupying powers under unified command).

14. *See* S.C. Res. 1483, *supra* note 9 (explaining that the CPA was subject to S.C. Res. 1483 regulation); *see also* Scheffer, *supra* note 6, at 844 (asserting that the Council, acting under Chapter VII of the U.N. Charter, was subject to obligations laid out in the Geneva Conventions of 1949 and the Hague Regulations of 1907); Eyal Benvenisti, *Future Implication of the Iraq Conflict: Water Conflicts During the Occupation of Iraq,* 97 AM. J. INT'L L. 860, 861 (2003) (contending that S.C. Res. 1483 unequivocally called upon the occupational forces to comply with international law, specifically, the Hague Regulations and Geneva Conventions).

The CPA was created by the United States on June 16, 2003, as an organization under the control of the Department of Defense.[15] Its stated purpose is to administer Iraq, in accordance with S.C. Res. 1483.[16] In July 2003, the CPA created the IGC to serve as a transitional Iraqi governmental body.[17] The IGC would be subject to the CPA's approval of its orders, directives, and personnel appointments.[18] In effect, the IGC became a subordinate entity, operating under the authority of an occupying power.[19]

Since March 2003, the United States, the United Kingdom, and other foreign forces have formed an occupying power.[20] Security Council Resolution 1511 affirms the coalition's obliga-

15. *See* Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 202 (2005) (recounting the announcement by the United States and United Kingdom on the creation of the CPA in a letter to the Security Council on May 8, 2003); *see also* Melissa A. Murphy, Note, A *"World Occupation" of the Iraqi Economy?*, 19 CONN. J. INT'L L. 445, 448 (claiming that the CPA is essentially an American-led operation because it was implemented after President George Bush declared the fight to be over and was headed by Ambassador L. Paul Bremer); CPA, Reg. No. 1, May 16, 2003, *available at* http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_pdf (last visited Feb. 21, 2005) (noting that Regulations and Orders issued by CPA Administrator are binding until repealed by the Administrator or superseded by legislation issued by democratic institutions of Iraq) [hereinafter C.P.A., Reg. No. 1].

16. *See* Patrick Wintour, *Britain to Seek U.N. Resolution on Iraq*, GUARDIAN (London), Aug. 9, 2003, at 6 (asserting that the mandate given to the U.N. in S.C. Res. 1483 gave sole responsibility for law and order and the administration of Iraq to Britain and the U.S. through the CPA); *see also* Thomas Catan & Demetri Sevastopulo, *Report Hits at Disbursement of Oil Money by Authorities*, FIN. TIMES (London), Jan. 31, 2005, at 3 (articulating that CPA did not meet the mandate of S.C. Res. 1483 by not adequately reviewing and accounting for DFI funds provided to the Iraqi ministries); C.P.A., Reg. No. 1, *supra* note 15, (stating that CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives to be exercised under S.C. Res. 1483).

17. *See* Rajiv Chandrasekaran, *Mistakes Loom Large As Handover Nears; Missed Opportunities Turned High Ideals to Harsh Realities*, WASH. POST, June 20, 2004, at A01 (declaring that the IGC was assigned to produce a temporary constitution and that an interim government would be selected through caucuses); *see also* Larry Diamond, *The Seeds of Insurgency; American Mistakes, Hubris Feed the Postwar Violence*, SEATTLE TIMES, July 3, 2005, at C1 (remarking that the U.S. had established IGC to foster a transition to sovereignty and democracy); CPA, Reg. No. 6, July 13, 2003, *available at* http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_pdf (last visited Feb. 21, 2005) (noting that "[on] July 13, 2003, the Governing Council met and announced its formation as the principal body of the Iraqi interim administration") [hereinafter C.P.A., Reg. No. 6].

18. *See* Dan Murphy, *Local Iraqi Councils Struggle for Relevance*, CHRISTIAN SCI. MONITOR, May 24, 2004, at 1 (finding that decisions on who serves on police forces and teaches in schools lie in the hands of U.S. appointees in the center and the Governing Council largely cut out of the public process); *see also* Farah Stockman, *Bremer's Mission is Finished, but His Impact Lingers*, BOSTON GLOBE, June 29, 2004, at A14 (reporting that even after the interim constitution was passed by IGC, the CPA Chief Administrator Paul Bremer's orders will stay in effect at least until an elected government takes power); C.P.A., Reg. No. 6, *supra* note 17 (stating that the CPA recognizes the formation of Governing Council as the principal body of the Iraqi interim administration).

19. *See* Murphy, *supra* note 18, at 1 (explaining that the Governing Council has to "appeal to higher authorities" and that U.S. has put rules in place that will give U.S. officials effective veto power over many public policies); *see also* Stockman, *supra* note 18, at A14 (providing that CPA creates IGC but Paul Bremer, Chief Administrator of CPA, retains final authority); Editorial, *The Price of U.S. Hubris; One Year After the Attack on U.N. Headquarters in Baghdad, Eric Schwartz Looks at the Bush Administration's Flawed Effort to Bring the International Community into Iraq*, PITTSBURGH POST-GAZETTE, Aug. 22, 2004, at J2 (expressing that President Bush had no intention of relinquishing control of the political process leading to an Iraqi interim government and that some U.N. field officers cannot dispel the notion that the Governing Council was a creation of U.S. occupation).

20. *See* Fox, *supra* note 15, at 202 (affirming that U.S. and U.K. qualify as "occupying powers" in Iraq through CPA); *see also* Janadas Devan, Review, *One Country, Two Worlds*, STRAITS TIMES (Sing.), Oct. 29, 2004 (stating that U.S. and coalition forces occupied the country in March 2003); David M. Edelstein & Ronald R. Krebs, *It's Time to Get Out of Iraq*, CHI. TRIB., Jan. 3, 2005, at 15 (indicating that withdrawal of U.S. and coalition forces as occupying power from Iraq should be immediate).

tions as an occupying power.[21] The occupying power, no matter what name it takes on, is bound by the Geneva Conventions and other sources of customary international humanitarian law.[22]

Article 42 of the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land affirms: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends . . . where such authority has been established and can be exercised."[23] As recognized in a U.S. Army text addressing this provision, "Article 42 . . . emphasizes the primacy of fact as the test of whether or not occupation exists."[24] The Army text adds: "Article 43 of the Hague Regulations continues the theme of the traditional law with its provision for a clear transfer of authority: 'The authority of the legitimate power having *in fact* passed into the hands of the occupant . . . .'"[25]

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21. *See* S.C. Res. 1511, ¶ 1, U.N. Doc. S/RES/1511, Oct. 16, 2003 (underscoring the temporary nature of the exercise by the CPA of the specific responsibilities, authorities, and obligations under applicable international law); *see also* Colin Brown & Anne Penketh, *Iraq Crisis: Ministers Accused of Misleading MPS Over Iraq Abuses*, THE INDEPENDENT (London), May 12, 2004, at 8 (claiming that S.C. Res. 1511 reaffirms the role of multi-national force in Iraq giving a fresh mandate to the continuing presence of coalition forces); Colum Lynch, *U.S. Urged to Give Iraq More Control*, WASH. POST, May 13, 2004, at A22 (indicating that U.S.-led coalition in Iraq has the authority under S.C. Res. 1511 to remain in Iraq throughout the political transition).

22. *See* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 826 (2005) (clarifying that all parties to the conflict must comply with obligations under international humanitarian law and in particular, the Geneva Conventions); *see also* Michael D. Ramsey*, Torturing Executive Power*, 93 GEO. L.J. 1213, 1252 (2005) (reporting that the combination of the Supremacy Clause and the Take Care Clause amount to a specific constitutional prohibition on unauthorized executive suspensions of treaties that are supreme law of the land). *See generally* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004) (asserting that the President of United States is bound by the Geneva Conventions or treaties because they have status of supreme federal law and the President has the Constitutional duty to execute treaties).

23. *See* The Hague Convention Respecting the Laws and Customs of War on Land, art. 42, ¶ 3, Oct. 18, 1907, 1907 U.S.T. LEXIS 29, 36 Stat. 2277 [hereinafter Laws and Customs]; *see also* International Committee of the Red Cross, *available at* http://www.icrc.org/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6?OpenDocument (last visited Mar. 2, 2006); University of Minnesota Human Rights Library, *available at* http://www1.umn.edu/humanrts/instree/1907c.htm (last visited Mar. 2, 2006).

24. *See U.S. Dept. of Army Pam. 27-161-2*, 2 International Law 159 (1962); *see also* Jordan J. Paust, *The United States As Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War*, 27 SUFFOLK TRANSNAT'L L. REV. 1, 2 (2003) ("[A]rticle 42 . . . emphasizes the primacy of FACT as the test of whether or not occupation exists.") [hereinafter *Special Responsibilities*]; Charles H. Stockton, *The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL'Y 843, 845 (2004) ("[T]erritory is considered occupied when it is actually placed under the authority of the hostile army.").

25. *See U.S. Dept. of Army Pam. 27-161-2*, *supra* note 24, at 160; *see also Special Responsibilities*, *supra* note 24, at 2 (providing that Article 43 of the Hague Regulations states a clear transfer of authority); Michael Ottolenghi, Note, *The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 FORDHAM L. REV. 2177, 2184 (2004) (stating that Article 43 codifies duties of the occupying power after the authority of the legitimate power, in fact, has been passed).

B. The Creation of the Iraqi Special Tribunal

After the fall of Baghdad, it became clear that some form of post-conflict justice system would have to be established to address the Ba'ath regime's violations of international humanitarian law, international human rights law, and Iraqi law.[26]

The Bush Administration, along with the United Nations and other Non-Governmental Organizations ("NGO") considered three logical alternatives: (1) an international tribunal established by the Security Council similar to the ad hoc international criminal tribunals set up for the former Yugoslavia and Rwanda; (2) a mixed international and national tribunal similar to the one established in Sierra Leone; and (3) a national Iraqi tribunal with some international support. The Bush Administration favored the last option.[27]

In April and June 2003, several NGOs, most notably Human Rights Watch and the Open Society Institute, along with U.N. representatives, met in New York to discuss viable options for post-conflict justice in Iraq.[28] The overwhelming majority of the participants expressed a preference for an ad hoc international criminal tribunal.[29] Such a tribunal would be established by the U.N. Security Council, and would maintain jurisdiction over crimes committed during the Iran-Iraq War of 1980 to 1988, the invasion and occupation of Kuwait from

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26. *See* Asli Ü. Bâli, *Nation-Building in the Middle East*: *Justice under Occupation, Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 451 (2005) (emphasizing that Iraqi judicial system was subverted under Ba'ath regime due to lawyers' and judges' supporting roles); *see also* Bassiouni, *supra* note 2, at 334 (recognizing that Iraq's future requires a thoughtful national reflection on past abuses by Saddam Hussein and his repressive Ba'ath regime, and an assessment of post-conflict justice needs); Tom Parker, *Prosecution, Defense and Investigation: Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 899, 899 (2005) (realizing the need to address major human rights abuses and atrocity crimes allegedly committed by Saddam's regime).

27. *See* Justice Richard Goldstone, *What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?*, 27 FORDHAM INT'L L.J. 1490, 1490–92 (2004) (providing four options to bring Saddam Hussein justice including domestic trial, hybrid international/domestic court, treaty-based multinational court, or ad hoc tribunal by Security Council); *see also* Margaret Sewell, *Freedom from Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapon*, 16 ST. THOMAS L. REV. 365, 388 (2004) (reviewing options for the prosecution of Saddam Hussein and that hybrid court is favored by the Bush administration); Human Rights Watch, *Letter from Human Rights Watch to the U.S. Regarding the Creation of a Criminal Tribunal for Iraq, available at* http://hrw.org/press/2003/04/iraqtribunal041503ltr.htm (last visited Feb. 21, 2005) (urging for creation of an international tribunal to prosecute past crimes).

28. *See* Bassiouni, *supra* note 2, at 343 (noting that several NGOs, including Human Rights Watch and Open Society Institute and the U.N., met to discuss post-conflict justice in Iraq). *See generally* Open Society Institute & United Nations Foundation, *Iraq in Transition: Post-Conflict Challenges & Opportunities*, *available at* http://www.soros.org/initiatives/washington/articles_publications/publications/iraq_20041112/iraq_Transition.pdf (last visited Feb. 21, 2005).

29. *See* Bassiouni, *supra* note 2, at 343 (expressing that NGO community felt that creation of a specialized international tribunal is necessary); *see also* David M. Gersh, Note, *Poor Judgment: Why the Iraqi Special Tribunal Is the Wrong Mechanism for Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law*, 33 GA. J. INT'L & COMP. L. 273, 289 (2004) (illustrating how human rights organizations argue that IST should be designed to more closely resemble the Special Court where involvement of experienced international judges and prosecutors is mandated); Human Rights Watch, *Ensuring Justice for Iraq: Evidence Preservation and Fair Trials*, *available at* http://www.hrw.org/press/2003/09/iraq091203.htm (last visited Feb. 21, 2005) (asserting that a mixed Iraqi-international tribunal or an international tribunal should be established to bring accountability for those most responsible for genocide, war crimes, and crimes against humanity).

1990 to 1991, and over crimes committed against the Kurds, Shi'a, and other Iraqi citizens.[30] The second option preferred by the meeting's participants was for a mixed national and international tribunal like the one established in Sierra Leone.[31]

The Bush Administration was opposed to the idea of an international tribunal established by the Security Council, preferring instead a national Iraqi tribunal that it could help fashion and influence.[32] The Bush Administration felt that an Iraqi tribunal would allow the people of Iraq to assume responsibility for trying high-ranking Ba'ath officials.[33] In addition, an Iraqi tribunal would provide a strong foundation for a system of government based on the rule of law.[34] In the Administration's view, it is likely that any tribunal would look like a U.S.-led show trial.[35] However, they believed that an Iraqi trial would send a powerful message to Arab and Muslim leaders that systematic repression will not be tolerated.[36]

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30. *See* Bassiouni, *supra* note 2, at 343 (describing such an ad hoc tribunal's jurisdiction); *see also* L. Elizabeth Chamblee, *Post-War Iraq: Prosecuting Saddam Hussein*, 7 CAL. CRIM. L. REV. 1, 1 (2004) (stating that the ad hoc tribunal may exert subject matter jurisdiction over crimes against humanity, genocide, and war crimes). *See generally* Sewell, *supra* note 27 (noting that ad hoc tribunal is one way the world community can prosecute Hussein's regime for its use of chemical weapons and other war crimes).

31. *See* Bassiouni, *supra* note 2, at 343 (finding that many prominent non-governmental organizations in the international community preferred some type of a mixed national and international tribunal for Iraq); Carsten Stahn, *Justice Under Transitional Administration*: *Contours and Critique of a Paradigm*, 27 HOUS. J. INT'L L 311, 312 (2005) (discussing how hybrid tribunals have been introduced in Sierra Leone and Cambodia); Gersh, *supra* note 29, at 285–86 (indicating that hybrid tribunals, such as the one established in Sierra Leone, applies a mixture of domestic and international law).

32. *See* Bassiouni, *supra* note 2, at 343 (showing that Bush Administration opposed international involvement in establishment of new Iraqi tribunal); Gersh, *supra* note 29, at 282 (suggesting the advantages of the hybrid tribunals should be employed despite the Bush Administration's opposition to international law tribunals such as the International Criminal Court (ICC)); *see also* Michael J. Frank, *Justice for Iraq, Justice for All*, 57 OKLA. L. REV. 303, 303–05 (2004) (indicating that the U.S. will strongly assist and influence the new Iraqi trial process).

33. *See* Bassiouni, *supra* note 2, at 343 (stressing the desire and need for the people of Iraq to try former Ba'ath officials in the IST); David B. Hodgkinson, *Post-Conflict Justice*: *From Malmedy to Halabja*: *University of Idaho College of Law*: *2nd Annual International Law Symposium*: *Coeur D'Alene, Idaho*: *March 18–21, 2004*: *Preparations for a Precedent,* 13 MICH. ST. J. INT'L L. 79, 81–82 (2005) (claiming that the tribunal in Iraq would allow for Iraqi people to hold those criminals accountable and further, to allow the Iraqi people to learn and understand the tribunal system); *see also* Michael P. Scharf & Ahran Kang, *Milosevic & Hussein on Trial*: *Panel 3*: *The Trial Process*: *Prosecution, Defense and Investigation*: *Errors and Missteps*: *Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L.J. 911, 912 (2005) (reporting that the Iraqi people had a strong voice in the establishment of the IST, and assumed the responsibility of prosecuting Saddam Hussein and other Ba'ath officials).

34. *See* Bassiouni, *supra* note 2, at 344 (asserting that the IST will help establish a form of government based on the rule of law); Hodgkinson, *supra* note 33, at 81–82 (supporting the IST and how it will help establish a rule of law); *see also* Bâli, *supra* note 26, at 460 (suggesting that trials of Ba'ath officials will be a foundation for the new Iraqi rule of law).

35. *See* Bassiouni, *supra* note 2, at 346 (suggesting that because of U.S. involvement and occupation in Iraq, any tribunal established, regardless of its legitimacy, would be perceived as a puppet of U.S. officials); Bâli, *supra* note 26, at 431–33 (illustrating that many believe that Saddam Hussein's trial will be a show, that is, IST will be a show-trial with a predetermined outcome).

36. *See* Bassiouni, *supra* note 2, at 344 (recognizing that the IST may have a profound effect on the repressive actions of other Arab and Muslim leaders in the region); Frank, *supra* note 32, at 308–12 (asserting that the IST and the trials of Ba'ath Party officials will serve as a warning to others that repression will not be tolerated). *See generally* Fox, *supra* note 15 (illustrating how the CPA took measures to address the former repression tactics employed by the former Iraqi regime).

Between September and December 2003, the S.I.S.T. was drafted and approved by the IGC and CPA.[37] On December 10, 2003, the IGC promulgated a Statute for the Tribunal,[38] but did not enact the Iraq interim constitution until March 8, 2004.[39] Unlike some other war crimes tribunals, the IST was not established pursuant to a U.N. Security Council resolution or treaty.[40] The IGC's members were handpicked by the U.S.-led CPA under former U.S. viceroy Paul Bremer.[41] The U.S. funded the effort to establish the IST with $75 million, and set up a tribunal liaison office to help train judges and investigators, track down witnesses, and translate documentation left behind by Saddam Hussein's regime.[42]

The IGC approved a decree on December 9, 2003, establishing the IST, and on the same day, the CPA issued Order 48, which contained the statute.[43] On December 10, 2003, after

37. *See* Farhad Malekian, *Milosevic & Hussein on Trial*: *Panel 1*: *Global or Local Justice*: *Who Should Try Ousted Leaders?*; *Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 673, 714–15 (2005) (noting that the IGC passed the statute to allow for the IST); *see also* Fox, *supra* note 15, at 214–15 (finding that the IGC assisted in drafting the tribunal's statute). *See generally* Gersh, *supra* note 29 (explaining that the tribunal would be established to try Iraqis for genocide and other war crimes).

38. S.I.S.T, *supra* note 2, at art. 1(b), n.2; Scharf & Kang, *supra* note 33, at 911–12 (finding that on Dec. 10, 2003, the IGC officially established the IST); Danielle Tarin, Note, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 468 (2005) (indicating that on Dec. 10, 2003, the IGC promulgated a S.I.S.T.).

39. *See* Dexter Filkins, *Iraq Council, with Reluctant Shiites, Signs Charter*, N.Y. TIMES, Mar. 9, 2004, at A2; *see also* Scharf & Kang, *supra* note 33, at 924 (asserting that IGC ratified the IST prior to enactment of the Iraqi interim constitution); Tarin, *supra* note 38, at 472 (acknowledging that the Iraqi interim constitution was not enacted until Mar. 8, 2004).

40. *See* Malekian, *supra* note 37, at 723 (suggesting that U.N. involvement in the development of international law tribunals has problems in itself and has been criticized by the U.N.); Tarin, *supra* note 38, at 472–73 (affirming that the IST was not established pursuant to a U.N. Security Council resolution or treaty). *See generally* Anne K. Heindel, *International Human Rights & U.S. Foreign Policy*: *The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. SOC. JUST. 345 (2004) (identifying the limitations of international law tribunals when there is no approval or oversight by the U.N. Security Council).

41. *See* Farnaz Fassihi, *Judgment Day: Hussein's Lawyers Aim to Focus Trial on U.S. Occupation; Defense for an Ex-Dictator: Compare 1982 Mass Killing to Offensive in Fallujah; 'There Will Be Stunts' in Court*, WALL ST. J, Oct. 19, 2005, at A1 (explaining that Paul Bremer personally selected members for the IGC); Gersh, *supra* note 29, at 297–98 (reporting that members of the IGC were selected by CPA Administrator Paul Bremer); *see also Iraq Report 2005*, Amnesty International, *available at* http://web.amnesty.org/report2005/irq-summary-eng (last visited Feb. 22, 2006) (indicating that members of the Iraqi Governing Council were appointed by CPA leader Paul Bremer).

42. *See* Bassiouni, *supra* note 2, at 345–46 (stating that U.S. involvement in the IST included monetary funding of the tribunal and assistance with training of the Iraqi judiciary); Hodgkinson, *supra* note 33, at 88–89 (emphasizing that U.S. has provided financial assistance in establishing the IST); *see also* Scharf & Kang, *supra* note 33, at 914 (explaining that the Department of Justice's Regime Crimes Liaison Office (RCLO) has assisted the IST by providing training of judges, drafting rules of evidence, etc.).

43. *See* Tarin, *supra* note 38, at 472–73 (noting that Order Number 48 in the statute established creation of the IST); C.P.A.O. Number 48, *supra* note 4, (detailing that the CPA authorized C.P.A.O. Number 48); The Coalitional Provisional Authority, *Law of Administration for the State of Iraq for the Transitional Period*, *available at* http://www.cpa-iraq.org/government/TAL.html (last visited Feb. 22, 2006) (finding the IST Statute issued on Dec. 10, 2003, was confirmed) [hereinafter *Law of Administration*].

CPA Administrator Paul Bremer signed the order, it was published in the CPA's Official Gazette.[44] At that moment, the IST became an official institution of the occupying power.[45]

The United States has claimed administration of the IST and established the Department of Justice's ("DOJ") Regime Crimes Liaison Office ("RCLO").[46] The RCLO has assumed the responsibility for setting a prosecutorial strategy; training judges and prosecutors; providing resources and personnel for investigations; gathering evidence; and establishing the IST's infrastructure.[47] Shortly after the IST was established, CPA Administrator Bremer announced that the U.S. would make $75 million available to it,[48] and the DOJ dispatched a team of prosecutors and investigators to Iraq in March 2004, to gather evidence to be used in prosecutions, to organize the tribunal, and to give on-the-job training to its judges and prosecutors.[49]

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44. *See* CPA Transcripts, *Bremer Affirms*: *Iraq Turns the Page*, *available at* http://www.iraqcoalition.org/transcripts/20040423_page_turn.html (last visited Mar. 1, 2006) (finding that C.P.A.O. Number 48 was signed by Paul Bremer on Dec. 10, 2003); Mikhail Wladimiroff, *Milosevic & Hussein on Trial*: *Panel 3*: *The Trial Process*: *Prosecution, Defense and Investigation*: *Former Heads of State on Trial*, 38 CORNELL INT'L L.J. 949 (2005) (affirming that IGC, along with CPA leader Paul Bremer, signed the order establishing the IST). *See generally Trial of Saddam Hussein*, The Law Library of Congress, *available at* http://www.loc.gov/law/public/saddam/saddam_trib.html#establishment (last visited Feb. 22, 2006) (declaring that C.P.A.O. Number 48 was signed on Dec. 10, 2003).

45. *See* Michael A. Newton, *Milosevic & Hussein on Trial*: *The Trial Process*: *Prosecution, Defense and Investigation*: *The Iraqi Special Tribunal*: *A Human Rights Perspective*, 38 CORNELL INT'L L.J. 863, 876–77 (2005) (suggesting that establishment of the IST will help legitimatize the Iraqi government); *see also* Russell A. Miller, *Post-Conflict Justice*: *From Malmedy to Halabja*: *University of Idaho College of Law*: *2nd Annual International Law Symposium*: *Coeur D'Alene, Idaho*: *March 18–21, 2004*: *Before the Law*: *Military Investigations and Evidence at the Iraqi Special Tribunal*, 13 MICH. ST. J. INT'L L. 107, 115 (2005) (arguing that the IST must be a key institution in installing democratic ideals in Iraq). *See generally* United States Institute of Peace, *Special Report 122: Building the Iraqi Special Tribunal*: *Lessons from Experiences in International Criminal Justice*, *available at* http://www.usip.org/pubs/specialreports/sr122.pdf (last visited Feb. 22, 2006) (expressing the difficulties from establishing the IST).

46. *See* Bassiouni, *supra* note 2, at 347 (stating that the Department of Justice's Regime Crimes Liaison Office was established when the U.S. reclaimed administration of the IST); *see also* Scharf & Kang, *supra* note 33, at 912 (observing that the IST was funded by the U.S.); Michael J. Kelly, *Milosevic & Hussein on Trial: Perspective: The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal*, 38 CORNELL INT'L L. J. 983, 1003 (2005) (discussing how the Department of Justice's involvement with the IST led to the Regime Crime Liaison Office's formation).

47. *See* Scharf & Kang, *supra* note 33, at 912 (recounting the experience of an international expert selected by the Department of Justice Regime Crimes Liaison Office to advise IST judges and prosecutors); *see also* Michael P. Scharf, *Nation-Building: Lessons from the Past and Challenges Ahead*, 39 NEW ENG. L. REV. 1, 5 (2004) (stating that international trainers participated in sessions organized by the Regime Crime Liaison Office to train IST prosecutors); United States Institute of Peace, *supra* note 45 (describing the United States Institute of Peace's involvement in training the IST prosecutors and judges).

48. *See* Geoffrey Robertson, *Milsosevic & Hussein on Trial: Keynote Address: Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L. J. 649, 668–69 (2005) (stating that the U.S. made $75 million available to the IST); *see also* Kelly, *supra* note 46, at 1003 (explaining that the Department of Justice Regime Crime Liaison Office was given a budget of $75 million); CPA Transcripts, *supra* note 44 (reporting that the IST has an annual budget of $75 million).

49. *See* Ravi Chandrasekaran, *Hussein's Trial Not Likely to Begin This Year, U.S. Official Says*, WASH. POST, Sept. 25, 2004, at A14 (reporting that investigators are gathering evidence to prepare for trial) [hereinafter *Hussein's Trial*]; *see also* Peter Landesman, *Who v. Saddam?*, N.Y. TIMES, July 11, 2004, at 34 (asserting that the Justice Department appointed lawyers to assist with evidence collection and to devise a prosecution strategy); Neil A. Lewis & David Johnston, *U.S. Team Is Sent to Develop Case in Hussein Trial*, N.Y. TIMES, Mar. 7, 2004, at 1 (stating that the Department of Justice sent investigators and prosecutors to assemble and organize evidence against Saddam Hussein).

The tribunal was designed by a team of Iraqi lawyers working with CPA-provided U.S. legal advisers.[50] The international community, including international lawyers with specific expertise in the workings of the ad hoc international war crimes tribunals for the former Yugoslavia, Rwanda, Cambodia, and the hybrid tribunal of Sierra Leone, was excluded from the process.[51]

In March 2004, at the request of the RCLO, the United States Institute of Peace and the Institute for International Criminal Investigation co-sponsored a training conference in Amsterdam for IST judges and prosecutors.[52] In September 2004, the DOJ and the U.K. Foreign Office scheduled a training session for judges and prosecutors in London, which included some IST judges and prosecutors.[53] The U.S. continues to be instrumental in setting up the judicial process. A panel of Iraqi judges trained by international legal experts will serve as prosecutors who will also render verdicts.[54] This massive oversight role that the United States has taken in the process has contributed to the widespread belief that the IST is a U.S. enterprise.[55]

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50. *See* Bâli, *supra* note 26, at 457 (explaining that the tribunal was designed by Iraqi lawyers while the CPA acts as a legal advisor); *see also* Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Whose Actions?*, 28 HAMLINE L. REV. 91, 101 (2005) (asserting that the Judicial Review Committee was composed of Iraqi and international members and that the CPA's role is to consult and coordinate all matters that govern Iraq); Stanley A. Roberts, Note, *Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq*, 33 HOFSTRA L. REV. 367, 386 (2004) (suggesting that Council's purpose is to promote independence).

51. *See* Bâli, *supra* note 26, at 455 (revealing that international lawyers with specific expertise in the workings of ad hoc war crime tribunals were excluded); *see also* Gersh, *supra* note 29, at 281 (asserting that purely international tribunals, such as Yugoslavia and Rwanda, have been criticized); Ravi Chandrasekaran, *Rights Court Run by Iraqis Is Approved by Council*, WASH. POST, Dec. 10, 2003, at A01 (comparing special courts established in Yugoslavia and Rwanda with the tribunal established by the U.S.) [hereinafter *Rights Court*].

52. *See* Bassiouni, *supra* note 2, at 347 (reporting that in March 2004, a training session for IST judges and prosecutors was held in Amsterdam); *see also* Daniel Serwer, *Doing Right by Iraq*, WASH. POST, Mar. 10, 2004, at A29 (stating that Americans are training Iraqi prosecutors and judges in March 2004); Marlise Simons, *Iraqis Meet with War Crimes Trial Experts*, N.Y. TIMES, Apr. 7, 2004, at 9 (discussing a training meeting in Amsterdam where Iraqis met with members of international courts).

53. *See* Bassiouni, *supra* note 2, at 347 (asserting that a training session took place in London); *see also Hussein's Trial*, *supra* note 49, at 34 (discussing a London training session); Michael Scharf, *Can This Man Get a Fair Trial?*, WASH. POST, Dec. 19, 2004, at B01 (mentioning that the Regime Crime Liaison Office held a training session in London to train Iraqi judges) [hereinafter *Can This Man*].

54. *See* Bassiouni, *supra* note 2, at 347 (detailing the importance of a training program for the Iraqi judges and prosecutors); *see also* Michael A. Newton, *Harmony or Hegemony? The American Military Role in the Pursuit of Justice*, 19 CONN. J. INT'L L. 231, 243 (2004) (describing how Iraqi judges and lawyers will be the core of the Special Tribunal); Fassihi, *supra* note 41, at A1 (stating that Iraqi judges will be rendering verdicts).

55. *See* Fox, *supra* note 15, at 199 (pointing out troubling implications of the U.S. reform of Iraq as to whether the U.S. is acting as a liberator or an occupier); *see also* Diane Marie Amann, *Rethinking Reconstruction after Iraq: Introduction*, 11 U.C. DAVIS J. INT'L L. & POL'Y 1, 1 (2004) (emphasizing the amount of involvement by the U.S. in Iraq); Tarin, *supra* note 38, at 493 (arguing that the U.S. government is too closely associated with the trials).

As an occupying power, the U.S. could set up an international military tribunal for the prosecution of war crimes and other crimes under international law.[56] If the United States did so, it would be required to follow certain procedural rules and provide due process protections guaranteed under human rights law and the Geneva Conventions.[57]

C. The Function of the Iraqi Special Tribunal

The IST is comprised of five units: tribunal investigative judges; ten trial chambers (each with a five-judge panel); one appeals chamber (a nine-judge appellate court); a prosecutions department; and an administrative department.[58] The IST will try cases involving a variety of issues, including the initial purge of Bakr's regime, the Anfal Campaign, the Iran-Iraq War, and the invasion of Kuwait.[59]

The tribunal possesses substantive jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes, and an assortment of specific offenses under Iraqi law, including misappropriation of funds and invasion of another Arab country.[60] The tribunal's jurisdiction is limited to crimes committed between July 17, 1968, and May 1, 2003, the

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56. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135, 1949 U.S.T. LEXIS 483 (providing the U.S. with authority to form a tribunal as an occupying power in Iraq); *see also* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 512 (2003) (quoting the Geneva Convention regarding war-related occupation) [hereinafter *Judicial Power*]; Tarin, *supra* note 38, at 473 (noting the U.S. power under the Geneva Conventions to set up a military tribunal as an occupying power).

57. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 56 (stating the due process rules that the U.S. must follow when setting up a tribunal as an occupying power in Iraq); *see also Paust*, *supra* note 56, at 512 (outlining the due process protections and human rights law that the Geneva Conventions guarantee); Tarin, *supra* note 38, at 473 (describing the procedural rules that the U.S. must follow as an occupying power under the Geneva Conventions).

58. *See* S.I.S.T., *supra* note 2; *see also* Bâli, *supra* note 26, at 462–63 (explaining how the tribunal is comprised of five units); Tarin, *supra* note 38, at 477 (clarifying the separation between the Tribunal of Investigative Judges and the Prosecutions Department under the S.I.S.T.).

59. *See* Bassiouni, *supra* note 2, at 335 (identifying the goals of post-conflict justice in Iraq, which include prosecuting violations committed during the Iraq-Iran War, Iraq-Kuwait War, and occupation of Kuwait); *see also* Gersh, *supra* note 29, at 278 (stating that the tribunal will also hear human rights violations that occurred during the war with Iran and the invasion of Kuwait); Hamza Hendawi, *New Tribunal Might Be Option for Saddam* (Dec. 14, 2003), *available at* http://www.boston.com/news/world/middleeast/articles (last viewed Feb. 21, 2006) (enumerating the types of cases that the IST will hear).

60. *See* S.I.S.T., art. 10, *supra* note 2, at 232 (listing substantive issues the tribunal has jurisdiction over in Article 10); *see also* Bâli, *supra* note 26, at 463 (stating that the court will have substantive jurisdiction over genocide, crimes against humanity, war crimes, misappropriation of funds and invasion of another Arab country); Tarin, *supra* note 38, at 475 (explaining that genocide, crimes against humanity, war crimes, or violations of certain Iraqi law will be heard by the Special Tribunal).

period during which the Ba'ath regime ruled Iraq.[61] The tribunal's personal jurisdiction is limited to Iraqi nationals and residents.[62]

The first case to be brought before the IST involved Saddam Hussein and seven former close associates.[63] They were indicted for ordering the destruction of the town of Dujail and the murder of 143 residents after an assassination attempt on Hussein during a 1982 presidential visit.[64] The Dujail incident was chosen as the first case because it is well-documented and there are multiple eyewitnesses.[65]

Later cases will try Hussein and other members of his regime for such crimes as the killing of 5,000 ethnic Kurds with chemical gas in 1988, and the mass murder of Arabs in southern

61. *See* S.I.S.T., art. 1(b), *supra* note 2, at 231 ("[T]he Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968, and up until and including May 1, 2003."); *see also* Curtis F.J. Doebbler & Michael P. Scharf, *Will Saddam Hussein Get a Fair Trial?*, 37 CASE W. RES. J. INT'L L. 21, 22 (2005) (highlighting the significance of the tribunal's jurisdictional parameters); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Use of Force and Arms Control: Turmoil in Iraq, Transitional Arrangements, and the Capture of Saddam Hussein*, 98 AM. J. INT'L L. 190, 192 (2004) [hereinafter *Turmoil in Iraq*] (outlining crimes and dates that serve as the basis for the Iraqi Special Tribunal jurisdiction).

62. *See* S.I.S.T., art. 1(b), *supra* note 2, at 231 ("The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below . . . . "); *see also* Bassiouni, *supra* note 2, at 356, 358, 361, 372 (underscoring the fact that the tribunal can only reach Iraqi nationals and residents at various points in the article); Liebl, *supra* note 50, at 104 (explaining that both Iraqi nationals and residents fall within the purview of the IST Statute).

63. *See* Fassihi, *supra* note 41, at A1 (acknowledging that this is the first of several planned trials against Saddam Hussein and seven former close associates, who are charged with crimes against humanity and genocide, among other offenses); *see also* Mohamad Bazzi, *Saddam Trial Forges on; Tighter Security Surrounds Hussein Case After Killing of 2 Defense Lawyers and Foiled Murder Plot*, NEWSDAY, Nov. 28, 2005, at A2 (detailing that all eight defendants will face a maximum sentence of death in the Dujail case); Edward Wong, *Hussein, Gleeful, Badgers the Judge and Declares a Hunger Strike over His Treatment*, N.Y. TIMES, Feb. 15, 2006, at A1 (providing that the case is against Hussein and seven defendants for the torture and execution of 148 people in Dujail).

64. *See* Fassihi, *supra* note 41, at A1 (pointing out that the IST has charged Hussein with the murder of 150 residents of Dujail after a failed assassination attempt); *see also* Bruce Zagaris, *Special Iraqi Tribunal Will Try Saddam Hussein in Next Few Months*, 21 No. 8 INT'L ENFORCEMENT L. REP., § Law of War, at ¶6 (2005) (explaining that 143 of the 1,500 Shiites arrested in Dujail after the attempted assassination on Hussein were publicly convicted in show trials, and executed); *Saddam's Road to Hell—The Crimes of Saddam Hussein*, *available at* http://pbs.org/frontlineworld/stories/iraq501/events_dujail.html (last visited Feb. 15, 2006) (maintaining that the first criminal case stems from the 1982 killing of approximately 160 people from the village of Dujail after an attempted assassination).

65. *See* Fassihi, *supra* note 41, at A1 (affirming the author's proposition that the Dujail incident was the first case to be prosecuted because it was well-documented and there were eyewitnesses); *see also* Bruce Zagaris, *Special Iraqi Tribunal Begins Hussein Trial*, 21 No. 12 INT'L ENFORCEMENT L. REP. 508, at ¶2 (2005) (confirming that Iraqi officials chose to try this case first because they had sufficient evidence, from the assassination attempt through the death sentences and executions at Abu Ghraib prison); John F. Burns, *The Struggle for Iraq: The Tribunal; Hussein Goes on Trial Tomorrow, and Iraqis See a First Accounting*, N.Y. TIMES, Oct. 18, 2005, at A1 (commenting that Iraqi officials chose to begin with the Dujail case because it would be relatively straightforward to prosecute since it is centered on a sequence of well-documented events).

Iraq after a revolt in 1991.[66] Kuwait and Iran, two countries Hussein invaded, plan to bring separate charges against him.[67]

The tribunal's rules of conduct were modeled after the United Nations war-crimes trials concerning events in the former Yugoslavia, Rwanda, and Sierra Leone.[68] However, unlike the U.N. tribunals, the Iraqi tribunal was not set up under the auspices of the international community, nor does it follow a formal treaty of surrender by any government, as did tribunals for German and Japanese leaders after World War II.[69]

II. The Illegality of the Iraqi Special Tribunal

A. Lack of Legitimacy

The legitimacy of the IST is being questioned by many, due to the role of the United States in forming the IGC, which wrote the S.I.S.T. and picked its members.[70] There are 25

66. *See* Fassihi, *supra* note 41, at A1 (reinforcing the fact the later cases will accuse Mr. Hussein and his cohort with atrocities beyond those that occurred in Dujail); *see also* Bruce Zagaris, *Iraq Governing Council Establish Special Tribunal and Saddam Hussein Is Arrested*, 20 No. 2 INT'L ENFORCEMENT L. REP. 76, at ¶20 (2004) (referring to Mr. Chalabi, one of the architects of the tribunal, who said Mr. Hussein would be charged with only a dozen specific atrocities, including the use of chemical weapons against ethnic Kurds in 1988, the execution of Shiite Muslim clerics, and the killing of hundreds of Sunni Muslim tribesmen after a coup attempt); Chris Stephen, *Saddam: Guilt—and Quickly: Hussein's Charge Sheet Should Be One of the Longest in History, but Hundreds of Cases Against Him Will Not Be Heard*, NEW STATESMAN, Oct. 24, 2005, at ¶3 (suggesting that Saddam's charge sheet should include gassing of the Kurds and ecocide against the Marsh Arabs).

67. *See* Fassihi, *supra* note 41, at A1 (indicating that Kuwait and Iran, two countries Mr. Hussein invaded, plan to bring separate charges against him); *see also Iran Press: Commentary Discusses Saddam's Trial*, BBC MONITORING INT'L REP., Nov. 3, 2005, at ¶6 (translating an Iranian news article that discusses Saddam Hussein's trial and suggests adding the bill of indictments prepared by Iran and Kuwait to the list of charges against him); *Iran Says It Wants Saddam Charged with War Crimes*, GUELPH MERCURY (Ontario, Canada), Oct. 19, 2005, at A10 (demonstrating that Iran has asked the tribunal to try Hussein for his use of chemical weapons during the Iran-Iraq war).

68. *See* Fassihi, *supra* note 41, at A1 (stating that the tribunal's rules of conduct were modeled after the United Nations war crimes trials regarding events of former Yugoslavia, Rwanda and Sierra-Leone); *see also* Doebbler & Scharf, *supra* note 61, at 29 (recognizing that the procedures set out in Article 20 of the S.I.S.T. were based on the Yugoslavia and Rwanda tribunal statutes). *But see* Editorial, *Saddam Hussein's Trial*, WASH. POST, July 2, 2004, at A14 (suggesting that none of the precedents, including Tribunals of Yugoslavia and Rwanda, are ideal models for the Iraqi court, and recognizing that no trial procedures will satisfy all parties involved).

69. *See* Fassihi, *supra* note 41, at A1 (distinguishing the Iraqi court from the U.N. tribunals in that it was not set up with international guidance, and it does not follow a formal surrender as with Nuremberg); *see also* Laurel Miller, *Iraq's Special Tribunal May Be Flawed but Not Unfair*, FIN. TIMES, Oct. 19, 2005, at ¶¶ 1–2, *available at* 2005 WLNR 16941638 (stating that many governments, international organizations, and non-governmental groups, including the U.N. and European Union, that might have been expected to provide political support and concrete assistance have been boycotting the Iraqi tribunal); *Q&A: The Trial of Saddam Hussein*, GUARDIAN UNLIMITED, Oct. 18, 2005, at ¶ 8, *available at* 2005 WLNR 16885972 (presenting an interview with Simon Jeffery, where he comments that the Iraqi tribunal is unlike any other tribunal because the United Nations was not involved in its formation, and it will be operating under national jurisdiction while applying international law).

70. *See* Peter Slevin, *Iraqi Governing Council Says It Wants to Try Hussein*, WASH. POST, Dec. 15, 2003, at A9 (recognizing the concern of human rights organizations regarding the legitimacy of the Iraqi tribunal in light of the strong hand the United States played in its formation); *see also* Gersh, *supra* note 29, at 297 (affirming the apprehension voiced by many regarding the validity of the IST); Wladimiroff, *supra* note 44, at 969–70 (stating that the Governing Council established the IST on the authority of the Administrator of the CPA).

members of the IGC, two of whom are judges, and all of whom were appointed by American CPA Administrator Bremer, on July 13, 2003.[71]

National and international groups have contrasting views of what is necessary to ensure the IST's legitimacy. Iraq's justice minister, Hashim Abdul-Rahman al-Shalabi, said that, "the presence of foreign judges will undermine Iraqi sovereignty and would undercut the value of the Iraqi judiciary."[72] Human rights organizations and activists, however, believe that the legitimacy of the IST would be enhanced by broad international participation.[73]

Iraqi officials were initially committed to prosecuting Saddam Hussein without the assistance of international judges.[74] The original S.I.S.T. did not even include a provision for the involvement of international judges in the trials.[75] However, the IGC yielded at the last minute to the urging of U.S. authorities and included international judges.[76]

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71. *See* Coalition Provisional Authority, *Iraqi Governing Council*, *available at* http://cpa-iraq.org/government/governing_council.html (last visited Feb. 18, 2006) (explaining that the Governing Council was appointed by CPA Administrator Bremer on July 13, 2003) [hereinafter *Iraqi Governing Council*]; *see also* Gersh, *supra* note 29, at 297 (providing an overview of the formation and composition of the IGC, including the questionable backgrounds of the two judges on the Council); Tyler, *supra* note 1, at A10 (highlighting the composition of the IGC).

72. *See* Gersh, *supra* note 29, at 295 (quoting the Iraqi Justice Minister regarding the sovereignty of the Iraqi judiciary without international participation); *see also Bremer Was Not Likely Targeted*, SEATTLE TIMES, Dec. 20, 2003, at A16 (highlighting the Justice Minister's strong confidence in the Iraqi judiciary to carry out the domestic prosecution of their former leader without international involvement); *Iraqi Judges Hesitant to Try Saddam*, WASH. TIMES, Jan. 5, 2004, at ¶11, 14 (expressing the overall sentiment among Iraqi officials to maintain control over the judicial proceedings against Hussein, seeking international expertise only when necessary).

73. *See* Anne Barnard, *As Trial Set to Start, Court's Readiness Debated; Ousted President to Face Charges in Dujail Killings*, BOSTON GLOBE, Oct. 19, 2005, at A13 (indicating the concerns of organizations, such as Human Rights Watch and Amnesty International, regarding the lack of comprehensive international involvement); *see also* Slevin, *supra* note 70, at A9 (quoting Kenneth Roth, executive director of Human Rights Watch, who recognized that while it is important for the Iraqi people to feel ownership of the trial, international involvement is key to avoid the perception of vengeful justice); *Prosecuting Saddam Hussein—A Conversation with Fiona McKay, Former Director of the International Justice Program at Human Rights First*, Dec. 13, 2003, at ¶ 8, 10, 14, *available at* http://www.humanrightsfirst.org/international_justice/w_context/w_cont_11.htm (last visited Feb. 18, 2006) (recognizing the need for the participation of international experts to maintain legitimacy).

74. *See Iraqi Governing Council*, *supra* note 71, at ¶ 2–25 (listing all members of the IGC, none of whom are international judges); *see also* Frank, *supra* note 32, at 304 (highlighting that the Iraqi people, as expressed through the IGC and the interim president, want the first opportunity to bring Saddam and the Ba'athists to justice); *A Court on Trial; Saddam Hussein*, ECONOMIST, Oct. 22, 2005, § Special Report, at 1 (recognizing that the Iraqi tribunal has no international judges or advisors).

75. *See* S.I.S.T., art. 4(d), *supra* note 2, at 232; *see also* Gersh, *supra* note 29, at 288 (stating that the original IST Statute did not include a provision for participation by international judges). *See generally* John F. Burns, *Legal Reckoning Awaits Saddam Aides to Stand Trial First, Building Case*, INT'L HERALD TRIB., Feb. 11, 2005 (describing the process by which the first trials against Saddam Hussein and his cohort will proceed).

76. *See* Bâli, *supra* note 26, at 472 n.73 (suggesting that the IGC succumbed to pressure from the United States when it modified the IST Statute to allow for international judges to participate in the trial); *see also Rights Court*, *supra* note 51, at A1 (recognizing that while the modification was a result of a request by U.S. authorities, Iraqi officials involved in the drafting maintained that the process would remain Iraqi-run); Slevin, *supra* note 70, at A9 (quoting a State Department official, who noted that provision would give Iraqis the greatest flexibility and leave open the possibility for international participation).

Human rights organizations are concerned by a U.N. team's evaluation of Iraq's justice system as "degraded" in August 2003.[77] The team said the system was "not capable of rendering fair and effective justice for violations of international humanitarian law and other serious criminal offenses involving the prior regime."[78] Judge Wael Abdulatif was "disbarred and imprisoned by Saddam" and Judge Dara Nor al Din, a former Court of Appeals judge, served 8 months of a 2-year sentence in prison after he "held one of Saddam's edicts (confiscating land without proper compensation) unconstitutional."[79] Most of the members of the IGC are "noted long-time opponents of the regime, representatives of oppressed groups, and/or were imprisoned or exiled by the Ba'athists."[80] So, "if, like the members of the IGC, the IST judges are selected exclusively from communities that have suffered harsh oppression under the Ba'ath Party, the tribunal will lose the appearance of impartiality."[81]

In his article entitled, "Nation-Building in the Middle East: Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq,"[82] Asli Ü. Bâli makes a compelling

77. *See* Zagaris, *supra* note 66, at ¶10 (suggesting that some international experts have responded with concern to the August 2003 U.N. report); *see also* Jess Bravin, *Putting Former Dictator on Trial Is Next Test Facing U.S. and Iraq*, WALL ST. J., Dec. 15, 2003, at A1 (quoting Michael Posner, executive director on the Lawyers committee for Human Rights, who suggested that the Iraqi justice system is too weak to conduct a full and fair proceeding of this magnitude without outside assistance); Niko Price, *Iraq to Create War Crimes Tribunal in Coming Days*, ASSOCIATED PRESS, Dec. 5, 2003, *available at* http://www.USAToday.com/news/world/ iraq/2003-12-05-iraq-tribunal_x.htm (last visited Feb. 15, 2006) (citing Richard Dicker, Director of the International Justice Program at Human Rights Watch, as questioning the ability of the Iraqi judiciary to handle the Saddam Hussein trial, particularly in light of the 2003 U.N. study).

78. *See Rights Court*, *supra* note 51, at A1 (presenting the conclusion reached by a team of U.N. specialists on the Iraqi justice system in August 2003); Slevin, *supra* note 70, at A9 (quoting a U.N. team on the Iraqi justice system and the value of having international participation in the process); Price, *supra* note 77 (referencing a U.N. study on the Iraqi judicial system).

79. *See Iraqi Governing Council*, *supra* note 71 (listing brief biographies of the IGC members); Gersh, *supra* note 29, at 297 (describing reasons why the legitimacy of certain U.S.-appointed Council members may have preconceived biases against the overthrown regime); *see also* John Daniszewski, *New Council Ends Holidays of Hussein Era; The 25-Person Unelected Body Drawn from Ethnic and Religious Groups Declares Date Dictator Was Driven from Power As Future National Day*, L.A. TIMES, July 14, 2003, at 1 (identifying "Dara Nooreddine," a member of the Iraqi Governing Council, as a Sunni Kurd who served as a judge on the Iraqi Court of Appeal until he was imprisoned by Saddam Hussein for ruling against the government).

80. *See* Gersh, *supra* note 29, at 297 (stating that most of the members of the IGC are known to be long-time opponents of Saddam's regime, representatives of oppressed groups, and/or were imprisoned or exiled by the Ba'athists); *Iraqi Governing Council*, *supra* note 71 (providing brief biographies of the IGC members, which reveals that most of the Council members were opponents of the Saddam regime); *see also* Nicholas Riccardi, *Iraqi Teachers Learn Hard Political Lesson; Hussein's Victims and Ba'ath Party Members Compete for Lucrative and Limited Positions*, L.A. TIMES, May 14, 2004, at A10 (noting that the U.S. appointed Saddam Hussein's opponents, many of whom had long been in exile, to the IGC).

81. *See* Prosecuting Iraqi War Crimes, 108th Cong. 50–55 (2003) (statement by Tom Malinowski, Washington Advocacy Director, Human Rights Watch), *available at* http://www.senate.gov/~govt-aff/041003malinowski.pdf (last visited Feb. 15, 2006) (announcing before Congress that selecting judges exclusively from the exile community or communities that suffered harsh repression under the Ba'ath Party, detracts from the appearance of impartiality in the adjudication of Ba'ath Party crimes); Gersh, *supra* note 29, at 297–98 (stating that the IST will lose the appearance of impartiality if, like the members of the IGC, the tribunal's judges are selected exclusively from communities that have suffered harsh repression under the Ba'ath Party); *see also* Tarin, *supra* note 38, at 499–500 (declaring that the possibility that some judges may have been victims of torture, imprisonment, or forced exile by Saddam is troubling because no credible judicial system could allow victims to serve as judges in the trial of the alleged perpetrators).

82. *See* Bâli, *supra* note 26 (arguing that although U.S. troops entered Iraq as liberators, their presence now impedes the establishment of a legitimate Iraqi nation).

argument that the U.S.-led occupation of Iraq poses a problem for establishing the legitimacy of the IST:[83]

> First, the invasion and occupation of Iraq are widely seen as illegal under international law. Second, during the course of the occupation, the United States has consistently ignored the international law of belligerent occupation, set forth in the 1907 Hague Regulations and the 1949 Geneva Convention. For instance, the international law framework for belligerent occupation requires an occupying power to retain the status quo with respect to the legal and political system of the occupied territory, except where modifications are strictly necessary for reasons of security. Since one of the declared objectives of the U.S. occupation of Iraq was regime change, the CPA and the Bush Administration made it clear from the outset that these requirements would not be observed and that an interim constitution would be put in place, designed precisely to transform the legal and political system. These alterations to the underlying Iraqi legal system were undertaken without the consent of the Iraqi people, a democratic mandate, or the international legitimacy that would have been associated with a U.N. framework for the conduct of the civilian administration of Iraq . . . While these first two problems are serious, the third dilemma is perhaps the most damaging to the prospects of rule-of-law promotion through occupation. U.S. efforts to afford impunity to U.S. military and civilian personnel in Iraq directly undermine basic principles of the rule of law.[84]

Mr. Bâli concludes his argument by asserting that an international trustee would be better able to institute the rule of law in Iraq because it would not be subject to the level of illegitimacy that the United States currently faces.[85]

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83. *See* Bâli, *supra* note 26, at 466–72 (positing that U.S.-led occupation presents an obstacle to the establishment of the rule of law in Iraq); *cf.* Bassiouni, *supra* note 2, at 358–59 (mentioning that the continued control of the IST's process by the United States undermines its legitimacy and credibility in the perception of the Iraqi and other Arab people); Henry H. Perritt, Jr., *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT'L L. & COM. 149, 176 (2004) (critiquing the U.S. occupation of Iraq for its detrimental effect on the achievement of internal Iraqi legitimacy).

84. *See* Bâli, *supra* note 26, at 466–67.

85. *See* Bâli, *supra* note 26, at 471–72 (providing three reasons for why an international trustee would be subject to fewer claims of illegitimacy than the U.S.). *See generally* Bassiouni, *supra* note 2 (opining that the IST lacks legitimacy and sustainability, and that significant international assistance is required); Gersh, *supra* note 29 (expressing that human rights organizations believe that broad international participation is necessary to ensure the legitimacy of the complex trial of Saddam).

An additional reason for the illegitimacy of the IST is that the now defunct IGC, a political body whose authority derived from the CPA, had the power to appoint the sitting judges,[86] investigating judges,[87] and prosecutors under the statute.[88] The statute "gives the Judicial Council only a limited consultative role."[89] In reality, "these appointments have been made by the Prime Minister, on the basis of a decision of the Council of Ministers in consultation with some of the members of the Judicial Council."[90] This procedure "violates Articles 1 to 5 of the United Nations' Principles of the Independence of the Judiciary, which disfavor having judicial

86. *See* S.I.S.T., art. 5(c), *supra* note 2, at 232 (explaining that judges are nominated and appointed by the Governing Council, after consultation with the Judicial Council); *see also* Tarin, *supra* note 38, at 491–92 (acknowledging that the IST Statute authorizes the IGC and its successors to appoint judges to the tribunal and that fact raises the concern that those judges are not sufficiently insulated from executive influence and are thereby thought of as illegitimate); M. Cherif Bassiouni, *Ace in the Hole; Saddam Hussein Is Ours, but What Are We Going to Do with Him?*, CHI. TRIB., Dec. 21, 2003, at C1 (opining that a new mechanism for the appointment of judges is needed because the current one, where the Governing Council appoints the judges, has political overtones and detracts from the independence of the judiciary).

87. *See* S.I.S.T., art. 7(b), *supra* note 2, at 233 ("Tribunal Investigative Judges are to be nominated and appointed by the Governing Council, after consultation with the Judicial Council"); *see also* Tarin, *supra* note 38, at 476 (indicating that the Tribunal of Investigative Judges, which is an organ separate from the Trial Chambers, is composed of a maximum of twenty investigative judges who are appointed by the IGC for a one-year term). *See generally* Slevin, *supra* note 70 (reporting that according to the law that will establish a tribunal, Iraqi judges will be nominated by a special judicial board and approved by the 25-member Governing Council, which will also appoint prosecutors, defense lawyers and investigators).

88. *See* S.I.S.T., art. 8(d), *supra* note 2, at 235 (stating that prosecutors are to be nominated and appointed by the Governing Council after consultation with the Judicial Council); *see also* Tarin, *supra* note 38, at 491–92 (acknowledging that the S.I.S.T. authorizes the IGC and its successors to appoint prosecutors to the tribunal and that fact raises the concern that the tribunal's prosecutors will be viewed as illegitimate puppets of the foreign occupying power). *See generally* Slevin, *supra* note 70 (indicating that pursuant to the law that will establish a tribunal, Iraqi judges will be nominated by a special judicial board and approved by the 25-member Governing Council, which will also appoint prosecutors, defense lawyers and investigators).

89. *See* Bassiouni, *supra* note 2, at 367 (affirming that according to the Statute, the Judicial Council has only a limited consulting role); S.I.S.T., art. 5(c), *supra* note 2, at 232 (proclaiming that judges are to be nominated and appointed by the Governing Council, after consultation with the Judicial Council); *see also* Ilias Bantekas, *The Iraqi Special Tribunal for Crimes Against Humanity*, 54 INT'L & COMP. L.Q. 237, 246 (2005) (providing that there is a statutory provision that both permanent and reserve judges be nominated and appointed by the IGC, after consulting with the Judicial Council).

90. *See* Bassiouni, *supra* note 2, at 367 (indicating that the appointments of sitting judges, investigating judges, and prosecutors have been made by the Prime Minister, presumably on the basis of a decision of the Council of Ministers in consultation with some of the members of the Judicial Council). *See generally* John F. Burns & Dexter Filkins, *Iraqis Battle over Control of Panel to Try Hussein*, N.Y. TIMES, Sept. 24, 2004 (mentioning that there was a bitter political struggle over control of the special Iraqi tribunal in which Prime Minister Ayad Allawi and his rivals maneuvered for influence over the appointment of judges); Brett H. McGurk, Editorial, *Iraqis Battle over Control of Panel to Try Hussein*, WASH. POST., Jan. 7, 2005 (suggesting that the prime minister will be the most powerful figure in the Iraqi government because he will have the power to approve cabinet selections and appoint judges to Iraq's highest court).

appointments by political authority."[91] Ironically, "this selection process is similar to the Ba'athist approach, whose 1977 Law on the Organization of the Judiciary placed the Minister of Justice as the head of the Judicial Council instead of the President of the Court of Cassation."[92]

The continued control of this process by the United States undermines the IST's legitimacy and credibility in the perception of the Iraqi and other Arab people.[93] The establishment of a domestic tribunal by American forces during an occupation also raises significant questions as to whether the justice delivered by that court will be seen by the international community as fair.[94] Violations of coalition forces, which need not be prosecuted, are beyond the reach of the IST's temporal jurisdiction, lending credence to the perception of politicized justice.[95] With-

91. *See* Bassiouni, *supra* note 2, at 367 (noting that the appointment procedure violates Articles 1 to 5 of the 1985 United Nations' Principles of the Independence of the Judiciary, which disfavor having judicial appointments by political authority); *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 26–Sept. 6, 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), *available at* https://www1.umn.edu/humanrts/instree/i5bpij.htm (last visited Feb. 19, 2006) (emphasizing the need for a competent and independent judiciary) [hereinafter *Basic Principles*]. *See generally* Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99 (2004) (discussing that the United Nations Basic Principles on the Independence of the Judiciary sets out a number of different principles governing an effective and independent judiciary, including the need for appropriate resources, mandates, training, and selection processes).

92. *See* Bassiouni, *supra* note 2, at 367 (noting that the selection of judges and prosecutors for the IST is eerily similar to the approach used by the Ba'athists); Qanun al-Tanzim al-Qada'l [Iraqi Judicial Organization Law], Law 160, art. 4(1), *available at* http://www.hrcr.org/hottopics/note.html (last visited Feb. 18, 2006) (detailing the process for the selection of judges under the Ba'athist government) [hereinafter Iraqi Judicial Organization Law]. *But see* John C. Williamson, *Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System*, 33 GA. J. INT'L & COMP. L. 229, 240 (2004) (explaining that the courts in Iraq had been an independent branch of government during the period of the monarchy, and it was only under Saddam that they lost all independence and became completely subjugated to the Ministry of Justice).

93. *See* Bassiouni, *supra* note 2, at 358–59 (mentioning that the continued control of the IST's process by the United States undermines its legitimacy and credibility in the perception of the Iraqi and other Arab people); *see also* Marlise Simons, *The Conflict in Iraq: The Legal System; Iraqis Not Ready for Trials; U.N. to Withhold Training*, N.Y. TIMES, Oct. 22, 2004, at A11 (reporting that supporters of Saddam Hussein and Arab media regularly attack the legitimacy of the IST because of the apparent extent of American involvement). *See generally* Kelly, *supra* note 46 (suggesting that whether international advisors for the IST are drawn from Arab states or Western countries could be a potential legitimacy issue for the tribunal and that the least legitimacy would be accorded the IST if it incorporated U.S. military JAG officers as advisors).

94. *See* Robertson, *supra* note 48, at 669 (recognizing that the new Iraqi government has failed to take steps to legitimize the tribunal); *see also* Human Rights Watch, *Memorandum to the Iraqi Governing Council on 'The Statute of the Iraqi Special Tribunal,'* December 2003, *available at* http://www.hrw.org/backgrounder/mena/iraq121703.htm, ¶ Conclusion (last visited Mar. 2, 2006) (recommending amendments to the statute of the IST to ensure fairness and legitimacy). *See generally* Fox, *supra* note 15 (recounting the events leading to the U.S. occupation of Iraq).

95. *See* Bassiouni, *supra* note 2, at 356–57 (describing the unencumbered immunity of the coalition forces); *see also* Liebl, *supra* note 50, at 104 (enumerating the crimes over which the tribunal has jurisdiction); Sharon Otterman, *Iraq: U.N. Resolution 1546*, June 10, 2004, *available at* http://www.cfr.org/background/background_iraq_1546.php (last visited Mar. 2, 2006) (answering significant questions of Iraq's statute and propriety of multinational forces).

out the participation of international judges, there is a serious risk that the Iraqi courts—supported only by American forces—will be seen as dispensing with justice.[96]

B. The Iraqi Special Tribunal Violates International Law

The United States is bound by the Fourth Geneva Convention of 1949[97] and the Hague Regulations of 1907.[98] According to these sources of applicable law, the U.S. is an occupying power, and it cannot, *inter alia*, do the following: (1) change the functioning of the administration of the occupied territory;[99] (2) change the existing legal system;[100] (3) alter the status of

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96. *See* Liebl, *supra* note 50, at 100–02 (addressing U.S. control via the CPA of the Iraqi court system); *see also* Miller, *supra* note 45, at 109–11 (rationalizing that the IST would be undermined if viewed as enforcing the victor's justice); Robertson, *supra* note 48, at 669 (suggesting a method to overcome the apparent lack of impartiality of a court made up of Iraqi judges); Slevin, *supra* note 70, at A9 (questioning the legitimate participation of foreign judges). *But see* Liebl, *supra* note 50, at 100 (emphasizing the growth and development of Iraqi courts); *Can This Man, supra* note 53, at B01 (expressing support for the IST's legitimacy after initial discontent).

97. *See* The Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.N.T.S. 287, *available at* http://www.unhchr.ch/html/menu3/b/92.htm (last visited Mar. 2, 2006) (providing the articles of protection for the fourth Geneva Convention) [hereinafter 6 U.N.T.S. 287]; *see also* Ottolenghi, *supra* note 25, at 2182 (noting how the law of belligerent occupation finds its source, in part, in the Fourth Geneva Convention of 1949, which the U.S. has accepted); Kerstin Pastujova, Comment, *Was the United States Justified in Renewing Resolution 1487 in Light of the Abu Ghraib Prisoner Abuse Scandal?*, 11 ILSA J. INT'L & COMP. L. 195, 211 (2004) (claiming that the U.S. has violated several of its provisions after ratification of the Fourth Geneva Convention of 1949).

98. *See* Laws and Customs, *supra* note 23 (providing the original text of the Hague Regulations of 1907); *see also* David J. Scheffer, *Agora (Continued): Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 849–50 (2003) (noting the United States' acknowledgement of its obligation to the Hague Regulations of 1907); Ottolenghi, *supra* note 25, at 2182 (indicating ratification of the Hague Regulations of 1907 by the U.S.).

99. *See* Laws and Customs, *supra* note 23, arts. 43, 48 (requiring the occupying power to respect the occupied territories' laws, and mandating conformity with the state's laws when collecting taxes, dues, or tolls for the benefit of the territory); *see also* 6 U.N.T.S. 287, *supra* note 97, arts. 51, 54, 64 (mandating that the persons protected by the Convention continue to benefit from legislation regarding working conditions, and the public officials and judges in office); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 86 (1990) (citing the 1907 Hague Regulations (Articles 48–56) as the source for the theory that an occupying power is effectively a trustee for the occupied territory); Christopher Greenwood, Book Note, 90 AM. J. INT'L L. 712, 713 (1996) (reviewing Eyal Benvenisti, *The International Law of Occupation* (1993)) (arguing that imposition of "value-added tax" by the victor in an occupied territory may violate Article 43 of the Hague Regulation's prohibition against modifying the territory's administrative functions, namely taxing). *But see* Eyal Benvenisti, *Agora (Continued): Future Implication of the Iraq Conflict: Water Conflicts During the Occupation of Iraq*, 97 AM. J. INT'L L. 860, 862 (2003) (arguing that Resolution 1483 allows for the will of "popular sovereignty" and not the demised regime).

100. *See* Laws and Customs, *supra* note 23, art. 43 (requiring that an occupying power "take all measures" to ensure public order, safety and respect for the occupied territory's laws); *see also* Melysa H. Sperber, Note, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 179 n.70 (2003) (noting the Geneva Conventions provided for the codification of judicial proceedings and punitive measures, as a supplement to the Hague Regulations); John F. Burns, *Tribunal Leader in Hussein's Case Is Target of Plot*, N.Y. TIMES, Nov. 28, 2005, at A1 (stating the U.S. may have violated Geneva Convention rules by creating a jurisdictional institution as an occupying power).

public officials and judges;[101] (4) change the penal legislation;[102] (5) issue new penal provisions;[103] (6) intern civilian populations other than on the basis of prisoner of war;[104] (7) change the tribunals of the occupied territory;[105] (8) prosecute inhabitants for acts committed before the occupation;[106] or (9) enter into agreements with the governing authority of the occupied territory or make agreements on behalf of the occupied territory that "shall adversely affect the

101. *See* 6 U.N.T.S. 287, *supra* note 97, art. 54 (prohibiting the occupying power from changing the position of public officials or judges); *see also* John F. Burns, *Ignoring U.S., Chalabi Pursues Attempt to Fire Hussein Judge*, N.Y. TIMES, July 27, 2005, at A12 (noting America's influence of barring former Ba'athist on Iraq's tribunal and later reversal of position). *But see* John F. Burns, *Hussein Tribunal Shaken by Chalabi's Bid to Replace Staff,* N.Y. TIMES, July 20, 2005, at A9 (reporting on the turmoil caused by the Iraqi leadership's removal of judges from office).

102. *See* 6 U.N.T.S. 287, *supra* note 97, art. 64 (allowing the occupying power to subject the people of the occupied territory to requirements, which are necessary to fulfill its obligations under the present Convention); *see also* Brian Farrell, *Israeli Demolition of Palestinian Houses As a Punitive Measure: Application of International Law to Regulation 119*, 28 BROOK. J. INT'L L. 871, 878, (2003) (acknowledging the customary international law that "the law in force in occupied territory must be respected by the occupying power"); Ottolenghi, *supra* note 25, at 2207–08 (discussing opposing views regarding the application of Article 64 of the Fourth Geneva Convention of 1949 and Article 43 of the Hague Regulations with regard to the prescriptive powers of the occupation administration). *But see Turmoil in Iraq*, *supra* note 61, at 192 (stating that the penalties imposed on defendants are defined under the Iraqi Criminal Code); John William Heath, Jr., Note, *Journey over "Strange Ground": From Demjanjuk to the International Criminal Court Regime*, 13 GEO. IMMIGR. L.J. 383, 398 (1999) (noting that the Geneva Convention is not self-executing and would require domestic penal legislation for implementation).

103. *See* 6 U.N.T.S. 287, *supra* note 97, art. 64 (allowing the occupying power to subject the people of the occupied territory to requirements, which are necessary to fulfill its obligations under the present Convention); *see also* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 93 n.70 (2005) (stating that international criminal law was incorporated into the Iraqi Special Tribunal); Salih Saif Aldin & Jackie Spinner, *Victims' Relatives Await Hussein's Trial; after 1982 Attempt to Assassinate the President, Government Rounded Up and Executed 143 Men,* WASH. POST, Oct. 17, 2005, at A09 (reporting that Saddam Hussein's trial at the Iraqi Special Tribunal will be governed by Iraqi and international criminal laws).

104. *See* 6 U.N.T.S. 287, *supra* note 97, arts. 79–135 (protecting the indigenous people from the occupying power); *see also* S.C. Res. 1483, *supra* note 9, at ¶¶ 4–5 (calling upon the U.S. and all concerned to promote the welfare of the Iraqi people and to observe the Geneva Conventions of 1949 and the Hague Regulations of 1907); Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 370 (2004) (stating the consequences of denial of POW status); Rajiv Chandrasekaran, *Iraq Assumes Legal Custody of Hussein, 11 Deputies; Country to See Him Again Today in Televised Court Appearance,* WASH. POST, July 1, 2004, at A10 (noting that Saddam Hussein and his underlings were once prisoners of war until legal custody was given to Iraq). *See generally* Jinks, *supra* (detailing the misunderstood immunity accorded to lawful combatants).

105. *See* 6 U.N.T.S. 287, *supra* note 97, art. 64 (allowing the occupying power to subject the people of the occupied territory to requirements, which are necessary to fulfill the power's obligations under the present Convention); *see also* Jackie Spinner, *Hussein Faces Tribunal Today in First Trial for Actions in Iraq,* WASH. POST, Oct. 19, 2005, at A01 (stating that the IST was set up by U.S.-led occupation authority in Iraq administering international and Iraqi laws). *But see* John F. Burns, *Trials of Some of Hussein's Aides to Start Within Weeks; His Is Expected in 2006*, N.Y. TIMES, Feb. 10, 2005, at A8 (noting that Iraqi court procedures will be used during Saddam Hussein's trial, preventing him from advancing a political platform); *Can This Man*, *supra* note 53, at B01 (stating that because trials were to begin after the elections of January 2005, the IST does not violate the Geneva Convention).

106. *See* 6 U.N.T.S. 287, *supra* note 97, art. 70 (prohibiting the arrest, prosecution and conviction of protected persons by the occupying power for acts committed or for opinions expressed before the occupation); *see also* John F. Burns, *First Case Against Hussein, Involving Killings in 1982, Is Sent to a Trial Court*, N.Y. TIMES, July 18, 2005, at A10 (detailing the prosecution of Saddam Hussein for crimes committed during his 24-year rule); Burns, *supra* note 105, at A8 (stating that Saddam Hussein's subordinates and aides will be tried for atrocities during Hussein's 24-year rule).

situation of the protected persons, as defined by the present Convention, or restrict the rights which it confers upon them."[107]

An exception to the aforementioned rules is that the penal laws of the occupied territory may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the Geneva Conventions, or if the laws introduced by the occupying power are more favorable to the civilian population.[108] Article 4 of Protocol I confirms the above limitations on the occupying power.[109] Although the United States has not ratified Protocol I, this provision still applies because it is deemed part of customary international law.[110]

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107. *See* 6 U.N.T.S. 287, *supra* note 97, art. 6 (permitting "High Contracting Parties" to form contracts, but prohibiting any harmful effect on the persons protected in the occupied territory); *see also* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 249 (2000) (reciting Protocol I prohibitions, including, "reprisals against the entire civilian population, individual civilians and civilian objects, cultural objects"); Ottolenghi, *supra* note 25, at 2185 (stressing the importance of upholding the legal order of the occupied territory).

108. *See* 6 U.N.T.S. 287, *supra* note 97, art. 64 (allowing the occupying power to subject the people of the occupied territory to requirements which are necessary to fulfill the power's obligations under the present Convention); *see also Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions*, art. 75, Nov. 1977, 16 I.L.M. 1391, 1424 (requiring persons accused of war crimes or crimes against humanity, who do not benefit from favorable treatment under the Conventions or Protocol 1, to be accorded treatment under Article 75) [hereinafter Diplomatic Conference]; Shane Darcy, *Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel*, 21 PENN ST. INT'L L. REV. 477, 482 (2003) (citing the official commentary to Article 64 of the Fourth Geneva Convention stating, "when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail"); Murphy, *supra* note 15, at 458 (tracing the laws that instructed occupying powers to respect local laws, "unless absolutely prevented"). *See generally* Katharine Shirey, Comment, *The Duty to Compensate Victims of Torture Under Customary International Law*, 14 INT'L LEGAL PERSP. 30 (2004) (recounting treaties codifying international humanitarian laws for the protection of nations during armed conflict).

109. *See* Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 4, June 8, 1977, 1125 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/94.htm (last visited Mar. 2, 2006) (providing the original text of Protocol I) [hereinafter 1125 U.N.T.S. 3]; *see also* Diplomatic Conference, *supra* note 108, at 1397 (requiring that application of the Conventions and Protocol I not affect the legal status of the parties to the conflict and the territory in question); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV 293, 312 n.100 (2005) (stating Protocol I's increased protections for civilian non-prisoners of war).

110. *See* 1125 U.N.T.S. 3, *supra* note 109, art. 4 (providing the original text of Protocol I); *see also* Maxine Marcus, *Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization?*, 25 HOUS. J. INT'L L. 99, 111 (2002) (pointing to provisions of the U.S. Army Manual that supports Article 4 of Protocol I); Tara Weinstein, Note, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 GEO. INT'L ENVTL. L. REV. 697, 702 (2005) (stating the U.S. objects to Articles 35(3) and 55 to Protocol I, without indication that Article 4 poses a problem). *But see* Weinstein, *supra* at 705 n.54 (questioning the tribunal's jurisdiction under Protocol I to which Iraq is not a signatory).

Article 34 of the 1907 Hague Regulations requires that an occupying power "re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[111] In addition, the Geneva Conventions prohibit occupying powers from changing a nation's laws or setting up their own courts to try citizens while under occupation.[112]

The IST was established pursuant to the IGC Decree of December 9, 2003.[113] Like all other decisions taken by the IGC, it was subject to the CPA's official enactment and became effective only upon its signature by CPA Administrator Bremer on December 10, 2003.[114] The Transition of Administrative Law ("TAL") confirmed C.P.A.O. Number 48,[115] but the TAL

111. *See* Laws and Customs, *supra* note 23, art. 43 (declaring that an occupying power must prioritize public order and safety, and the laws in force in the country); *see also* Bâli, *supra* note 26, at 439 (explaining that under Article 43 of the 1907 Hague Regulations, any reconstruction effort by an occupying power is limited under international law to providing transitional arrangements to further the self-determination interests of the occupied population); John R. Cook, *Current Development: The United Nations Compensation Commission—A New Structure to Enforce State Responsibility,* 87 AM. J. INT'L L. 144, 149 (1993) (asserting that a belligerent has particular duties to maintain law and order in territories it oversees according to Article 43 of the 1907 Hague Regulations).

112. *See* Laws and Customs, *supra* note 23, art. 54 (establishing that occupying powers are prohibited from establishing their own courts to try citizens or changing existing laws); *see also* Theo van Boven, *Appendice: Appendix C: United Nations: Economic and Social Council: Distribution: General: E/CN.4/Sub.2/1993/8, 2 July 1993: Original: English: Commission on Human Rights: Sub-Commission on Prevention of Discrimination and Protection of Minorities: Forty-Fifth Session: Item 4 of the Provisional Agenda: Review of Further Developments in the Fields with Which the Sub-Commission Has Been Concerned: Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr. Theo van Boven, Special Rapporteur,* 33 LAW & CONTEMP. PROBS. 283, 287 (1996) (enumerating the minimum humanitarian standards, which have to be respected at any time and in any place whatsoever under the 1949 Geneva Conventions); Jeanne M. Woods, *In Iraq Our Nation Acts Like a Colonial Power,* TIMES–PICAYUNE (New Orleans), Sept. 24, 2003 (Metro-Editorial), at 6 (opining that the Iraqi Governing Council's reform of Iraq's foreign investment laws are illegal because the Geneva Conventions of 1949 prohibit an occupying power from rewriting an occupied country's laws).

113. *See* CPA Transcripts, *supra* note 44 (indicating that the IST was established on December 9, 2003); *see also* Gersh, *supra* note 29, at 287 (stating that the IGC voted to establish the IST to try Iraqis for genocide, war crimes, and crimes against humanity); Zagaris, *supra* note 66, at ¶ 1 (reporting that on December 9, 2003, Iraq's transitional Governing Council voted to establish its own special tribunal to judge Iraqi nationals on charges of war crimes, crimes against humanity, and genocide).

114. *See* CPA Transcripts, *supra* note 44 (affirming that the IST became established and effective only after Paul Bremer approved it); *see also* Debate, "*Will Saddam Hussein Get a Fair Trial?,"* 37 CASE W. RES. J. INT'L L. 21, 22 (2005) (indicating that the IST was established after it was approved by Paul Bremer, head of the CPA); *Greenstock Says Iraq's Violent Elements Will Not Join Forces, High-Powered Think-Tank Hears Views of Former U.K. Envoy, Writes Lynne O'Donnell in London,* IRISH TIMES, June 26, 2004 (World News), at 11 (claiming that the political program laid out by Bremer, aimed to lead Iraq towards elections by December 2005).

115. *See Law of Administration*, *supra* note 43 (discussing the establishment of Order 48); s*ee also* Bassiouni, *supra* note 2, at 345 (2005) (indicating that C.P.A.O. Number 48 was published in the CPA's Official Gazette when Administrator Paul Bremer signed the order on December 10); Walter Pincus, *Iraqi Rules for Candidacy Spur Some U.S. Concern; U.N. Also Worries Pressure May Squelch Sunnis,* WASH. POST, Nov. 6, 2004, at A19 (asserting that the Transition Administrative Law ("TAL") was drafted under Bremer's direction).

was promulgated by the IGC under the authority of the CPA,[116] and is therefore an instrument developed by a subordinate body of the occupying power. Notwithstanding the TAL, however, Bremer reserved for himself a veto power over all IGC decisions and personnel appointments.[117]

The IST, by its very nature and function, contradicts international human rights norms.[118] The establishment of the IST by an occupying power violates the Geneva Conventions and customary international humanitarian law applicable to conflicts of an international character.[119] The specific naming of the tribunal as a "special" judicial body violates the International Covenant on Civil and Political Rights ("ICCPR").[120] The IST is referred to in the Arabic version of the statute as "Al-Mahkama Al-Mukhtassa."[121] This could have been trans-

116. *See Law of Administration*, *supra* note 43 (recognizing that the CPA was responsible for the establishment of both the IGC and the TAL); *see also Coalition Laws*, *supra* note 4, at 602–03 (describing the numerous regulations, orders, memoranda and public notices concerning the conduct of the occupation and the development of Iraqi laws and institutions promulgated under the authority of the CPA); Ruba Husari, *Iraq Prepares Ground for Future Contracts,* OIL DAILY 54, June 14, 2004, at 54 (discussing the timeline set by the TAL for a permanent Iraqi government).

117. *See* C.P.A., Reg. No. 1, *supra* note 15 (giving Paul Bremer veto power); *see also* Bassiouni, *supra* note 2, at 352 (noting that Bremer reserved himself a veto power over decisions and personnel appointments made by the IGC); Karen Matusic, *Power Struggle Grips Iraqi Oil Sector; Minister to Be Named,* OIL DAILY, Aug. 11, 2003, at 53 (asserting that Bremer is reluctant to use his right of veto unless any ministerial appointments were made on the basis of politics alone).

118. *See* Bassiouni, *supra* note 2, at 364 (suggesting that the exceptional nature of the IST contradicts international human rights norms); *see also* Karima Bennoune, *Rethinking Reconstruction After Iraq: Toward a Human Rights Approach to Armed Conflict: Iraq 2003,* 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 221 (2004) (citing the ICCPR, alongside humanitarian law, as the norms of international human rights law). *But see* Scharf & Kang, *supra* note 33, at 914–15 (arguing that the IST rules afford more protection of the rights of defendants than United States law does by providing that all interrogations, following a waiver of the right to remain silent, must be videotaped in order to ensure that no coercive tactics were employed).

119. *See* 6 U.N.T.S. 287, *supra* note 97 (setting forth the international humanitarian norms); *see also* Newton, *supra* note 45, at 874–75 (explaining why the second paragraph of Article 64 and Article 47 of the Fourth Geneva Convention are key to understanding the promulgation of the IST); Richard Beeston & Francis Gibb, *Saddam Trial Judges Were Secretly Trained in Britain,* TIMES (London), Oct. 18, 2005, at 33 (reporting that Saddam Hussein hopes to defend himself against criminal charges by arguing that the IST, set up by the United States to try him, is illegal under the Geneva Conventions).

120. *See* ICCPR, Dec. 16, 1966, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 (prohibiting "special" judicial bodies); *see also* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law,* 75 S. CAL. L. REV. 1407, 1421–22 (2002) (discussing how special tribunals are problematic under the standards of the ICCPR); G.N.K. Vukor-Quarshie, *Criminal Justice Administration in Nigeria: Saro–Wiwa in Review,* 8 CRIM. L. F. 87, 97 (1997) (stating that ICCPR provides that every defendant shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law).

121. *See* Bassiouni, *supra* note 2, at 363 (referring to the Arabic language version of the statute); *see also* Scharf & Kang, *supra* note 33, at 947 (maintaining that the case law of international tribunals should be translated into Arabic so that it is accessible to the IST); Roberts, *supra* note 50, at 382–83 (describing and naming various Iraqi courts).

lated as "specialized tribunal" or "competent tribunal."[122] However, the controlling English language text chose the term "special" tribunal, which translates into Arabic as "Al-Mahkama al Khassa."[123] The name of the tribunal itself, therefore, makes it an "exceptional" tribunal in violation of Article 14 of the ICCPR.[124]

The IGC, a temporary political authority whose authority is derived from the occupying power, had the power to appoint sitting judges, investigative judges, and prosecutors.[125] This procedure violates Articles 1 through 5 of the 1985 United Nations' Principles of the Independence of the Judiciary,[126] which disfavor having judicial appointments by a political authority.[127] The determination of compensation of the sitting judges, investigative judges, and prosecutors by the IGC affects judicial independence and the impartiality of the tribunal, and thus, constitutes a violation of international human rights law.[128]

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122. *See* Bassiouni, *supra* note 2, at 363 (discussing the significance of the statute's translation); *see also* Hodgkinson, *supra* note 33, at 81–83 (concluding that Iraqis wanted to have a "specialized" Arabic word to describe the tribunals in order to move away from the connotation of what a "special tribunal" entailed under Saddam Hussein's reign); Newton, *supra* note 45, at 881–82 (claiming that Iraqi lawmakers made a deliberate amendment at the very last editing session to use different Arabic terms to distinguish the "special" courts, which operated under Saddam Hussein's authority).

123. *See* THE MIDDLE EAST AND THE UNITED STATES 184 (Davis W. Lesch, ed., 2003) (translating the Arabic word "al-khama" as "special"); *see also* Bassiouni, *supra* note 2, at 365 (discussing the Arabic translation of the statute); Edward Bennett Miller, Article, *Implementing the Oslo Accords,* 6 CARDOZO J. INT'L & COMP. L. 363, 395 (1998) (interpreting the Arabic word "al-khassa" as "special").

124. *See* ICCPR, *supra* note 120, art. 14 (declaring "exceptional" tribunals illegal); *see also* Miller, *supra* note 45, at 137 (discussing how Article 14 of the ICCPR, to which both the United States and Iraq are parties, codifies the "kaleidoscope" of protections); Amy Howlett, Note, *Getting "Smart": Crafting Economic Sanctions that Respect All Human Rights,* 73 FORDHAM L. REV. 1199, 1225 (2004) (quoting Article 14, which requires a "fair and public hearing").

125. *See* S.I.S.T., *supra* note 2, at 232 (describing the scope of authority of the IGC); *see also* Bâli, *supra* note 26, at 457 (revealing that the United States' occupation authority asked IGC members to include a provision giving the Council the right to appoint international judges if needed); Tarin, *supra* note 38, at 491 (stating that the IGC has the authority to appoint judges and prosecutors to the tribunal).

126. *See* S.I.S.T., *supra* note 2, at 232 (prioritizing judicial autonomy); *see also* Venkat Iyer, *States of Emergency–Modernizing Their Effects on Human Rights,* 22 DALHOUSIE L.J. 125, 188 (1999) (emphasizing the importance of such matters as independence of the judiciary in emergency regimes); Allen N. Sultan, *Judicial Autonomy under International Law,* 21 DAYTON L. REV. 585, 647–48 (1996) (detailing how the document protects judicial autonomy).

127. *See Basic Principles*, *supra* note 91 (enforcing the independence of the judiciary by granting exclusive authority to the judiciary); *see also* Fionnuala Ni Aolain, *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, 19 MICH. J. INT'L L. 957, 983 (1998) (noting the necessity for judicial independence in a society plagued with violence); Dorean Marguerite Koenig, *Independence of the Judiciary in Civil Cases & Executive Branch Interference in the United States: Violations of International Standards Involving Prisoners and Other Despised Groups*, 21 U. DAYTON L. REV. 719, 726 (1996) (clarifying the United Nations' characteristics of an independent judiciary, including protecting individual judges from outside influence).

128. *See Basic Principles*, *supra* note 91 (prohibiting unwarranted or inappropriate interference with the judicial process); *see also* Bassiouni, *supra* note 2, at 370–71 (critiquing the statute for the compensation of sitting judges as violating the principles of a judiciary's independence); Daniels & Trebilcock, *supra* note 91, at 110 (finding that the United Nations' Basic Principles on the Independence of the Judiciary seek to "provide a template for a desirable contractual arrangement (including compensation) between the public and the members of the judiciary").

The Iraqi legal system is not an adversary-accusatorial system; it is an inquisitorial one, modeled after the French legal system.[129] Iraqi criminal laws and procedures are based on Egyptian law, which is also based on the French legal system.[130] Under that system, an investigative judge gathers the evidence and prepares the case for submission to trial.[131] The statute is based in part on the American adversary-accusatorial system, which does not include investigative judges.[132]

The statute makes clear in Article 1 that the tribunal is an "independent entity" and "not associated with any Iraqi government departments."[133] The statute also makes clear that the tribunal's prosecutors and investigative judges are prohibited from "seeking or receiving instructions from any government department, or from any other source."[134] Yet, the United States, with U.K. input, prepared a draft of the "Rules of Procedure and Evidence."[135] These proposed rules, however, were essentially redrafted by the IST in accordance with the 1971

129. *See* Bassiouni, *supra* note 2, at 381 (clarifying distinctions between the Iraqi legal system and other legal systems); *see also* Newton, *supra* note 45, at 888 (stating that Iraqi law and inquisitorial procedure were drawn into the IST Rules and Procedures); Jeffrey Gettleman, *Making Wheels of Justice Turn in a Chaotic Iraq*, N.Y. TIMES, Aug. 1, 2004, at 1 (explaining that the Iraqi court system was a French-inspired inquisitorial process).

130. *See* Bassiouni, *supra* note 2, at 381 (citing the historical roots of the Iraqi legal system); *see also* Laura Nader, *Law and the Theory of Lack*, 28 HASTINGS INT'L & COMP. L. REV. 191, 202 (2005) (observing that Iraqi jurists "drafted a code that balanced and merged elements of Islamic and French law in one of the most successful attempts to preserve the best of both legal systems"); Wladimiroff, *supra* note 44, at 970 (finding a potential conflict between the IST Statute and the Iraqi legal system, which has a "Franco-Egyptian background from the Ottoman era").

131. *See* Bassiouni, *supra* note 2, at 381 (acknowledging the roles of the investigative judges); *see also* Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. INT'L CRIM. JUST. 124, 133 (2005) (expounding on the procedure of the investigative judge who worked closely together with prosecuting authorities to create the case file); S.I.S.T., *supra* note 2, at 233–34 (detailing the duties of the investigative judges, including the power to gather evidence from whatever source they consider suitable).

132. *See* Bassiouni, *supra* note 2, at 381 (noting the difference between the Iraqi judiciary system and the system set out in the statute); *see also* Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 867–68 (2002) (illuminating the fact that common-law countries conduct trials with the adversarial system, in which the judge takes a "neutral" role); Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 243–44 (1998) (elucidating that the adversarial system and jury trial, as in the United States, have been rejected by other countries).

133. *See* S.I.S.T., *supra* note 2, at 231 (stating the independent role the tribunal will have); *see also* Liebl, *supra* note 50, at 100 (describing the claim that the judicial system was functional and independent); Michael A. Newton, *Justice Abandoned*, INT'L HERALD TRIBUNE, Nov. 25, 2004, *available at* http://www.globalpolicy.org (making clear the statute's desire ensured a process free of political constraints).

134. *See* S.I.S.T., *supra* note 2, at 233–36 (prohibiting the judges of the tribunal from receiving outside influence); *see also* Tarin, *supra* note 38, at 473 (setting forth the idea that the tribunal is an independent entity not associated with any Iraqi government departments); Bantekas, *supra* note 89, at 247 (noting that the Human Rights Watch group raised concerns regarding the independence of the investigative judges as set forth in the statute).

135. *See* Bassiouni, *supra* note 2, at 348 (proving outside influence on the drafting of the tribunal's procedures); *see also* José E. Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. INT'L CRIM. JUST. 319, 326 (2004) (noting that the goals of the tribunal are severely undermined because the statute was "reportedly drafted" by the United States); Symposium, *Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L.J. 911, 914 (2005) (explaining that the Rules of Procedure and Evidence were drafted in part by a half-dozen assistant U.S. attorneys and JAG officers from across the United States who had volunteered for temporary assignment to Baghdad).

Criminal Procedure Law.[136] The Iraqi legal system, like almost all of the world's legal systems, does not recognize such court rules because the judges constitute judicial authority and cannot make laws or rules, which are the province of the legislative authority.[137]

The definitions of certain crimes in the statute that are not contained in Iraqi law are in violation of the principles of legality recognized in Iraqi law and international human rights law.[138] The maxims *nulla poene sine lege* and *nullum crimen sine lege* have long-been regarded as basic principles of criminal law.[139] They have become standard in almost all of the world's legal systems as principles of legality.[140] They are also embodied in Article 15 of the ICCPR,[141] Arti-

136. *See* Bassiouni, *supra* note 2, at 348 (outlining the changes made to the Rules of Procedure and Evidence by the tribunal); *see also Saddam Hussein's First Hearing*, 2 J. INT'L CRIM. JUST. 927, 927–28 (2004) (noting that the investigating judge at Hussein's trial used Iraqi Law on Criminal Proceedings instead of the Draft Rules of Procedure and Evidence); Press Release, State Dep't, (July 1, 2004), *available at* 2004 WLNR 2528961 (adding that the IST was drafting rules of procedure and evidence to try Saddam Hussein).

137. *See* Bassiouni, *supra* note 2, at 348 (finding conflicted result with the conflicting judicial systems); *see also* Dan E. Stigall, *From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code*, 65 LA. L. REV. 131, 141 (2004) (finding that Iraqi courts are "bound to proceed according to equity" because legislation and custom are the authority); Salvatore Zappalá, *The Iraqi Special Tribunal's Draft Rules of Procedure and Evidence, Neither Fish Nor Fowl?*, 2 J. INT'L CRIM. JUST. 855, 856 (2004) (detailing the conflicts between the draft provisions of the statute and Iraq's procedural model).

138. *See* Malekian, *supra* note 37, at 714 (2005) (explaining that there are specific international criminal laws that are not a part of the Iraqi Criminal Code); *see also* Bâli, *supra* note 26, at 464 (adding that Human Rights Watch has found glaring shortcomings in the statute itself); Human Rights Organization, *Rules of Procedure and Evidence Missing Key Protections*, Apr. 22, 2005, *available at* http://hrw.org/english/docs/2005/04/22/iraq10533_txt.htm (fearing the Rules of Procedure and Evidence fail to protect individuals' rights to a fair trial).

139. *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 150–58 (2d ed., Martinus Nijhoff 1999) (outlining two fundamental principles of criminal law throughout the world); *see also* Marianne Geula, *South Africa's Truth and Reconciliation Commission As an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, 73 n.110 (2000) (explaining that *nullum crimen sine lege, nulla poene sine lege* is a principle of criminal law); Stanislaw Pomorski, *Reflections on the First Criminal Code of Post-Communist Russia*, 46 AM. J. COMP. L. 375, 384 (1998) ("[I]t is considered axiomatic today that the requirement of definiteness of penal statutes is part-and-parcel of the principle of legality.").

140. *See* Christopher Keith Hall, *The First Five Sessions of the U.N. Preparatory Commission for the International Criminal Court*, 94 AM. J. INT'L L. 773, 775 (2000) (explaining the U.N.'s desire to "give teeth to the concept" of *nullum crimen sine lege*); *see also* Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 821 (2005) (citing that the IST's obligation is to respect the fundamental principle of *nulllum crimen sine lege*); Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT'L CRIM. JUST. 1007, 1008 (2004) (finding that the principle prevents ex post facto laws from infringing on people's freedoms).

141. *See* ICCPR, *supra* note 120 (declaring that no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense at the time the act was committed); *see also Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 231–32 (1999) (acknowledging the importance of the principles in international law); Luis Marquez Urtubey, *Non-Applicability of Statutes of Limitation for Crimes Committed in Argentina: Barrios Altos*, 11 SW. J.L. & TRADE AM. 109, 122 (2005) (determining the principle as being universally recognized by the International Convention on Civil and Political Rights).

cle 7 of the European Convention on Human Rights,[142] and Article 9 of the American Convention on Human Rights.[143] In the U.S. Constitution, they are specifically mentioned as prohibitions against "ex post facto" laws and against "Bills of Attainder,"[144] and its Fifth and Fourteenth Amendments have been interpreted as prohibiting statutes that are vague and ambiguous.[145] The S.I.S.T. violates these principles by borrowing from the International Criminal Court ("ICC") statute the definitions for the crimes of genocide, crimes against humanity, and war crimes,[146] which are not contained in the 1969 Iraqi Criminal Code.[147]

C.P.A.O. Number 17 and Article 1(b) of the S.I.S.T. appear to provide substantive immunity from prosecution.[148] No such immunity is permissible under international humani-

142. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, 312 U.N.T.S. 221 (1950) (setting out principles of justice according to the U.N.) [hereinafter 312 U.N.T.S. 221]; *see also* Giulia Pinzauti, *An Instance of Reasonable Universality*, 3 J. INT'L CRIM. JUST. 1092, 1101–02 (2005) (referring to the European Convention on Human Rights and its application of the principles of legality); Robert Cryer, *Aggression at the Court of Appeal*, 10 J. CONFLICT & SECURITY L. 209, 219 (2005) ("[A]n offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions make him criminally liable.").

143. *See* American Convention on Human Rights, art. 9, July 1970, 9 I.L.M. 673, 678, 1144 U.N.T.S 123 (showing the stance of the American Convention of Human Rights on ex post facto laws) [hereinafter 1144 U.N.T.S. 123]; *see also* Anthony P. Ewing, Article, *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention of Human Rights*, 26 COLUM. HUM. RTS. L. REV. 751, 754–56 (1995) (describing how the American Convention on Human Rights was created and how it operates). *See generally* Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 653 (2004) (explaining the recognition of the principle of *nullum crimen sine lege* in international law).

144. *See* U.S. CONST. art. I, § 9, cl. 3 (containing the clause from which constitutional protection against ex post facto laws flows); *see also* Collins v. Youngblood, 497 U.S. 37, 46 (1990) (analyzing the ex post facto clause); Calder v. Bull, 3 U.S. 386, 389–91 (1798) (setting forth the characteristics of an ex post facto law).

145. *See* U.S. CONST. amend. V, amend XIV, § 1 (listing the constitutional amendments the Supreme Court has used to prohibit vague and ambiguous statutes); *see also* Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966) (describing the standards for when a law violates the due process clause as being too vague); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (illustrating the rule for when a criminal statute is too vague and ambiguous to be constitutional).

146. *See* Rome Statute of the International Court, art. 6–8, U.N. Doc. A/CONF.183/9 (July 17, 1998), 37 I.L.M. 999, 1004–09, 2187 U.N.T.S. 3, *available at* http://www.un.org/law/icc/statute/romefra.htm (presenting the international court's stance on genocide, crimes against humanity, and war crimes) [hereinafter 2187 U.N.T.S. 3]; *see also* Mahnoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 24–25 (1999) (detailing the main principles of the Rome Statute). *See generally* Yassin El-Ayouty, *International Terrorism under the Law*, 5 ILSA INT'L & COMP. L. 485 (1999) (examining the origins of the Rome Statute).

147. *See* Qanun al-Uqubat [Criminal Code] Law No. 111 [1969], art. 7 (Iraq) (showing that the ICC does not contain definitions for the crimes of genocide, crimes against humanity, and war crimes); *see also* Bassiouni, *supra* note 2, at 373 (stating how the IST Statute violates the principles of the Iraqi legal system by borrowing criminal definitions from the ICC). *See generally Turmoil in Iraq*, *supra* note 61 (describing how the IST was enacted and how it functions).

148. *See* Bassiouni, *supra* note 2, at 357 (discussing the problem of the IST allowing substantial immunity from prosecution); *see also* Bâli, *supra* note 26, at 468–69 (describing the immunity from prosecution available to U.S. personnel in Iraq). *See generally* Gersh, *supra* note 29 (examining the implementation of the IST).

tarian law or other sources of international law with regard to international crimes, such as genocide, crimes against humanity, war crimes, torture, slavery, and slave-related practices.[149]

Iraqi criminal procedure is based on individual cases presented by victims as complainants and investigated only by an investigative judge.[150] Iraqi criminal law does not regard conspiracy as a crime, though it is included in the Statute of the IST.[151] Article 5(f)(3) of the statute gives the IGC the authority to remove the president of the IST.[152] This is a blatant breach of the independence of the judges under Iraqi law, since removal and discipline of judges are the prerogatives of the Judicial Council.[153]

Pursuant to Article 4(d) of the Statute of the IST, the IGC and its successor may appoint foreign judges to the IST provided that they fulfill certain criteria, which do not include familiarity with the Arabic language or the Iraqi legal system.[154] The appointment by a political authority of foreign judges who lack familiarity with the Arabic language and the Iraqi legal system is contrary to Iraqi law.[155] Similarly, the appointment of practicing lawyers as judges violates the Iraqi law on the judiciary.[156]

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149. *See* Bassiouni, *supra* note 2, at 357 (comparing the prosecution immunity under the IST with other sources of international law); *see also* Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L REV. 293, 316–20 (2005) (analyzing the criminal prosecutions available under the Rome Statute). *See generally* Kelly D. Askin, *Stefen A. Riesenfeld Symposium 2002: Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288 (2003) (assessing the protection available from international humanitarian law and the principal international humanitarian law treaties).

150. *See* Qanun Usul al Mahakamat al-Jaza-ia [Criminal Procedure Law] Law No. 132 [1971] (Iraq) (stating how Iraqi criminal cases are presented by the victim of the crime and investigated only by the judge); s*ee also* Bassiouni, *supra* note 2, at 373 (explaining how Iraqi criminal procedure was based on individual cases investigated only by the judge). *See generally* Miller, *supra* note 45 (reasoning that the IST provides greater protection than did previous Iraqi law).

151. *See* S.I.S.T., art. 11, *supra* note 2, at 236–37 (describing the IST position on conspiracy to commit genocide); *see also* Danner & Martinez, *supra* note 103, at 159–60 (discussing the inclusion of genocide in the Statute of the Iraqi Special Tribunal). *See generally* Liebl, *supra* note 50 (examining the powers delegated to the IST).

152. *See* S.I.S.T., art. 5, *supra* note 2, at 233 (establishing the requirements for judges on the IST); *see also* Bassiouni, *supra* note 2, at 372 (assessing who has the power to remove the president of the Iraqi Special Tribunal under the IST Statute); Gersh, *supra* note 29, at 296–97 (discussing how judges are chosen under the rules of the IST).

153. *See* Iraqi Judicial Organization Law, *supra* note 92, Law No. 160 [1979], arts. 58–59 (discussing the removal and discipline of Iraqi judges under Iraqi laws); *see also* Bassiouni, *supra* note 2, at 368 (examining the threat posed to the independence of Iraqi judges by the IST). *See generally* Newton, *supra* note 45 (discussing the role of the judges under the IST).

154. *See* Iraqi Judicial Organization Law, *supra* note 92, Law No. 160, art. 4 (discussing the criteria for judges under Iraqi law); *see also* Bassiouni, *supra* note 2, at 368 (commenting on the criteria necessary to be a judge under the IST). *See generally Turmoil in Iraq*, *supra* note 61 (analyzing the selection of judges under the IST system).

155. *See* Iraqi Judicial Organization Law, *supra* note 92, Law No. 160, art. 4 (discussing the requirement of Iraqi judges to be familiar with the Arabic language and Iraqi legal system); *see also* Bassiouni, *supra* note 2, at 368 (claiming that the appointment of foreign judges unfamiliar with Arabic and Iraqi law is contrary to Iraqi law). *See generally Turmoil in Iraq*, *supra* note 61 (commenting on the power of the IGC to appoint non-Iraqi judges).

156. *See* Iraqi Judicial Organization Law, *supra* note 92, Law No. 160, art. 4 (stating that practicing lawyers cannot be appointed as Iraqi judges); s*ee also* Bassiouni, *supra* note 2, at 368 (declaring that appointing practicing Iraqi lawyers as judges violates Iraqi law). S*ee generally* Robertson, *supra* note 48 (commenting on the Power of the Tribunal Statute to appoint non-Iraqi judges).

The ICCPR is generally considered to set forth the minimum standard required under international law for the protections of the rights of the accused.[157] Unlike the ICCPR, the S.I.S.T. provides no guarantee against double jeopardy,[158] and it permits the imposition of the death penalty.[159] The Director of the International Justice Program at Human Rights Watch, Richard Dicker, has complained that the statute has "glaring human rights shortcomings" as a result of the inadequate protections afforded to defendants.[160] Similarly, U.N. Secretary-General Kofi Annan expressed "serious doubts" that the IST could meet "relevant international standards."[161] Annan maintained that the U.N. should not assist national courts that can order the death penalty.[162]

The principles of legality, which prohibit crime or penalty without a clear and specific legal textual description, and the retroactive application of criminal laws and penalties, are recognized in the 1969 Iraqi Criminal Code and in general principles of the criminal laws of more

157. *See* Bâli, *supra* note 26, at 463 (discussing jurisdiction of the tribunal over international humanitarian law issues and personal jurisdiction); *see also* Ana D. Bostan, *The Right to a Fair Trial: Balancing Safety and Civil Liberties*, 12 CARDOZO J. INT'L & COMP. L. 1, 21–23 (2004) (analyzing international standards for rights of the accused). *See generally* Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997) (explaining the protections accorded to the accused under the tribunal based on international standards).

158. *See* S.I.S.T., arts. 25–26, *supra* note 2, at 246 (presenting the standard for appeal in the IST); *see also* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 289–90 (1993) (discussing the availability of protection from double jeopardy under the ICCPR). *See generally* Lara A. Ballard, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM RTS. L. REV. 143 (1997) (assessing the general rule of international law regarding double jeopardy).

159. *See* S.I.S.T., art. 24, *supra* note 2, at 245–46 (establishing the penalties available to the IST); *see also* Bennoune, *supra* note 118, at 221 (remarking on the availability of the death penalty under the IST); *Turmoil in Iraq*, *supra* note 61, at 192 (examining penalties under the IST including the death penalty and life imprisonment).

160. *See* Bâli, *supra* note 26 (mentioning Richard Dicker's remark that the IST Statute has "glaring human rights shortcomings" in light of the little protection it gives defendants); *see also* Simons, *supra* note 93, at 11 (alleging that the Director of the International Justice Program at Human Rights Watch, Richard Dicker, has said that the ITS statute has "glaring human rights shortcomings); Marlise Simons, *With Trials Looming, Iraqi Judges Agree They Need Help*, INT'L HERALD TRIBUNE, Oct. 23, 2004, at 4 (expressing that Richard Dicker said by telephone that there were still "glaring human rights shortcomings" in the statute of the Iraqi tribunal).

161. *See* Reuters, *U.N. Spurns Iraqi Trial; Won't Sanction Death for Saddam*, WINNIPEG SUN, Oct. 23, 2004, at 9 (asserting that Kofi Annan's spokesperson said that "serious doubts exist regarding the capability of the Iraqi special tribunal to meet relevant international standards"); *see also* Simons, *supra* note 93, at A11 (holding that Kofi Annan doubts that the IST will satisfy the "relevant international standards"); *U.N. Unhappy with Saddam Trial; Refuses Help to U.S.,* PRESS TRUST OF INDIA, Oct. 23, 2004 at 2 (noting that Stephane Dujarric communicated U.N. Secretary General Kofi Annan's "serious doubts" that the IST will meet the "relevant international standards" at a news conference).

162. *See* Warren Hoge, *U.S. and U.N. Are Once Again the Odd Couple over Iraq,* N.Y. TIMES, Nov. 14, 2004, at 15 (noting that U.N. Secretary General Kofi Annan said that the U.N. is not obligated to help for the set up of the Iraqi courts, and that the U.N. is opposed to judicial systems that have the death penalty); *see also U.N. Spurns Iraqi Trial*, *supra* note 161, at 9 (revealing that Kofi Annan opined that the U.N. should not help any court that may impose the death penalty); Simons, *supra* note 93, at A11 (expressing Kofi Annan's view that the U.N. should not help courts that give the death penalty).

than 120 of the world's criminal justice systems, international criminal law, and international humanitarian law.[163]

Iraq also follows a rigid positivistic approach to the non-retroactivity of criminal laws, which is consistent with international human rights law,[164] and the principles of legality enunciated in Article 15 of the ICCPR.[165] The same prohibition also exists under Article 7 of the European Convention on Human Rights,[166] Article 9 of the American Convention on Human Rights,[167] and Article 7 of the African Charter on Human and Peoples' Rights.[168] The princi-

163. *See* Bassiouni, *supra* note 2, at 363 (mentioning that the principles of legality are part of "general principles of law"); *see also* Edward M. Wise, *Report of the International Law Association: Published Jointly with Association International De Droit Penal, 13 Nouvelles Etudes Penales 1997: General Rules of Criminal Law*, 25 DENV. J. INT'L L. & POL'Y 313, 313–14 (1997) (maintaining that the principle of legality requires that crimes and punishment for the crimes be specifically defined in the law before the conduct sought to be punished occurs). *See generally* Edward M. Wise, *International Criminal Court: A Budget of Paradoxes*, 8 TUL. J. INT'L & COMP. L. 261 (2000) (stating that 120 countries voted for the Rome Statute, which upholds the principles of legality and prohibits retroactive application of criminal laws) [hereinafter International Criminal Court].

164. *See, e.g.,* International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1976); *see also* Bassiouni, *supra* note 2, at 363 (stating the positivistic approach followed by Iraq regarding the non-retroactivity of criminal laws, is consistent with international human rights law); OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, Status of Ratifications of the Principal International Human Rights Treaties, *available at* http://www.unhchr.ch/pdf/report.pdf (last visited Apr. 2, 2006) (displaying that Iraq signed the ICCPR on Mar. 23, 1976). *See generally* John Strawson, *Palestine's Basic Law: Constituting New Identities Through Liberating Legal Culture*, 20 LOY. L.A. INT'L & COMP. L.J. 411, 421 (1998) (commenting that many Arab/Islamic regions, such as Palestine, use this rigid positivistic exposition of rules).

165. *See* International Covenant on Civil and Political Rights, *supra* note 120, art. 15 (noting that Article 15 prohibits retroactive application of criminal laws); *see also* Bassiouni, *supra* note 2, at 363 (maintaining that Iraq has a positivistic approach to the principles of legality, which are included in Article 15 of the ICCPR); Bostan, *supra* note 157, at 34 (mentioning that Article 15 of the ICCPR prohibits ex post facto legislation).

166. *See* 312 U.N.T.S. 221, *supra* note 142, art. 7 (stating that Article 7 provides freedom from retroactive criminal law); *see also* Jonathan L. Black-Branch, *Observing and Enforcing Human Rights under the Council of Europe: The Creation of a Permanent European Court of Human Rights*, 3 BUFF. J. INT'L L. 1, 11 (1996) (referring to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides freedom from retroactive laws); Nic Coidan, *Letter: Hoax Law Is Illegal*, INDEP., Oct. 27, 2001, at 2 (noting that Article 7 of the European Convention provides specifically that, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.").

167. *See* 1144 U.N.T.S. 123, *supra* note 143, art. 9 (stating that Article 9 forbids retroactive legislation); *see also* Andres E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. U. INT'L L. REV. 269, 281 (2001) (expressing that Article 9 of the American Convention on Human Rights provides freedom from ex post facto laws); Inara K. Scott, Note, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection?*, 19 VA. ENVTL. L.J. 197, 237 n.31 (2000) (mentioning that Article 9 prohibits ex post facto laws).

168. *See Judicial and Similar Proceedings: Special Court for Sierra Leone: Prosecutor v. Sam Hinga Norman,* art. 7, May 31, 2004, 43 I.L.M. 1129 (affirming that Article 7(2) of the African Charter of Human and Peoples' Rights forbids retroactive application of criminal laws); *see also Organization of African Unity: Banjul Charter on Human and Peoples' Rights*, art. 7, Jan. 1982, 21 I.L.M. 58 (remarking that Article 7 of the African Charter prohibits conviction or punishment for an act that was not a punishable offense at the time the act was committed); African Charter of Human and Peoples' Rights, *available at* http://www.achpr.org/english/info/charteren.html ("No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.").

ples of legality are part of "general principles of law," a source of international law under Article 38 of the Statute of the International Court of Justice, which is part of the U.N. Charter.[169] The U.S.-led coalition, as an occupying power, cannot derogate from these principles.[170]

Articles 11, 12, and 13 of the S.I.S.T. extend the jurisdiction of the IST to three international core crimes: genocide, crimes against humanity, and war crimes.[171] The statute defines the three core crimes identically to the definitions contained in the Statute of the ICC, though without establishing a foundation for their application under Iraqi law.[172] This approach—on its face—violates the principles of legality,[173] since these crimes were not covered in the 1969

169. *See* Bassiouni, *supra* note 2, at 363 ("The principles of legality are part of 'general principles of law,' a source of international law under Article 38 of the Statute of the International Court of Justice, which is part of the U.N. Charter."); *see also* Aman Mahray McHugh, *Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice*, 49 HOW. L.J. 209, 232 (2005) (positing that Article 38 of the ICJ statute recognizes "general principles of law accepted by civilized nations" as a source of law that the ICJ shall apply); U.N. Charter Introductory Note, *available at* http://www.un.org/aboutun/charter/ (maintaining that the ICJ statute is an integral part of the U.N. Charter).

170. *See* Bassiouni, *supra* note 2, at 363 (alleging that an occupying power cannot derogate from the principles of legality); *see also* Dominic McGoldrick, *Interface Between Public Emergency Powers and International Law*, 2 INT'L J. CONST. L. 380, 418 (2004) (asserting that the principles of legality must be respected and that they are non-derogable even during emergency situations and times of armed conflict); Hernan Montealegre, Conference: *The American Red Cross-Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U. L. REV. 41, 46 (1983) (providing that a State has no right to derogate from the principles of legality and the non-retroactivity of criminal laws).

171. *See* S.I.S.T, arts. 11-13, *supra* note 2, at 236–42 (extending the jurisdiction of the IST over genocide, war crimes, and crimes against humanity); *see also* Bassiouni, *supra* note 2, at 373 (holding that Article 11, 12 and 13 of the IST Statute give jurisdiction to the IST over the three "core crimes," namely, genocide, crimes against humanity, and war crimes); Newton, *supra* note 45, at 879 (positing that Articles 11, 12 and 13 of the statute give the tribunal competence to prosecute genocide, crimes against humanity, and war crimes respectively).

172. *See* 2187 U.N.T.S. 3, *supra* note 146, arts. 6-8 (stating the definitions of genocide, crimes against humanity, and war crimes); *see also* Bassiouni, *supra* note 2, at 373–74 *(*"The Statute defines the three core crimes identically to the definitions contained in the ICC statute, though without establishing a foundation for their application under Iraqi law."); Symposium, *Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE L. REV. 1, 6 (2004) (claiming that the IST Statute literally copied the definitions of the three "core crimes" as stated in the ICC statute).

173. *See* Bassiouni, *supra* note 2, at 373–74 (claiming that the IST's "approach on its face violates the principles of legality, since these crimes are not covered in the 1969 Criminal Code"); *see also* Malekian, *supra* note 37, at 681–90 (asserting that the IST Statute is problematic because it mentions provisions that were not part of the ICC and adding that the statute may be challenged by Saddam on the grounds that it applies ex post facto laws); Yuval Shany, *Does One Size Fit All?*, 2 J. INT'L CRIM. JUST. 338, 339 (2004) (mentioning that the IST Statute has sentencing policies with no equivalents under Iraqi law).

Criminal Code,[174] nor were they separately promulgated in another national legislation published in the Official Gazette of Iraq as required under Iraqi law[175]

Article 24(c) of the statute provides that the penalty for any crimes under Articles 11 through 13, which do not have a counterpart under Iraqi law, shall be determined by the Trial Chambers, taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person, and the relevant international precedents.[176] This delegation of legislative power by the IST to the judges in determining penalties for crimes under Articles 11 through 13 of the statute expressly conflicts with the principles of legality.[177]

III. A Hybrid Court As an Alternative to the IST

A. What Is a Hybrid Court?

Many post-conflict states have seen the need for adjudication mechanisms that require international judges to serve on criminal tribunals with their domestic counterparts in order to

174. *See* Penal Code, No. 111 (1969) (Iraq), *available at* http://www.iraq-ist.org/en/docs/IraqiPenalCode of1969.doc (detailing and setting forth criminal acts under Iraqi law but making no mention of genocide, war crimes and crimes against humanity); *see also* Malekian, *supra* note 37, at 714 (asserting that there are no provisions for genocide, war crimes, and crimes against humanity in the criminal law of Iraq). *See generally* Newton, *supra* note 45 (holding that principles of criminal law contained in the Iraqi Criminal Code of 1969 shall be applicable to one prosecuted under the IST Statute).

175. *See* Bassiouni, *supra* note 2, at 375 (stating that the IST does not satisfy the principles of legality since the three crimes are not part of national law published in the Official Gazette); *see also Text of Iraqi Decree on Kuwait United Press International,* UNITED PRESS INT'L, Nov. 10, 1994, at 1 (last visited Feb. 19, 2005) (holding that the court's decree to be implemented must be published in the Official Gazette). *See generally* Steve Inskeep, *Patricia discusses the types of procedures that should be used in any trial of Saddam Hussein*, NAT'L PUB. RADIO, Dec. 14, 2003 (revealing the uncertainty of whether Saddam will be tried for crimes defined in the 1969 Iraqi Criminal Law or for the international crimes of genocide, crimes against humanity, and war crimes, thus indicating that genocide, war crimes and crimes against humanity are not part of the 1969 Penal Code).

176. *See* S.I.S.T., art. 24, *supra* note 2, at 245–46 ("[T]he penalty for any crimes under Articles 11 to 13 which do not have a counterpart under Iraqi law shall be determined by the Trial Chambers taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and the relevant international precedents."); *see also* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 610 n.23 (2005) (mentioning that under Article 24(e) of the IST Statute the penalties for crimes that have no equivalent under Iraqi law shall be determined by taking into consideration the gravity of the crime, the individual circumstances of the convicted person, and the relevant international precedents). *See generally* Symposium, *Justice in Cataclysm Criminal Trials in the Wake of Mass Violence: Article: Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997) (referring to the IST Statute for the former Yugoslavia and reporting that Article 24 says that the Trial Chambers should take into account the gravity of the offense and the individual circumstances of the convicted person in setting penalties).

177. *See* Bassiouni, *supra* note 2, at 378 ("The delegation of legislative power by the IST to the judges to determine penalties for crimes under Articles 11 through 13 of the statute expressly conflicts with the principle that there can be no penalty without an expressed provision in the law."). *See generally* Shahabuddeen, *supra* note 140 (holding that the principle of *nulla poena sine lege*, which prohibits punishment of a person if the law does not prescribe punishment, is a component of the principles of legality); International Criminal Court, *supra* note 163 (maintaining that the principles of legality include the principles of *nullum crimen sine lege* and *nulla poena sine lege*, of which the latter means that there can be no punishment without law prescribing such punishment).

enhance the tribunal's credibility.[178] Therefore, a recent legal development in seeking justice for international atrocities in post-conflict situations has been the hybrid tribunal.[179] The hybrid tribunal was first created in response to the criticisms of both international ad hoc tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and purely domestic courts.[180] As stated by Laura A. Dickinson:

> Hybrid courts are courts in which both the institution and the applicable law consist of a blend of the international and the domestic: foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries; and at the same time, the judges apply domestic law that has been reformed to include international standards.[181]

Hybrid courts are emerging enforcement mechanisms of international criminal law that generally have been used in post-conflict situations where no viable judiciary exists, either because the judiciary is too politically charged to deliver fair trials or because the judiciary's

178. *See* Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1069 (2003) (referring to the enhanced legitimacy of using international judges and prosecutors in the eyes of the local population and the international community); *see also* Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 296 (2003) (stating that there are advantages and disadvantages with hybrid courts, such as their legitimacy, their ability to establish rule of law and human rights norms) [hereinafter *The Promise of Hybrid Courts*]. *See generally* Debate, *supra* note 114 (indicating that international judges alone are falsely seen as more legitimate than having local judges in administering fair trials).

179. *See* Gersh, *supra* note 29, at 280–81 (explaining that the hybrid tribunal is a new means of addressing human rights violations and achieving justice); *see also* Bâli, *supra* note 26, at 465 n.107 (positing that hybrid tribunals operate through a combination of international expertise, impartiality, and legitimacy to solve conflict situations). *See generally* Anthony O'Rourke, Note, *The Writ of Habeas Corpus and the Special Court for Sierra Leone: Addressing an Unforeseen Problem in the Establishment of a Hybrid Court*, 44 COLUM. J. TRANSNAT'L. L. 649, 685 n.158 (2006) (maintaining that there have been proposals for hybrid tribunals in Iraq, Cambodia, and the Congo).

180. *See* Stephanie H. Bald, Note and Comment, *Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?*, 18 AM. U. INT'L. L. REV. 537, 561 (2002) (commenting that the hybrid tribunal in Sierra Leone is in response to the successes and failures of the ICTY and ICTR); *see also* Patricia M. Wald, Book Review, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, 99 AM. J. INT'L L. 720, 724 (Richard B. Bilder ed., A&M University Press, 2004) (2005) (indicating that the many problems with the ICTY are being rectified by the hybrid tribunals, such as the purely international judges, the outreach programs being too late and too traditional, the westernization of the tribunal, and the lack of reconciliation). *See generally* Rosanna Lipscomb, Note, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182 (2006) (stating that purely domestic courts are ineffective in establishing fair trials and purely international courts include the ICC and ad hoc tribunals, but hybrid tribunals are a blend of these two forms of adjudication).

181. *See* Symposium, *Diversity or Cacophony?: New Sources of Norms in International Law: International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 976–77 (2004) (indicating that hybrid tribunals are models by which national and international legal systems are influencing each other, whereby the international system may include local judges, prosecutors and procedures to make it a more unified system); *see also* Brady Hall, Symposium, *Using Hybrid Tribunals As Trivias: Furthering the Goals of Post-Conflict Justice while Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal*, 13 MICH. ST. J. INT'L L. 39, 45–46 (2005) (demonstrating that "hybrid" courts are a combination of international and local law where judges are both international and local); *The Promise of Hybrid Courts*, *supra* note 178, at 295 (showing that "hybrid" courts blend international and domestic law together where foreign and domestic judges sit together in adjudicating trials).

infrastructure was destroyed during conflict.[182] The essential purpose of a hybrid tribunal is to prosecute those responsible for crimes against humanity, war crimes, and other serious violations of international humanitarian law while addressing some of the problems and criticisms faced by purely international tribunals.[183] Such criticisms include cost, a failure to help rebuild the local judiciary, and a legitimacy deficit from the perspective of civilians who are supposed to be made whole by the proceedings.[184]

In theory, hybrid tribunals combat the limitations of purely domestic or international tribunals, most notably problems of capacity-building[185] and of achieving both domestic and international legitimacy.[186] International tribunals have been criticized for not doing more to rebuild the local judiciary, while analysts have questioned the ability of local institutions to issue fair verdicts when trying members of an ousted regime.[187]

182. *See The Promise of Hybrid Courts*, *supra* note 178, at 302 (showing that in Sierra Leone, Kosovo, and East Timor, it was difficult for local courts to administer fair trials); *see also* Gersh, *supra* note 29, at 280–81 (arguing that new democracies may not be able to administer fair trials because they are too politically charged); Lipscomb, *supra* note 180, at 182–83 (mandating that purely domestic prosecutions are difficult because of the issue of fair trials).

183. *See* David M. Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts*, 37 CASE W. RES. J. INT'L L. 1, 2 (2005) (showing the hybrid tribunals are a political compromise to prosecute those violators of war crimes, crimes against humanity, and other serious violations of international humanitarian law); *see also The Promise of Hybrid Courts*, *supra* note 178, at 298 (stating that hybrid tribunals were established to prosecute "serious crimes," defined as "war crimes, crimes against humanity, and genocide, as well as murder, sexual offenses and torture . . ."); Gersh, *supra* note 29, at 281 (addressing that the essential purpose of the hybrid tribunal is to prosecute crimes against humanity, war crimes, and other serious violations of international humanitarian law, while also referring to problems of purely international tribunals).

184. *See The Promise of Hybrid Courts*, *supra* note 178, at 305–08 (charging that purely domestic or international courts may fail to promote local capacity building, while hybrid courts may address these problems); *see also* Gersh, *supra* note 29, at 281–82 (stating that the criticisms of purely international tribunals include costs, failure to rebuild the local judiciary, and a failure to make those violators whole again); Daryl A. Mundis, Note and Comment, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142, 142 (2005) (arguing that criticisms of the international tribunals are their costliness and slow implementation of justice).

185. *See* Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENV. J. INT'L L. & POL'Y 23, 36 (2002) (showing that the failure of purely domestic and international courts is the problem in capacity-building) [hereinafter *Transitional Justice in Afghanistan*]; *see also* Gersh, *supra* note 29, at 273–74 (offering that hybrid tribunals address problems of capacity building found in purely domestic or international courts); Lipscomb, *supra* note 180, at 193–94 (indicating that problems with purely international courts include lack of capacity building).

186. *See Transitional Justice in Afghanistan*, *supra* note 185, at 33 (stating that hybrid tribunals have greater legitimacy than purely domestic or international courts). *See generally* Lipscomb, *supra* note 180 (explaining that this dual system will help establish accountability as in purely domestic processes, and will be impartial as in purely international processes). *But see* Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301, 313 (2003) (arguing that problems of legitimacy may still exist with hybrid tribunals).

187. *See Transitional Justice in Afghanistan*, *supra* note 185, at 30, 35 (exemplifying that problems with the local judiciary were evident from the international tribunal for Kosovo and under the Timorese system, where only limited autonomy was supported by the individuals to be tried, and questions about fairness of trials was at issue); *see also* Gersh, *supra* note 29, at 273–74 (stating that international tribunals have not done as much as anticipated, and local processes also have their own problems); Lipscomb, *supra* note 180, at 195–96 (indicating that international tribunals have not done much to build the local judiciary).

Hybrid courts combine international and domestic legal personnel and law and fall somewhere between ad hoc tribunals and purely domestic courts.[188] The courts have been created in East Timor, Kosovo, and Sierra Leone, and they may operate in Cambodia.[189] A hybrid court for Iraq, similar to those mentioned, is also permitted under the Tribunal Statute, which authorizes the IGC or the newly-elected Iraqi government to appoint international judges.[190]

B. The Kosovo and Sierra Leone Hybrid Courts

In Kosovo, the U.N. created a hybrid court comprised of both international and national judges to punish less high-profile offenders that the ICTY did not have the capacity to prosecute.[191] Few Serbian judges would serve on the court, meaning that the Kosovar Albanian majority dominated the court.[192] Although one international judge presided over the trials, the Albanian judges could outvote the international judge and, as a result, the court lost credibility.[193] Eventually, this problem led the U.N. to reform the Kosovar judiciary so that by

188. *See* William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 753 (2003) (indicating that hybrid tribunals are often created in situations where a pure international system is not feasible, nor is a pure domestic system because of the complexity of the cases); *see also* Gersh, *supra* note 29, at 281 (demonstrating that hybrid tribunals are a blend of both international and domestic processes employing actors from both sectors); Lipscomb, *supra* note 180, at 205 (attempting to combine strengths of both the international tribunals and local courts are what hybrid tribunals are).

189. *See The Promise of Hybrid Courts*, *supra* note 178, at 295 (displaying that hybrid tribunals have been created in East Timor, Kosovo, and Sierra Leone, while one has been agreed to be implemented in Cambodia); *see also* Thomas D. Grant, *Agora (Continued): Future Implication of the Iraq Conflict: The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 823, 828 (2003) (showing that hybrid international tribunals have been created in East Timor and Cambodia); Wald, *supra* note 180, at 724 (holding that hybrid courts have sprung up in Rwanda, East Timor, Cambodia and Sierra Leone).

190. *See* S.I.S.T., art. 4(d), *supra* note 2, at 232 (holding that the governing council may appoint international judges to the courts); *see also* Zagaris, *supra* note 66, at 9 n.29 (holding that a hybrid tribunal is a potential possibility for Iraq); CNN Live Sunday: *Iraqi Governing Council Wants to Try Hussein* (Dec. 14, 2003), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0312/14/sun.08.html (quoting Paul Van Zyle, director for country programs at the International Center for Transition Justice, for his belief that the Iraqi trials should blend Iraqi ownership and control with international expertise).

191. *See The Promise of Hybrid Courts*, *supra* note 178, at 297 (addressing accountability issues by allowing foreign judges to sit alongside domestic judges in local Kosovo courts to prosecute those responsible for committing atrocities); *see also* Gersh, *supra* note 29, at 295 (demonstrating that purely domestic courts with Albanian judges led to judgments being thrown out by hybrid tribunals because of the lack of due process). *See generally* Hall, *supra* note 181 (claiming that the ICTY has done all it can to bring justice for the most egregious crimes and that the lower cases left should be transferred to local courts, although problems of capacity and legitimacy exist for the local courts).

192. *See Transitional Justice in Afghanistan*, *supra* note 185, at 34 (claiming that Serbian judges refused to serve on the court and therefore, mostly Albanian judges were appointed); *see also The Promise of Hybrid Courts*, *supra* note 178, at 302 (stating that it was easier to appoint Albanian judges onto the court since Serbian judges generally refused to serve on the court); Stahn, *supra* note 31, at 328 (indicating that at first a group of local judges was appointed who controlled the Kosovo courts, but then fifty-four judges were appointed that were mostly Albanian).

193. *See Transitional Justice in Afghanistan*, *supra* note 185, at 34 (mandating that problems of due process and insufficient evidence led to judgments by the Albanian-majority judges to be thrown out); *see also* Goldstone, *supra* note 27, at 1501 (holding that initially only local Kosovo judges were appointed, but soon their bias was revealed and one international judge was appointed, which did not help the situation much since that international judge sat with two other local judges who were able to outvote him). *But see* Hall, *supra* note 181, at 68 (stating that international judges that sit alongside their domestic counterparts help to enhance legitimacy locally).

December 2000, a majority of international judges presided over the court.[194] The hybrid court generated verdicts that were supported by both Serbs and Albanians.[195]

In August 2000, the government of Sierra Leone and the U.N. established the Special Court for Sierra Leone ("SCSL"), "to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone."[196] As part of the agreement between the U.N. and the government of Sierra Leone establishing the court, two international judges selected by the U.N. Secretary-General and one Sierra Leonean judge appointed by the government of Sierra Leone would preside over the court's proceedings.[197]

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194. *See The Promise of Hybrid Courts*, *supra* note 178, at 297–98 (showing that initially because international judges were not the majority on the panel of judges, they had minimal impact until this situation was rectified in December 2000); *see also* Stahn, *supra* note 31, at 328 (fearing ethnic bias when only local Albanian judges were appointed forced UNMIK to assign international judges and prosecutors to the Kosovo judiciary); Wladimiroff, *supra* note 44, at 953 (speaking about internationalized panels of judges as another variation of courts where local Kosovo judges sit together with international judges and hear cases).

195. *See The Promise of Hybrid Courts*, *supra* note 178, at 306 (noting that the presence of international judges on the ICTY increased the Serbian population's support of its verdicts). *See generally* Hall, *supra* note 181 (stating that the legitimacy of the tribunals is strengthened by the presence of international judges as their presence acts to undermine suspicions of impartiality). *But see* Doebbler & Scharf, *supra* note 61, at 30–31 (arguing that the presence of international judges did not strengthen the legitimacy of the tribunal's verdicts as evidenced by a poll, which indicated that an overwhelming number of Serbs thought the international judges on the ICTY were biased).

196. *See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR at 1, U.N. Doc. S/2000/915 (2000) (stating that the U.N. Security Council passed resolution 1315 on Aug. 14, 2000, requesting that the Secretary-General "negotiate an agreement with the Government of Sierra Leone to create an independent special court"); s*ee also* Daryl A. Mundis, *Current Development: New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 935–36 (2001) (detailing the process through which the Special Court for Sierra Leone was created and noting that the Special Court has the power to prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law"). *But see* Ambassador Richard S. Williamson, *Transitional Justice: The U.N. and the Sierra Leone Special Court*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 7–8 (2003) (noting that on Jan. 16, 2002, the government of Sierra Leone and the United Nations signed an agreement establishing the Special Court).

197. *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.–Sierra Leone, art. II, Jan. 16, 2002, *available at* http://www.specialcourt.org/documents/Agreement.htm (last visited Feb. 20, 2006) (declaring that one domestic judge shall be appointed by the government of Sierra Leone and that two international judges shall be appointed by the Secretary-General); *see also* Burke-White, *supra* note 188, at 754 (commenting on how international judges would be appointed by the Secretary-General, and that in order to promote regionalism, preference would be given to those from member states of the Economic Community of West African States). *See generally War Court Judges for Sierra Leone Take Their Oaths*, N.Y. TIMES, Dec. 3, 2002 (reporting that the Special Court for Sierra Leone consists of two judges from Sierra Leone and six international judges from Britain, Canada, Austria, Nigeria, Gambia and Cameroon).

In June 2003, the SCSL indicted Liberian President Charles Taylor for war crimes related to his role in the Sierra Leonean war.[198] Remarkably, this was the first time a sitting head of state had been indicted for war crimes.[199] In March 2003, the SCSL court also arrested Sam Hinga Norman, former Minister of State Security for Sierra Leone, on charges of crimes against humanity.[200] Norman's arrest was significant because it demonstrated that even "a victor could be held to the same standards as the defeated."[201] As a result of its accomplishments, the SCSL has been successful in commanding respect in Sierra Leone and the international community.[202]

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198. *See* Jonathan H. Marks, *Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council*, 42 COLUM. J. TRANSNAT'L L. 445, 484–85 (2004) (discussing how the indictment of Charles Taylor by the Special Court of Sierra Leone contributed to his peaceful departure from office); *see also* Eric Pape, *Sierra Leone's War Crimes Tribunal Defied History by Going After the Victors, Not Just the Losers, in the Country's Civil War*, 2003 LEGAL AFF. 69, 71 (2003) (listing some of the seventeen counts contained in the Special Court of Sierra Leone's indictment of Charles Taylor); Davan Maharaj, *Liberian President Is Sought on War Crimes Indictment; Charles Taylor Stands Accused in Connection with a Terror Campaign in Sierra Leone. He Reportedly Leaves Peace Talks in Ghana.*, L.A. TIMES, June 5, 2003, at 3 (reporting that the prosecutors for the Special Court revealed the tribunals' indictment of Charles Taylor while Taylor was visiting Ghana to engage in negotiations with rebel forces of Liberia).

199. *See* Pape, *supra* note 198, at 71 (remarking on the significance of Charles Taylor being the first seated head of state indicted by an international war crimes tribunal). *See generally* Bruce M. MacKay, *"The Role of Justice in Building Peace": A View from the Trenches: The Special Court for Sierra Leone—The First Year*, 35 CASE W. RES. J. INT'L L. 273 (2003) (stating that the Special Court's indictment of Charles Taylor rendered moot the once debated question of whether an international tribunal could indict a sitting head of state). *But see* Tikkun A. S. Gottschalk, *The Realpolitik of Empire*, 13 J. TRANSNAT'L L. & POL'Y 281, 297 (2003) (noting that Slobodan Milosevic was the first sitting head of state to be indicted by an international tribunal for war crimes committed while in office).

200. *See* Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa, Case No. SCSL-03-14-I, Indictment, (Feb. 4, 2004), *available at* http://www.sc-sl.org/indictment-CDF.html (last visited Feb. 20, 2006) (charging Sam Hinga Norman with the following counts: murder; violence to life, health and physical or mental well-being of persons; inhumane acts; cruel treatment; pillaging; acts of terrorism; collective punishments; and enlisting children into the armed forces); *see also* Pape, *supra* note 198, at 69 (describing the manner in which Sam Hinga Norman, then current minister for state security of Sierra Leone, was arrested and transported into the custody of the Special Court for Sierra Leone); Somini Sengupta, *World Briefing Africa: Sierra Leone: U.N. Court Indicts 7,* N.Y. TIMES, Mar. 11, 2003, at A4 (reporting that Sam Hinga Norman was indicted by the Special Court of Sierra Leone and charged with crimes against humanity).

201. *See* Pape, *supra* note 198, at 69 (commemorating the Special Court for its indictment and prosecution of Sam Hinga Norman, a sitting member of the Sierra Leone government, who helped bring an end to the country's civil war); *see also* Kate Kerr, Note, *Fair Trials at International Criminal Tribunals: Examining the Parameters of the International Right to Counsel,* 36 GEO. J. INT'L L. 1227, 1240 (2005) (noting that unlike other international tribunals the Special Court for Sierra Leone, in indicting persons like Sam Hinga Norman, has "targeted suspects from all sides of the conflict, even the victorious"). *See generally* Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436 (2002) (remarking on the difficulties with which the Special Court of Sierra Leone would be faced in deciding whether to prosecute the victorious Komajor soldiers).

202. *See* Tarin, *supra* note 38, at 520 (commenting on how the indictment of Charles Taylor and the arrest of Sam Hinga Norman led to increased international and domestic respect for the Special Court for Sierra Leone). *See generally* Pape, *supra* note 198 (reporting that the arrest of Sam Hinga Norman reassured Sierra Leoneans that even the victors would be held responsible for their engagement in war crimes). *But see* James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L. J. 616, 642 (2005) (indicating that many Sierra Leoneans were not supportive of the indictment of Sam Hinga Norman).

C. A Hybrid Court in Iraq

It is entirely possible, if not desirable, to afford an expanded role to international jurists and prosecutors in the IST proceedings while minimizing the role of U.S. advisers.[203] This would bring the IST closer to achieving the model of a hybrid international-local tribunal, as best exemplified by the SCSL.[204] Under such a model, the tribunal would allow Iraqi judges and prosecutors to work side by side with leading international judges and lawyers with expertise and experience drawn from previous war crimes prosecutions.

Iraqi jurists have already expressed a need for an increased role by international jurists. At a recent training session held in London for Iraqi judges on the IST, the judges themselves cited concerns that they had little grasp of what one judge called "this whole new body of law," in reference to the complexities of international law used to deal with mass killings and genocide.[205]

Proponents of hybrid courts cite the many advantages, such as decreased costs, legitimacy, and the goal of capacity-building, as evidence of the superiority of hybrid courts over purely international or domestic tribunals.[206] These advantages, coupled with the problems associated

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203. *See* Bâli, *supra* note 26, at 458 (arguing that the expertise of international jurists will be needed to ensure effective prosecutions and to negate the perception that the IST is nothing more than the United States "preparing show trials for the Ba'ath regime"). *See generally* Gersh, *supra* note 29 (noting that many organizations have argued for the mandatory appointment of international jurists and prosecutors to the IST); Niko Price, *Iraq Plans to Hold War Crimes Trials*, VENTURA COUNTY STAR (California), Dec. 6, 2003 (reporting that several human rights organizations have voiced concern over both the extensive involvement of the United States in the Iraqi tribunal and the lack of experience amongst Iraqi jurists and prosecutors in trying international cases).

204. *See* John F. Burns & Somini Sengupta, *Much at Stake in an Iraq Trial*, N.Y. TIMES, July 1, 2004, at A1 (explaining that the IST's lack of international judges and prosecutors is one of the remarkable differences that exists between the tribunal and the Special Court of Sierra Leone); *see also* Diane Orentlicher, *International Justice Can Indeed Be Local*, WASH. POST, Dec. 21, 2003, at B5 (noting that unlike the hybrid courts that require the appointment of international judges, the statute creating the IST "requires that judges, investigative judges, prosecutors and the administrative head of the court be Iraqi nationals"). *See generally* Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J INT'L L. 1 (2005) (stating that hybrid tribunals, like the Special Court for Sierra Leone, include international as well as national judges).

205. *See* Simons, *supra* note 93, at A11 (quoting statements made by Iraqi jurists at a training session organized by the United States). *See generally* Bâli, *supra* note 26 (stating that several Iraqi jurists have requested additional international support, training, and advice to help them better understand international human rights law); Hodgkinson, *supra* note 33 (noting that Iraqi judges and prosecutors are aware that they will need international assistance to facilitate the competent fulfillment of their duties on the IST).

206. *See* Gersh, *supra* note 29, at 282 (listing the asserted advantages of hybrid courts over local and purely international tribunals); s*ee also* Varda Hussain, Note, *Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals*, 45 VA. J. INT'L L. 547, 569–71 (2005) (examining the hybrid tribunals superior ability to aid in the capacity-building of domestic legal systems); Suzanne Katzenstein, Note, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 245–46 (2003) (discussing how the creation of the hybrid tribunal stems from an attempt to obtain the benefit of the ad hoc tribunals' perceived legitimacy with the benefits of the local prosecution's effective capacity building, and cost efficiency).

with having Iraqis conduct these trials, lead to the conclusion that justice would be better served by a hybrid tribunal instead of the IST.[207]

Conclusion

Numerous legal, ethical, and political questions have been raised in the wake of the U.S.-led coalition's invasion of Iraq in 2003. This article does not presume to discuss the legal and ethical implications of the invasion itself, or the conflict that resulted. Rather, the issues raised here focus on the responsibilities of an occupying force, the transitional rule of law, and the legally acceptable methods used to administer justice to former heads of state.

As an occupying power, the U.S.-led coalition was bound by The Hague Convention of 1907 and the Geneva Convention of 1949.[208] One of the coalition's obligations was to transfer power *in fact* to its occupant. As we have seen, however, the creation of the IGC as a transitional government was more like a transfer of title, with the U.S. and its agents retaining power.[209]

In addition to the missteps taken in creating a transitional government, the creation of the IST demonstrated the coalition's blatant disregard for international legal principles. The creation of the IST was likely a good faith effort to allow the Iraqis to administer their own justice in post-Saddam Iraq. What has resulted, however, is a tribunal that lacks legitimacy in Iraq, in the Middle East, and in the international community.[210] The trial of Saddam Hussein before the IST is nothing more than a show trial to some people.[211]

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207. *See* Bassiouni, *supra* note 2, at 342–43 (stating that the majority of experts who met to discuss the form that the IST should take preferred an international-local model as exemplified by the SCSL over a national Iraqi tribunal); *see also* Gersh, *supra* note 29, at 301–02 (remarking that the legitimacy of the IST and the competency of its judges would be improved if, like the hybrid tribunals, international jurists were permitted to participate in the trials); Jonathon Marks, Op-Ed., *ICC Trial Won't Work*, THE NEWS & OBSERVER (North Carolina), Dec. 28, 2003, at A22 (concluding that the IST should be a hybrid court modeled after the SCSL as it would permit Iraqi nationals to participate while also permitting international jurists to lend their expertise).

208. *See* Benvenisti, *supra* note 99, at 860 (noting that the British and American troops in Iraq have been recognized by the U.N. Security Council as occupying forces subject to the Hague Regulations of 1907 and the Geneva Convention of 1949); *see also* Brett H. McGurk, *A Lawyer in Baghdad*, 8 GREEN BAG 51, 51–52 (2004) (discussing the impact of occupational law upon the legal environment of occupied Iraq); *Eviatar, supra* note 10, at B3 (recognizing the inherent conflict of the coalition forces' goal of constructing a free-market economy within Iraq while remaining in compliance with the Hague Regulations of 1907).

209. *See* Fox, *supra* note 15, at 206–07 (stating that the CPA retained "all executive, legislative and judicial authority necessary to achieve its objectives" while the IGC served a "purely advisory role"). *See generally* Ryan Frei, *Extracting Oil from Turmoil: The Iraqi Oil Industry and Its Role as a Promising Future Player in the Global Energy Market*, 4 RICH. J. GLOBAL L. & BUS. 147 (2004) (noting that the Governing Council is not a "fully functioning, influential political entity"); Rajiv Chandrasekaran, *U.S. to Appoint Council in Iraq; Officials Decide Not to Allow Large Assembly to Pick Interim Leaders,* WASH. POST, June 2, 2003 (reporting on the Bush administration's decision to appoint rather than to permit the election of persons to the IGC, which would serve as an advisor to the CPA).

210. *See supra* Part II.A.

211. *See* Awadh Al-Taiee, et. al., *Saddam's Family Rebuilds Defence Team Troubles in the Ousted Iraqi Ruler's Legal Team Mirror Upheavals at the Court that Will Try Him Writes Neil MacDonald*, FIN. TIMES (London), Aug. 10, 2005, at 9 (stating that thousands of Arab lawyers have rallied around Saddam during his "show trial"); *see also* Russell Miller, *National Lampoon*, SUNDAY TIMES (London), Sept. 4, 2005, at 34 (contending that this trial is just a show); Peter Quayle, *What Chance Has Saddam of a Fair Trial?*, TIMES (London), Oct. 25, 2005, at 4 (declaring that even the pre-trial IST has shown to involve "sketchy" processes).

Aside from the legitimacy in the world of public opinion, there are deeper issues to consider. The S.I.S.T. violates the principles of legality.[212] These principles are inherent in every legal system in the world, and are a part of customary international law. In addition, the IST violates the Principles of Independence of the Judiciary, the Geneva Convention, the Hague Convention, and the ICCPR.[213]

The S.I.S.T. states that the IST is an independent entity, yet the IST itself was created by the CPA.[214] The CPA was headed by former U.S. viceroy Paul Bremer.[215] The CPA issued C.P.A.O. Number 48, which contained the S.I.S.T., on December 9, 2003.[216] Not surprisingly, the IGC adopted C.P.A.O. Number 48 on December 10, 2003.[217] It should be noted that the IGC consists of members *hand-picked* by Mr. Bremer.[218] In turn, Mr. Bremer reserved veto power over any and all IGC decisions and orders.[219]

It is a fallacy to say that the IST is an independent entity created by a sovereign Iraqi government. In reality, the IST was created by the United States and its coalition partners.[220] The coalition hand-picked the judges, trained them, provided prosecutors, investigators, and $75 million in funding.[221] This violates the Geneva Conventions of which the United States and Iraq are both parties.[222]

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212. *See supra* Part II.A.

213. *See* Bassiouni, *supra* note 2, at 363–66 (illustrating various aspects of the IST that violate international human rights' norms); Koenig, *supra* note 127, at 725–27 (discussing the United Nations' adoption and characteristics of an independent judiciary standard); *see also* Pastujova, *supra* note 97, at 211–12 (claiming that the U.S. has violated several provisions of the Geneva Conventions in its Iraqi occupation).

214. *See* Bassiouni, *supra* note 2, at 345 (stating that the IST was drafted by the Governing Council and the CPA); *see also* Kelly, *supra* note 46, at 1002 (noting that the CPA drafted the S.I.S.T. and thereby created a domestic Iraqi court); Newton, *supra* note 45, at 864 (commenting that the CPA and Governing Council drafted the IST Statute after months of debate and consideration).

215. *See supra* note 5 and accompanying text.

216. *See* C.P.A.O. Number 48, *supra* note 4 (providing a translation of the original document, including the IST Statute as an appendix); *see also* Malekian, *supra* note 37, at 723 n.82 (noting that the CPA established the IST by C.P.A.O. Number 48 on Dec. 10, 2003); *The Former Iraqi Government on Trial: A Human Rights Watch Briefing Paper*, Oct. 16, 2005, at 3, *available at* http://www.hrw.org/backgrounder/mena/iraq1005/ (revealing that the IST Statute was promulgated as an order of the CPA on Dec. 10, 2003).

217. *See* Colum Lynch, *U.N. Refuses to Assist Iraqis with War Crimes Trials*, WASH. POST, Oct. 23, 2004, at A18 (reporting that the U.S.–appointed IGC was responsible for establishing the tribunal in December 2003); Tarin, *supra* note 38, at 472–73 (stating that the IGC issued C.P.A.O. Number 48 to the Iraqi people on Dec. 10, 2003); *see also Trial of Saddam Hussein*, *supra* note 44 (finding that the IGC signed C.P.A.O. Number 48 on Dec. 10, 2003).

218. See *supra* note 41 and accompanying text.

219. *See* Bâli, *supra* note 26, at 441 (criticizing the orders of Paul Bremer to be in sharp conflict with the country's fundamental laws); *see also* Owen Bonheimer, *The Duty to Prevent Waste of Iraqi Assets During Reconstruction: Taming Temptation through ICJ Jurisdiction*, 34 PUB. CONT. L.J. 673, 680 n.33 (2005) (citing the authority given to Bremer to have the ultimate decision-making power during the occupation); Fox, *supra* note 15, at 206 n.47 (quoting from a newspaper article Bremer's veto power).

220. *See supra* notes 41-42 and accompanying text.

221. *See id.*

222. *See supra* Part II.B.

A more desirable alternative to the IST would be a hybrid court. Similar courts have been formed in Sierra Leone and Kosovo, and have received glowing praise.[223] Hybrid courts have the advantages of lower financial burdens and greater domestic and international legitimacy.[224] Most, if not all, of the problems plaguing the IST would not arise should a hybrid court be realized.

There is no perfect solution to implementing a transitional rule of law in Iraq. Obviously, the IST will not be abandoned, at least not in the foreseeable future. At some point Iraq will have to rebuild its entire judicial infrastructure, and perhaps the IST is a good start. However, fundamental changes need to be made. Once a constitution is passed and the Iraqi government, whatever its form, takes hold, the IST and the resulting judiciary will need to be amended to conform with internationally recognized legal principles. In the meantime the IST, in its current form, will carry on unchallenged.

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223. *See* William W. Burke-White, *International Legal Pluralism,* 25 MICH. ST. J. INT'L L. 963, 976–77 (2004) (reporting that the hybrid courts in Sierra Leone and Kosovo represent a system in which national and international law systems are communicating and influencing one another and are more intertwined than ever before); *see also The Promise of Hybrid Courts*, *supra* note 178, at 306 (discussing that the hybrid courts in Sierra Leone, Kosovo, and East Timor offer some responses to the problems with other tribunals of legitimacy, capacity, and norm-penetration); Ivan Simonovic, Comment, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses,* 29 YALE J. INT'L L. 343, 359 (2004) (explaining that the hybrid courts used both in Sierra Leone and Kosovo involve both national and international judges and help strengthen the national system, making the work of the court go faster as the local judges eliminate some of the obstacles that are present when there are only foreign judges).

224. *See* Gersh, *supra* note 29, at 281 (stating that hybrid courts apply a mixture of domestic and international law with panels of international and local judges, with the purpose of prosecuting those who have committed crimes that violate international humanitarian law while addressing some of the problems faced by purely international tribunals); *see also* Hall, *supra* note 181, at 57–8 (asserting that hybrid courts eliminate problems of legitimacy of other tribunals by offering both international and domestic judges and law, making the proceedings appear more legitimate and less suspicious to the local people and local government); Tarin, *supra* note 38, at 518 (explaining that hybrid courts have the outside legitimacy of international courts and the national legitimacy of domestic courts and are more cost effective as they share resources with the funds provided by the international community and the state, needing less funds as they make use of domestic judicial infrastructure).

Banco Central de Paraguay v. Paraguay Humanitarian Found., Inc.

2005 U.S. Dist. LEXIS 26093 (S.D.N.Y. Oct. 31, 2005)

United States District Court for the Southern District of New York dismissed with prejudice a counterclaim because the foreign defendants asserted their claim against an opposing party in a capacity that was different from that in which the party sued. The court also dismissed without prejudice a third-party complaint, holding that where service in a foreign country is necessary, a party must show due diligence in attempting service, and show good cause for failure of such service.

I. Holding

In *Banco Central de Paraguay v. Paraguay Humanitarian Found., Inc.*,[1] the United States District Court for the Southern District of New York granted plaintiff's motion,[2] dismissing with prejudice[3] the Principal Defendants' counterclaim.[4] The court's decision was based on the fact that the plaintiff commenced the action in its representative capacity[5] and that the Principal Defendants' counterclaim was against the plaintiff in its individual capacity.[6] Accordingly, the court concluded that even if it assumed the truth of the counterclaim allegations, dismissal was necessary under the Rule 13 "opposing party" requirement.[7] The court further found that the exceptions to the Rule 13 "opposing party" requirement[8] did not apply in this case, because

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1. 2005 U.S. Dist. LEXIS 26093 (S.D.N.Y. Oct. 31, 2005) [hereinafter *Banco Central de Paraguay II*].

2. *Id*. at *5 (stating that plaintiff's motion to dismiss was based on the grounds that the Principal Defendants impermissibly asserted claims against the plaintiff in its regulatory capacity; the Foreign Sovereign Immunities Act protects the plaintiff from being sued in its regulatory capacity; and the act of state doctrine bars the counterclaim).

3. *Id.* at *6 (indicating that the court's goal on a FED. R. CIV. P. 12(b)(6) motion to dismiss for failure to state a claim must be to consider the legal feasibility of the claim rather than to weigh the supporting evidence); *see also* Masefield AG v. Colonial Oil Indus., No. 05 Civ. 2231 (PKL), 2005 U.S. Dist. LEXIS 18787, at *2 (S.D.N.Y. Sept. 1, 2005) (commenting that in a motion to dismiss the court also accepts the counterclaiming defendants' factual allegations as true and derives all reasonable inferences in their favor).

4. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *2–4 (alleging that the plaintiff went back on its promise and never paid the funds that it agreed to pay for a project in Paraguay, which resulted in the project being blocked).

5. *Id.* at *8. Plaintiff's amended complaint states that, "The Central Bank of Paraguay, acting as the highest banking authority in Paraguay and on behalf and as assignee of Banco Union and Banco Oriental, brings this action to recover the diverted funds." *Id.*

6. *Id.* Principal Defendants' counterclaim against the plaintiff proclaims that, "as the highest banking authority in Paraguay, [Banco Central] had power to enter into a commercial or financial transaction, as alleged in the counterclaim." *Id.*

7. *Id.* at *7 (noting that under FED. R. CIV. P. 13, when a plaintiff commences an action in one capacity, the defendant may not assert a counterclaim against that plaintiff in a different capacity); *see, e.g.,* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 885 (2d Cir. 1981); Blanchard v. Katz, 117 F.R.D. 527, 528 (S.D.N.Y. Nov. 10, 1987); 3 MOORE'S FEDERAL PRACTICE § 1390[2][d] (3d ed. 2005).

8. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *7; *see also Blanchard*, 117 F.R.D. at 528 (revealing that there are exceptions to FED. R. CIV. P. 13, which include a plaintiff who has sued in a representative capacity but will gain individually from any recovery or principles of equity, and judicial economy supporting such a counterclaim).

there was no indication that Banco Central would benefit individually from a recovery of the diverted funds or that judicial economy would be achieved by permitting the counterclaim.[9]

The court also granted the third-party defendant insolvent banks' motion,[10] dismissing without prejudice[11] the Principal Defendants' third-party complaint.[12] The Principal Defendants contended that the third-party summons and complaint were sent to Paraguay for service on each of the third-party defendants, but, to date, counsel had not received proof of service.[13] The Principal Defendants did not offer an explanation for the failure of service.[14] The court analyzed the service issue under Rule 4(m),[15] and based its holding on the fact that the Principal Defendants did not show good cause for failing to serve the third-party defendants.[16]

II. Facts and Procedural Posture

In 1998, Banco Central de Paraguay[17] ("Banco Central") placed Banco Union and Banco Oriental in liquidation.[18] On March 13, 2000, a representative of both Banco Union and Banco Oriental agreed in a letter of intent to place $16 million in a Paraguayan humanitarian project.[19] As a result, during March and April 2000, both banks transferred a total of $16 million to Citibank trust accounts in New York that were maintained by Nominal Defendant Tulac.[20] After execution of a loan agreement between the banks' representatives and Principal Defendant CQZ Humanitarian Foundation, $14 million of the $16 million was diverted to Citibank accounts maintained by Principal Defendant Paraguay Humanitarian Foundation.[21]

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9. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *9.

10. *Id.* at *11 (arguing that the third-party complaint fails on Rule 12(b)(6) grounds for several reasons and on Rule 4(m) grounds because the defendant did not serve the complaint to the third-party defendants until over two and one-half years after filing it).

11. *Id.*; *see also supra* note 3 and accompanying text.

12. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *5–6 (indicating that the allegations in the Principal Defendants' third-party complaint are nearly identical to those in the counterclaim with one difference being that the complaint is against two insolvent banks and not against the plaintiff).

13. *Id.* at *11 (clarifying that the Principal Defendants did not challenge the fact that they waited over two and one-half years after filing the third-party complaint to attempt service of the third-party defendants).

14. *Id.* at *13.

15. FED. R. CIV. P. 4(m) provides:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

16. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *13.

17. *Id.* at *8 (describing Banco Central as the highest banking authority in Paraguay).

18. Banco Central de Paraguay v. Paraguay Humanitarian Foundation, No. 01 Civ. 9649, 2005 U.S. Dist. LEXIS 293, at *4 (S.D.N.Y. Jan. 7, 2005) [hereinafter *Banco Central De Paraguay I*].

19. *Id.* at *5.

20. *Id.* at *6.

21. *Id.* at *7.

Over $1 million of the $16 million was also transferred to other accounts maintained or controlled by Principal Defendants Avijos, Avila, CQZ Holding Corp., and Nominal Defendant Tulac.[22] In January 2001, the Paraguayan press reported that $16 million was missing from the two banks.[23] Although several assurances were made by Nominal Defendant Tulac to the banks' liquidators that the diverted money would be returned, the money was never returned to the banks.[24] Subsequently, the two banks assigned all their rights and claims in connection with the diverted funds to Banco Central.[25]

On November 1, 2001, plaintiff Banco Central, on behalf of, and as assignee for, the two insolvent banks, commenced an action to recover the $16 million.[26] Banco Central alleged claims for conversion and constructive trust against all defendants, and a conspiracy claim against the Principal Defendants.[27] The Principal Defendants filed an answer with affirmative defenses, a counterclaim, and a third-party complaint.[28] Banco Central moved for summary judgment on its conversion claim.[29] The Principal Defendants moved for summary judgment dismissing Banco Central's claims.[30] The court granted the assignee's motion for summary judgment as to all but one individual defendant[31] and denied the remaining motions.[32]

In this action, plaintiff Banco Central moved to dismiss the Principal Defendants' counterclaim.[33] Third-party defendants Banco Union and Banco Oriental moved to dismiss the Principal Defendants' third-party complaint.[34]

III. The Court's Analysis

A. Rule 12(b)(6) Standards

The court began its analysis by stating that the court's role on a Rule 12(b)(6) motion to dismiss for failure to state a claim[35] is to evaluate the legal feasibility of the claim, rather than to

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22. *Id.* at *6.
23. *Id.* at *8.
24. *Id*. at *9–10.
25. *Id*. at *10.
26. *Id*. at *2.
27. *Id*. Banco Central filed an amended complaint adding other Principal Defendants. *See id.*
28. *Id*. Principal Defendants filed an answer to Banco Central's amended complaint and amended affirmative defenses. *See id.*
29. *Id*.
30. *Id*. Tulac filed his answer and interpleader counterclaim, and also moved for summary judgment. *See id.*
31. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *2; *see also Banco Central De Paraguay I*, 2005 U.S. Dist. LEXIS 293, at *20–21 (explaining that the motion for summary judgment was denied with respect to Tulac because the assignee did not provide evidence that showed Tulac acted outside the scope of trust agreements that stated he had no knowledge of an investment program arranged by the holding corporation).
32. *Banco Central de Paraguay I*, 2005 U.S. Dist. LEXIS 293, at *25.
33. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *1.
34. *Id*.
35. FED. R. CIV. P. 12(b)(6).

weigh any supporting evidence that may be offered.[36] For that reason, the court's analysis consists of taking the counterclaiming defendants' factual allegations as true and drawing all reasonable inferences in their favor.[37] The court emphasized that a plaintiff's motion to dismiss would be granted only if there is no doubt that the defendants cannot show facts in support of their claim that would warrant them relief.[38]

B. Counterclaim

The Principal Defendants' counterclaim alleged that, along with agreeing to a form of 100 percent non-recourse project financing, Banco Central also agreed in writing to provide Principal Defendant CQZ Humanitarian Foundation with $114,152,088.[39] Principal Defendants claimed that even though the project financing was supposedly approved, Banco Central did not supply the funds that ultimately blocked the advancement of the project.[40] They further claimed that the two insolvent banks imposed unreasonable conditions on the funds and that Banco Central went back on its commitment.[41]

The court based its decision on an analysis of the "opposing party" requirement in FED. R. CIV. P. 13.[42] Under the "opposing party" requirement, a defendant may not assert a counterclaim against a plaintiff in a capacity different from that in which the plaintiff sued.[43] Principal Defendants contended that Banco Central stood in the shoes of the two insolvent banks and therefore, was eligible to be sued in a counterclaim.[44] Conversely, Banco Central argued that it commenced this action as an assignee of the two insolvent banks, and accordingly, Rule 13 barred any counterclaims against it in its regulatory capacity.[45] The Principal Defendants noted that Banco Central's power as the highest banking authority in Paraguay allowed it to enter into the type of financial transaction asserted in the counterclaim.[46] The court found that these allegations provided enough proof that the defendants brought the counterclaim against Banco Central in its individual capacity as a regulator.[47]

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36. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *6. *See*, *e.g.*, Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).

37. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *6; *see also* Masefield AG v. Colonial Oil Indus., No. 05 Civ. 2231 (PKL), 2005 U.S. Dist. LEXIS 18787, at *5 (S.D.N.Y. Sept. 1, 2005).

38. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *6; *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811 (1993).

39. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *3.

40. *Id.*

41. *Id.* at *4.

42. *Id.* at *7.

43. *Id.*; *see also supra* note 7 and accompanying text.

44. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *7.

45. *Id.* at *7–8. Banco Central also argued that the counterclaim should be dismissed on the ground that the Foreign Sovereign Immunities Act, 28 U.S.C.S. §§ 1602–11 (LexisNexis 2006), bars suit against it in its regulatory capacity and on the ground that the act of state doctrine blocks the counterclaim. *See id.*

46. *Id.* at *8.

47. *Id.*

The court next examined the capacity in which Banco Central commenced the action.[48] The court focused on the language used in the amended complaint, which stated that, "[t]he Central Bank of Paraguay, acting as the highest banking authority in Paraguay and on behalf and as assignee of Banco Union and Banco Oriental, brings this action to recover the diverted funds."[49] The court found that any other language characterizing Banco Central as the "highest banking authority in Paraguay" was merely descriptive and did not refer to the bank's capacity when it sued.[50]

The court concluded that since Banco Central brought this action in its representative capacity as assignee of the two insolvent banks, Rule 13 barred the Principal Defendants' counterclaim against Banco Central in its regulatory capacity.[51] With respect to the exceptions to the "opposing party" requirement,[52] the court held that the exceptions would be inapplicable in this situation.[53] There was no proof that Banco Central would benefit individually from a recovery of the diverted funds.[54] Also, there would be no service to the judicial economy by allowing the counterclaim because the third-party complaint contained the same allegations as the counterclaim.[55]

The counterclaim also sought to recover against Banco Union and Banco Oriental, even though Banco Central was the only plaintiff in the action.[56] Principal Defendants admitted that they brought the third-party complaint to guarantee that the two insolvent banks were parties to the action.[57] The court found that Principal Defendants failed to proffer evidence that would show that the two insolvent banks were opposing parties.[58] As a result, the court held that Banco Union and Banco Oriental were not opposing parties under Rule 13.[59]

C. Third-Party Complaint

The Principal Defendants' third-party complaint contained the same allegations found in the counterclaim, except that the third-party complaint was asserted against the two insolvent banks and not against Banco Central.[60] Banco Central argued that the third-party complaint

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48. *Id.*

49. *Id.*

50. *Id.* at *8–9.

51. *Id.* at *9.

52. *Id.* at *7 (acknowledging that there are exceptions to the "opposing party" requirement in FED. R. CIV. P. 13, including an instance in which the plaintiff has sued in a representative capacity but will benefit in an individual capacity or an instance in which the principles of equity and judicial economy encourage bringing such a counterclaim).

53. *Id.* at *9.

54. *Id.*

55. *Id.*

56. *Id.* at *9–10.

57. *Id.* at *10.

58. *Id.*

59. *Id.*

60. *Id.* at *5–6.

should not only be dismissed on Rule 12(b)(6) grounds, for several reasons, but also on Rule 4(m) grounds for the Principle Defendants' failure to serve the complaint on each insolvent bank until over two and one-half years after filing it.[61]

The court acknowledged that Rule 4(m) does not apply to service in a foreign country.[62] Nevertheless, the court concluded, that where service is in a foreign country, the plaintiff does not have an unlimited amount of time to achieve service, and the standard used by some courts to determine the timeliness of the service was due diligence.[63]

The court found that the Principal Defendants were not diligent in attempting to serve the third-party complaint on Banco Oriental and Banco Union.[64] The court observed that the Principal Defendants did not challenge the fact that they waited over two and one-half years after filing the third-party complaint to attempt to serve Banco Oriental and Banco Union.[65] Instead, Principal Defendants argued that they served a copy of the complaint on the law firm that represented Banco Central, and they also sent the third-party summons and complaint to Paraguay for service on Banco Oriental and Banco Union but, to date, they had not received proof of service.[66] In view of these facts, the court concluded that the Principal Defendants offered no explanation and showed no good cause for the failure of the service according to Rule 4(m).[67] The court further held that the failure to effect service of process on the two insolvent banks was a violation under FED. R. CIV. P. 12(b)(5).[68]

IV. Conclusion

The United States District Court for the Southern District of New York concluded that the plaintiff was not an opposing party under Rule 13.[69] The court based its decision on a traditional rule that a defendant may assert a counterclaim against an opposing party only in the same capacity in which that party sued. A ruling contrary to this decision would only defeat and complicate the purpose of Rule 13: to resolve all controversies arising out of the same transaction or occurrence between the parties in a single suit. The judicial system must preserve its boundaries in a pleadings setting. There will be no boundaries in the judicial system if a defending party is allowed to assert any right in opposition to the plaintiff's claims, regardless of capacity or interest. This type of decision does not prohibit the defendant from ever asserting a claim against the other party in a different capacity. It simply prevents the defendant from doing so in the context of a response. The defendant may still have the option of filing a complaint against the other party in the different capacity.

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61. *Id*. at *11.

62. *Id*. at *12.

63. *Id*.; *see also* Travers Tool Co. v. Southern Overseas Express Line, Inc., 2000 U.S. Dist. LEXIS 1582, at *5 (S.D.N.Y. Feb. 17, 2000).

64. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *13.

65. *Id*. at *11.

66. *Id*.

67. *Id*. at *13.

68. *Id*.; *see also* FED. R. CIV. P. 12(b)(5).

69. *Banco Central de Paraguay II*, 2005 U.S. Dist. LEXIS 26093, at *9.

The court also addresses an important issue when dealing with foreign parties—service in a foreign country. It would be unsound policy to enforce a time limit for service within the United States but allow unlimited time for service in a foreign country. Therefore, the court's decision to apply a due diligence standard in determining the timeliness of the service in a foreign country is appropriate. This type of standard appears to take into account the extra difficulties that may be readily found in service outside the United States, while preserving the integrity of the U.S. law.

Michelle Francisco

SARL Louis Feraud Int'l v. Viewfinder Inc.

2005 U.S. Dist. LEXIS 22242 (S.D.N.Y. Sept. 29, 2005)

A foreign judgment cannot be enforced against an American corporation when repugnant to the fundamental notions of public policy of the United States and the forum state. The U.S. District Court held that foreign law does not have to be consistent with American law for an American court to uphold a foreign judgment. However, the French court's judgment against the defendant, an American corporation, cannot be upheld by an American court because the judgment would violate the defendant's freedom of expression and freedom of the press.

I. Holding

In *SARL Louis Feraud Int'l v. Viewfinder Inc.*,[1] the U. S. District Court for the Southern District of New York granted defendant Viewfinder Inc.'s (hereinafter "Viewfinder") motion for summary judgment to dismiss plaintiffs'[2] complaint, brought to enforce a French judgment against Viewfinder.[3] Defendant argued that the foreign judgment was not enforceable because the penalty had not been finalized by the foreign court;[4] the compensatory damages were excessive and incompatible with American law; and the judgment would be repugnant to the public policy of the forum state (New York) on several grounds.[5] The court determined that only Viewfinder's last argument held sufficient merit to grant its motion for summary judgment.[6]

The court held that the injunctive penalties were not enforceable because the French courts refused to finalize the penalties as necessary under French law,[7] and the federal district court would not collaterally review or second-guess the foreign court's procedures.[8] Additionally, the court held that the compensatory damages set by the French court were severable from the penalties,[9] and not excessive according to French or American intellectual property and copyright law.[10] Therefore, the court held these damages to be potentially enforceable.[11] Further, the court held that even if the compensatory damages had been excessive according to

1. 2005 U.S. Dist. LEXIS 22242 (S.D.N.Y. 2005).
2. *Id.* at *2 (noting that plaintiffs initiated two separate but identical actions in the French court, which resulted in similar judgments, but the U. S. District Court consolidated the two cases and dealt with the matching issues of both cases as one).
3. *Id.* at *1–2.
4. *Id.* at *4–5.
5. *Id.* at *8. Specifically, the defendant argued that the default judgment was repugnant to the principles underlying the First Amendment of the U. S. Constitution. *Id.*
6. *Id.*
7. *Id.* at *5 (explaining that the dispute over the enforceability of the injunctive penalty was in fact moot, since the French judge entered an order declining to enforce the penalty based on the insufficiency of the evidence presented by the plaintiffs).
8. *Id.* at *6 ("[P]laintiffs are in no position to demand enforcement in New York of a French judgment that a French judge has declined to put into effect.").
9. *Id.* at *7–8.
10. *Id.* at *10.
11. *Id.*

American law, they were not against public policy of the forum state.[12] Lastly, the court explained that while foreign judgments were generally enforceable, there were exceptions.[13] One such exception was that New York law "gives courts discretion to refuse to enforce a foreign judgment 'that is repugnant to the public policy of th[e] state.'"[14] Thus, the court held that in consideration of federal and forum-state notions of freedom of speech and freedom of expression, the French court's judgment against Viewfinder was repugnant to public policy and was ultimately unenforceable.[15] Therefore, Viewfinder's motion for summary judgment to dismiss plaintiffs' claim was granted.[16]

II. Facts and Procedural Posture

In January 2001, the plaintiffs, two French corporations that design and market clothing, brought individual suits in French court[17] against Viewfinder, the operator of an Internet site that posts "photographs from fashion shows and other information about fashion events."[18] Plaintiffs claimed unauthorized use of intellectual property and unfair competition, complaining that Viewfinder illicitly posted photographs of plaintiffs' clothing modeled at fashion shows on defendant's website.[19] Viewfinder was properly served, but it failed to answer the complaint or appear in court.[20] As a result, the French court entered a default judgment against Viewfinder in May 2001.[21] The relief granted to the plaintiffs included 1,000,000 francs (500,000 francs per plaintiff) for compensatory damages and costs, and an "*astreinte*," or coercive fine, of 50,000 francs for each day Viewfinder did not comply with the judgment to stop using the photographs.[22]

No further legal action was taken by either party until approximately two and one-half years later, in October 2003, when Viewfinder appealed the default judgment to the Cour d'Appel de Paris.[23] In January 2004, plaintiffs filed a brief in response, but the appeal, appar-

12. *Id.* at *15–17 ("Under New York law[,] . . . foreign decrees and proceedings will be given respect . . . even if the result under the foreign proceeding would be different than under American law.") (quoting Drexel Burnham Lambert Group, Inc. v. Galadari, 610 F. Supp. 114, 118 (S.D.N.Y. 1985), *vacated in part on other grounds*, 777 F.2d 877 (2d Cir. 1985)). The court went on to hold that "assuming arguendo that Viewfinder ha[d] shown that American copyright and trademark law would not have led to the same result, the judgment would still be enforced, since the alleged differences d[id] not involve 'fundamental notions of what is decent and just' in New York." *Id*.

13. *Id.* at *9–10.

14. *Id.* (quoting N.Y. CPLR 5304 (McKinney 2006)).

15. *Id*. at *28.

16. *Id.*

17. *Id*. at *2 (mentioning The Tribunal de Grande Instance de Paris).

18. *Id.* at *1.

19. *Id.* at *2.

20. *Id.* (noting that the complaint was appropriately served by the United States Marshal in accordance with the Hague Convention).

21. *Id*.

22. *Id.* (stating at the time the French court judgment was entered, the U.S. dollar equivalent of one million francs was $183,007.42).

23. *Id*.

ently untimely, was withdrawn without opposition and "the appeal was duly dismissed" in February 2004.[24] In December 2004, plaintiffs brought this action in U.S. District Court, seeking to enforce the default judgment of the French court where the cases were consolidated.[25] Defendant brought a motion for "dismissal and/or summary judgment" on various grounds.[26] First, defendant argued that the *astreinte* was not a final, binding judgment under French law, and therefore was unenforceable under American law.[27] Next, Viewfinder argued that the judgment's compensatory remedies could not be enforced because they were "repugnant" to American law in the following respects: 1) the compensatory damages were not based on actual damages and had no reasonable relation to any actual damages;[28] 2) the French judgment was inconsistent with French law, which permits only damages based on actual, proven loss;[29] and 3) New York disapproves of "contractual liquidated damage clauses that impose a penalty for breach and are excessive in relation to actual damage."[30]

The U.S. District Court for the Southern District of New York determined that it had jurisdiction over this case on diversity grounds: the plaintiffs were foreign corporations, the defendant was a Delaware corporation, and the amount in controversy exceeded $75,000.[31] Further, a federal jurisdiction case anchored in diversity provides for decisions to be based on the law of the forum jurisdiction, which in this case was New York.[32] Thus, based on the appropriate jurisdiction and the acknowledgement that all relevant facts of the case were within the court records and undisputed, the court was in a position to determine the enforceability of the default judgment and render a decision on defendant's motion to dismiss.[33] Accordingly, the district court held that the default judgment issued by the French court was unenforceable because it was repugnant "to fundamental notions of what is decent and just in the state where enforcement is sought,"[34] and defendant's motion for summary judgment was granted.[35]

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24. *Id.* at *2–3.

25. *Id.* at *1–3.

26. *Id.* at *4. The court determined that either a motion to dismiss or motion for summary judgment would suffice, since all of the relevant facts were contained either in the complaint or materials referred to in the complaint "or of which the Court [could] take judicial notice and [we]re in any event undisputed." *Id.*

27. *Id.* at*4–5.

28. *Id.* at *10.

29. *Id.*

30. *Id.* (citing Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420 (1977)).

31. *Id.* at *3 (citing 28 U.S.C.S. § 1332 (LexisNexis 2006)).

32. *Id.* at *9.

33. *Id.* at *4 (stating the court determined that although the French judgment had been entered on default, there was sufficient evidence on record to make a proper determination).

34. *Id.* at *16 (quoting Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986)).

35. *Id.* at *28.

III. The Court's Analysis

A. Finality

The district court first dealt with Viewfinder's argument against the injunctive penalty of 50,000 francs for each day that it failed to comply with the judgment.[36] Viewfinder argued that the injunctive penalty was unenforceable because it had not been "reduced to a fixed judgment in separate proceedings before another French tribunal," as required by French law.[37] The plaintiffs maintained that the judgment was final, yet 10 days before responding to Viewfinder's motion to dismiss, they brought the issue to the Juge de l'Exécution of the French court and asked for an abeyance until the judge rendered an order for a fixed amount.[38] The French judge refused to finalize the penalty, however, based on insufficient evidence that Viewfinder was violating the court order.[39] Plaintiffs argued that despite the French tribunal's refusal to finalize the penalty, the district court should render the penalty as enforceable because the French decision had been "obtained by unethical advocacy."[40] But the court, noting the irony of the request, determined it had no power to review collaterally the French court decision and would respect it as such.[41] Thus, based on the lack of finality regarding the injunctive penalties placed upon the defendant, the court found defendant's argument against enforcement of the penalties moot and the *astreinte* unenforceable.[42]

The court then turned to Viewfinder's contention that the default judgment of the French court was unenforceable because the damages and penalties were not severable unless determined to be so by French law.[43] The court determined that, although the *astreinte* was unenforceable, it had not determined whether the compensatory damages were enforceable.[44] The court ultimately dismissed defendant's argument, however, because it found the French judgment to be clearly severable between "both backward- and forward-looking remedies, awarding damages and costs for past harm, and also awarding prospective relief in the nature of an injunction backed by coercive penalties . . . ."[45] Thus, while the penalties set for violating the

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36. *Id*. at *4–5 (deciding that Viewfinder must "remove from its website the material about which plaintiffs complained").

37. *Id*. at *5.

38. *Id.* (explaining that "[p]laintiffs advised the Court in a letter dated March 7, 2005, that the matter should be held in abeyance until these proceedings were concluded, thus eliminating any question as to the finality of the judgment in question").

39. *Id.* at *5–6 (citing an order declining to enforce the penalty from the Tribunal de Grande Instance [T.G.I.] [County Court] Paris, June 13, 2005, RG No. 05/81354).

40. *Id.* at *6.

41. *Id.* (finding the argument "unpersuasive, particularly coming from parties whose entire cause of action is premised on the need for respect for foreign judgments").

42. *Id*. Based on the preceding rationale, the court also found Viewfinder's argument that the *astreinte* was unenforceable as a final judgment moot as well. *See id.*

43. *Id*.

44. *Id.*; *see also* Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) ("[C]ourts are not limited to recognizing a [foreign] judgment entirely or not at all. Where a foreign judgment contains discrete components, the enforcing court should endeavor to discern the appropriate 'extent of recognition,' with reference to applicable public policy concerns.").

45. *Viewfinder*, 2005 U.S. Dist. LEXIS 22242, at *7.

judgment were deemed by the district court to not be enforceable, the compensatory damages were in fact severable and procedurally enforceable.[46]

B. Repugnance

The court then addressed defendant's argument that the default judgment was unenforceable because it was repugnant to American law in three respects: 1) the damages awarded were excessive and bore no reasonable relation to any actual damages; 2) the underlying French law regarding copyright and intellectual property was "inconsistent" with that of American law; and 3) enforcement of the judgment would be in violation of the First Amendment of the U. S. Constitution.[47] The court determined that while defendant's first two arguments were without merit, the third argument was based on sufficient grounds and ultimately allowed the court to grant defendant's motion for summary judgment to dismiss the plaintiffs' suit.[48]

Judge Lynch recognized the doctrine of comity as the respect and "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation . . . ."[49] The court emphasized a balance: respecting judicial decisions of other nations, while maintaining "the laws and public policy of the forum state [so that] the rights of its residents will not be violated."[50] Thus, there is a general policy of allowing the enforcement of the judicial decisions of another country within the borders of this country and the forum state, with exceptions.[51] One such exception is if a foreign judgment "is repugnant to the public policy of the state,"[52] that is, the *fundamental* notions of what is fair and just in the state, the court does not have to enforce the foreign judgment.[53]

Defendant Viewfinder argued that the compensatory damages determined by the French court were calculated arbitrarily and inconsistently, went against both French and American law and were thus repugnant to public policy.[54] The court found defendant's argument to be without merit because 1) it is not the role of the federal district court to determine the French court's compliance with French law; and 2) it refused to "second-guess the French court's analysis of the record before it to determine whether the court has properly applied its own principle."[55] Further, the court held that in light of Viewfinder's failure to respond to the original suit, the French court was required to render a decision without any evidence provided by the defendant.[56] Likewise, New York law provides support for such a determination in similar situ-

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46. *Id.* at *8.

47. *Id.*

48. *Id.*

49. *Id.* at *9 (citing Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)).

50. *Id.* (citing Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 457 (2d Cir. 1985)).

51. *Id.* at *9–10.

52. *Id.* (citing N.Y. CPLR 5304 (McKinney 2006)).

53. *Id.* In essence, most foreign judgments within a competent jurisdiction will be upheld unless the judgment violates the fundamental rights of the citizens of the forum state. *See id.*

54. *Id.* at *10.

55. *Id.* at *11.

56. *Id.*

ations.[57] Lastly, the court focused specifically on damages in intellectual property cases and found that there was "nothing repugnant" to New York or federal law in allowing for damages in excess of the actual damages.[58] The court concluded that the defendant's argument of repugnance failed here by underscoring the underlying principle of comity according to the New York statute: "The test for application . . . is not whether the foreign law on which the judgment depends is perfectly congruent with domestic law on the same subject . . . . Rather, the test is whether the award 'is repugnant to the public policy of this state.'"[59]

Next, Viewfinder argued that the French judgment was repugnant because it was inconsistent with American intellectual property law.[60] However, the court dismissed Viewfinder's argument for the same reason that repugnance did not apply to the issue of compensatory damages.[61] The court emphasized that "copyright and trademark law are not matters of strong moral principle,"[62] but based on "what legal rules will produce the greatest economic good for society as a whole."[63] According to the district court, legal standards of economics do not fall within the concept of the principle of "fundamental notions of what is decent and just," on which American law is founded,[64] and, therefore, Viewfinder's argument was insufficient.[65]

C. Freedom of Expression

The court ultimately determined that the French court's judgment was repugnant because Viewfinder was protected by the First Amendment, and its motion for summary judgment was to be granted.[66] Underscoring the importance this specific protection held for the people of the United States, the court stated that the First Amendment, even more than the U.S. Constitution in general, "'reflects a pervasive recognition of the truth' that freedom of speech is 'the matrix, the indispensable condition of nearly every other freedom.'"[67] The court went on to acknowledge that, while other democratic countries share our "general commitment to human rights,"[68] even those governments that believe in such rights still have laws that fail to protect freedoms of speech and expression to the extent that American law does.[69]

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57. *Id.* (citing N.Y. CPLR 3215[b] (McKinney 2006)).

58. *Id.* at *12–14.

59. *Id.* at *13 (citing N.Y. CPLR 5304[b][4] (McKinney 2006)).

60. *Id.* at *14–15 (arguing that,"plaintiffs could not copyright their dress designs because Viewfinder's activities would not violate American trademark principles, and because its activity would constitute fair use").

61. *Id.* at *15 ("Assuming *arguendo* that Viewfinder is correct about American law, the issue here is not whether the actions alleged against it in France violate American law; rather, it is whether the judgment of the French court imposing liability under French law is *repugnant to the public policy* of the State of New York.").

62. *Id.* at *16.

63. *Id.*

64. *Id.* at *15 (citing Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986)).

65. *Id.* at *16–17.

66. *Id.* at *17.

67. *Id.* at *18 (citing Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

68. *Id.*

69. *Id.* at *18–19 (finding that "foreign judgments that run afoul of *First Amendment* values are inconsistent with *our* notions of what is fair and just, and conflict with the strong public policy of *our* State") (emphasis added).

Not to avoid the subject matter at hand, the court enforced the commitment to protecting speech that relates not only to politics, but to expression of thoughts, ideas, and cultural import.[70] Adding that photography is within the realm of First Amendment protections and fashion shows are of "great public interest,"[71] the court also noted that the fashion shows where the photographs in question were taken were events open to the public.[72]

Plaintiffs, in an attempt to "deflect" from the conclusion that Viewfinder was protected by the First Amendment, argued that: 1) the defendant's conduct failed to achieve "sufficient communicative elements" to allow for First Amendment protection; 2) the website operated by the defendant provided virtually no news or information related to the designers' collections or about the designers themselves; 3) the defendant copied the plaintiffs' work; and 4) because the site was designed to sell subscriptions to the site and photographs on the site, the defendant was acting unlawfully.[73] The court rejected the plaintiffs' arguments and found their authorities inapposite to the case at hand.[74] The court made mention of a few exceptions to protection of commercial speech, but decidedly refused to find Viewfinder's actions among those exceptions.[75]

IV. Conclusion

The U.S. District Court concluded that the French court judgment against defendant Viewfinder was repugnant to the public policy of the forum state and the federal constitution and therefore unenforceable. Specifically, the court found that the amount of compensatory damages on its face was not inconsistent with the fundamental notions of what is fair and just. Further, even if the damages had been inconsistent with American law, the court would generally enforce the foreign judgment based on the doctrine of comity. Nevertheless, because the acts of Viewfinder fell within the United States' fundamental principles of freedom of speech, the foreign judgment would not be enforceable.

Based on this reasoning, the district court reached a proper and fair decision. The court made its determination on sufficient American law and found the balance between respecting foreign judgments and the U.S. Constitution to lean more towards the latter, and rightfully so. Thus, while some, particularly the French, might disagree with the statement made by Judge Lynch that "copyright and trademark laws are not matters of strong moral principle,"[76] the American foundation of freedom of speech trumps an economic interest of a foreign corporation.[77]

Melissa B. Whitman

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70. *Id.* at *20 (citing Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996)).
71. *Id.* at *21.
72. *Id.* Viewfinder was able to take photographs at the fashion shows because it had been given an invitation.
73. *Id.* at *22–25.
74. *Id.* (finding a likeness between Viewfinder's website and written publications, such as newspapers and magazines: "A photograph or news item does not lose its quality as either art or as valuable information because the writer or photographer makes his living by selling it. Even 'commercial speech' is entitled to some protection under the *First Amendment*").
75. *Id.* at *26–27.
76. *Id.* at *16.
77. *See* The Patry Copyright Blog, *available at* http://www.williampatry.blogspot.com/2005/10/is-copyright-moral-imperative.html (last visited Mar. 23, 2006); *see also* General Newsletter from Rader, Fishman & Grauer, PLLC, *available at* http://www.raderfishman.com/RFGinfo/3_11.html (last visited Mar. 23, 2006).

Hongkong and Shanghai Banking Corp. Ltd. v. Suveyke

392 F. Supp. 2d 489 (E.D.N.Y. 2005)

The United States District Court for the Eastern District of New York applied the standard set forth by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.,* that forum selection clauses are presumed to be valid unless it is shown that enforcement would be unreasonable and unjust, or that fraud or overreaching was present. Additionally, contractual language evidenced the intent of the parties to create exclusive jurisdiction in the Philippines.

I. Holding

In *Hongkong and Shanghai Banking Corp. Ltd.*,[1] the United States District Court for the Eastern District of New York granted a motion by Defendant, Yusef Suveyke ("Suveyke" or "Defendant"), to dismiss an action brought by Plaintiff, The Hongkong and Shanghai Banking Corporation Limited ("HSBC" or "Plaintiff"), seeking to enforce the terms of a guarantee agreement ("Agreement") against Suveyke.[2] District Judge Trager found for Defendant on the ground that the court lacked jurisdiction because the agreement contained a forum selection clause that conferred exclusive jurisdiction upon the courts of Makati, Metro Manila, Philippines.[3]

The court held that: (1) the case should not be decided under Federal Rules of Civil Procedure 12(b)(3)[4] or 12(b)(6),[5] but rather should be governed by the Supreme Court's approach in *M/S Bremen v. Zapata Off-Shore Co.*;[6] (2) the international forum selection clause in the Agreement was presumed valid;[7] and (3) the parties intended to make jurisdiction exclusive, rather than permissive, as indicated in the language used in the clauses.[8] The court did not address Defendant's assertion that the case should be dismissed based on *forum non conveniens* because Defendant failed to support this argument.[9] The court dismissed the case, ruling that

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1. 392 F. Supp. 2d 489 (E.D.N.Y. 2005).
2. *Id.* at 490.
3. *Id.* at 492.
4. FED. R. CIV. P. 12(b)(3) ("[E]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (3) improper venue . . . .").
5. FED. R. CIV. P. 12(b)(6) ("[E]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .").
6. 407 U.S. 1, 15 (1972) (finding that, "[t]he correct approach would have been to enforce the forum selection clause specifically unless [plaintiff] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching").
7. *Hongkong*, 392 F. Supp. 2d at 491 (citing to *M/S Bremen*, 407 U.S. at 15, which concluded that, "in the light of present-day commercial realities and expanding international trade . . . the forum clause should control absent a strong showing that it should be set aside").
8. *Hongkong*, 392 F. Supp. 2d at 492.
9. *Id.* at 490.

the forum selection clause should be enforced based on the Plaintiff's failure to carry his burden of proving that venue was proper.[10]

II. Background and Procedural Posture

In 2000, HSBC agreed to provide another Philippine company, Karayom Garment Manufacturing, Inc. ("Karayom"), with banking facilities (i.e., working capital, loans and advances).[11] Karayom's obligations under the contract with HSBC were guaranteed by an agreement between Suveyke, a New York resident, and HSBC.[12] The Agreement between HSBC and Suveyke included the following:

> 13. Any lawsuit arising from, or in connection with, this guaranty shall be instituted with the competent courts of Makati, Metro Manila, Philippines.
>
> 14. Any notice or demand upon GUARANTOR shall be presented to the address hereinafter indicated: Provided [sic][13] however, that in case of any lawsuit arising in the Philippines relating to this GUARANTEE, GUARANTOR hereby irrevocably appoints the President or Corporate Secretary of BORROWER to receive service of process from the courts of competent jurisdiction, and any such service of process on either of them shall be deemed a valid service on GUARANTOR.
>
> 15. This guarantee and all rights, obligations and liabilities arising hereunder shall be construed and determined under, and may be enforced in accordance with, the law of the Philippines.[14]

When Karayom defaulted on its obligation to make loan and credit repayments to HSBC, HSBC called upon Suveyke to uphold his guaranty pursuant to the Agreement.[15] However, Suveyke defaulted as well.[16] Consequently, HSBC brought suit seeking to enforce the Agreement against Suveyke.[17]

HSBC filed its complaint in the United States District Court for the Eastern District of New York.[18] Defendant moved to dismiss the complaint on the ground that the Court lacked jurisdiction over the claim.[19] Suveyke argued that the forum selection clause included in the

10. *Id.* at 492.
11. *Id.* at 490.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

Agreement conferred exclusive jurisdiction over all disputes between the signatories.[20] HSBC responded by arguing that the language in the forum selection clause was merely permissive, rather than mandatory, and did not confer exclusive jurisdiction on the courts of the Philippines.[21] Moreover, HSBC argued that the forum selection clause should not be enforced and that the Court should uphold the claim.[22]

III. The Court's Analysis

American courts have not established a bright line rule for motions seeking to enforce forum selection clauses.[23] One approach has been to analyze these cases under Rule 12(b) of the Federal Rules of Civil Procedure.[24] Alternatively, courts have applied the rule of choice of forum enforcement as stated by the Supreme Court in *Bremen*.[25] In this case, the court addressed both approaches.[26] The court granted Defendant's motion to dismiss, relying on the *Bremen* decision, as well as other legal principles.[27]

A. Neither Rule 12(b)(3) nor Rule 12(b)(6) Applies

No clear rule has been established by circuit courts concerning whether a motion to enforce a forum selection clause should be framed as a motion to dismiss under the Federal Rules of Civil Procedure.[28] Previously, such claims have been analyzed under Rules 12(b)(1),[29] 12(b)(3),[30] and 12(b)(6).[31] Here, the court declined to evaluate the forum selection clause under a procedural mechanism, stating that none of the proffered 12(b) sections was "a good fit."[32] Instead, the court determined the enforcement procedure question by applying the standard enunciated by the Supreme Court in *Bremen*.[33] That decision placed the burden on the party attempting to set aside the forum clause to "clearly show that enforcement would be

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20. *Id.*
21. *Id.*
22. *Id.*
23. New Moon Shipping Co. v. MAN B&W Diesel AG, 121 F.3d 24, 28 (2d Cir. 1997).
24. *See, e.g.*, AVC Nederland B.V. v. Atrium Inv. P'ship, 740 F.2d 148, 152 (2d Cir. 1984).
25. *See, e.g.*, S. Distrib. Co., Inc. v. E. & J. Gallo Winery, 718 F. Supp. 1264, 1269 (W.N.D.C. 1989).
26. *See Hongkong*, 392 F. Supp. 2d at 491–92.
27. *Id.*
28. *See, e.g.*, *New Moon Shipping Co.*, 121 F.3d at 28.
29. FED. R. CIV. P. 12(b)(1) (providing dismissal for lack of subject matter jurisdiction); *see, e.g.*, *AVC Nederland B.V.*, 740 F.2d at 152.
30. FED. R. CIV. P. 12(b)(3) (providing dismissal for improper venue); *see, e.g.*, Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992).
31. FED. R. CIV. P. 12(b)(6) (providing dismissal for failure to state a claim); *see, e.g.*, LFC Lessors, Inc. v. Pacific Sewer Maint. Corp., 739 F.2d 4, 7 (1st Cir. 1984).
32. *Hongkong*, 392 F. Supp. 2d at 491.
33. *Bremen*, 407 U.S. at 1.

unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[34] It also held that arguing *forum non conveniens* would not be sufficient to overcome the presumption of enforceability that normally arises under the forum selection clause analysis.[35]

B. Forum Selection Clauses Are Presumed Valid

The court looked to the *Bremen* decision to conclude that forum selection clauses should be enforced unless there is a strong showing that overcomes the presumption of enforceability.[36] The court also mentioned Article 3(b) of the Hague Conference on Private International Law's proposed Convention on Choice of Court Agreements as supporting the validity of the clause.[37] Since HSBC brought the suit in a forum other than the one specified in the Agreement between the parties, the court held that Plaintiff bore the burden of proving that the forum selection clause should not control.[38] This burden became more difficult to overcome once the court determined that HSBC had drafted the contract, including the language governing the forum selection clause.[39]

Despite the fact that the Agreement provided for all disputes to be heard by the courts of the Philippines, the court applied United States contract law to the issue.[40] Citing several cases[41] and the *Restatement (Second) of Contracts*, the court emphasized that ambiguous language should be construed against the drafting party's interest.[42] The court was additionally persuaded to follow the principle of enforcement against the drafting party because HSBC had failed to offer evidence of a potential unfair or unreasonable result in the case if it was heard by the courts in the Philippines.[43]

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34. *Id.* at 15.

35. *See id. See generally* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 586 (1991).

36. *Hongkong*, 392 F. Supp. 2d at 491 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972), which states that international forum selection clauses are presumed valid).

37. *See* Convention on Choice of Court Agreements, art. 3, June 30, 2005, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited Feb. 8, 2006) ("[A] choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise."). As of Nov. 10, 2005, this Convention had not been signed by any country. *Id.*

38. *Hongkong*, 392 F. Supp. 2d at 491.

39. *See id.* Contractual language often presents ambiguities in the interpretation of a word or phrase. The Latin phrase, *contra proferentem* (which literally means "against the offeror"), stands for the generally accepted principle that ambiguities are construed against the drafting party. *See generally* 11 WILLISTON ON CONTRACTS § 32:12 (4th ed. 2005) (defining *contra proferentem* as ambiguities interpreted against the drafter).

40. *Id.*

41. *Id.* (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) and Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1207 (2d Cir. 1970)).

42. *Hongkong,* 392 F. Supp. 2d at 491 (citing Restatement (Second) of Contracts § 206 (1981) which states that, "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom the writing otherwise proceeds").

43. *Id.*

C. The Parties Intended Jurisdiction to Be Exclusive

The last prong of the court's analysis included a determination of whether the language in the forum selection clause granted exclusive jurisdiction to the courts of the Philippines or was merely intended to be permissive and did not mandate jurisdiction in a particular forum. First, the court distinguished the case from *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs. Inc.*[44] *In Boutari*, the Second Circuit cited the Ninth Circuit's *Docksider, Ltd. v. Sea Technology, Ltd.*,[45] to state the general rule regarding forum selection clauses: "[w]hen only jurisdiction is specified, the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive, [unless] mandatory venue language is employed" (internal quotation omitted).[46] Second, the court determined that the word "shall," as used by the parties in the Agreement, indicated mandatory language.[47] Third, the court looked to paragraphs 14 and 15 of the Agreement for proof of additional intent to be bound by the clause.[48]

The court held that the principal case differed substantially from *Boutari* in four relevant ways.[49] First, Suveyke moved for dismissal at the beginning of the litigation, unlike the defendant in *Boutari*, who waited until summary judgment to file its motion.[50] Second, the parties in the case at bar had only minimally invested in the litigation, as opposed to the parties in *Boutari*.[51] Third, HSBC and Suveyke had agreed in the clause not only on the jurisdiction in which claims would be brought, but also on the specific court that would hear them.[52] The court held that the language generally used qualified as "mandatory venue language."[53] In contrast, the parties in *Boutari* had only announced that the venue of all lawsuits would be a foreign court; no specific court was identified.[54] Finally, the Agreement at issue included the word "shall." Under *Boutari*, that word signified mandatory, command-like language.[55]

The court relied on several additional cases to conclude that the word "shall" indicated the mandatory intent of the forum selection clause and negated HSBC's argument that the clause

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44. *Id.* (citing John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distribs. Inc., 22 F.3d 51, 52–53 (2d Cir. 1994) to respond to HSBC's reliance on the case to support its argument that the language was only permissive).

45. Docksider, Ltd. v. Sea Tech., Ltd., 875 F.2d 762, 764 (9th Cir. 1989).

46. *Boutari*, 22 F.3d at 52.

47. *Hongkong*, 392 F. Supp. 2d at 492.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

was permissive.[56] Citing *ASM Communications Inc. v. Allen*,[57] *Baosteel Am. Inc. v. M/V Ocean Lord*,[58] and *Phoenix Global Ventures, LLC*,[59] which further explained that "shall" signified "a command, and exclusive jurisdiction," the court stated that the parties' intent to have mandatory jurisdiction in the court of the Philippines was clear.[60]

Lastly, the court examined paragraphs 14 and 15 of the Agreement to show that the parties' intent was to confer exclusive jurisdiction.[61] Both the inclusion of terms clarifying the method for service of process and language that stated Philippine law would control further persuaded the court of the intent of the parties.[62] Based on this additional language, and for the foregoing reasons, the court decided the language was mandatory and conferred exclusive jurisdiction on the court in the Philippines.[63]

IV. Conclusion

The court granted Defendant's motion to dismiss for lack of jurisdiction. The holding was firmly grounded on existing case law that has recently given substantial deference to the parties' selected forum. Although forum selection clauses are not governed by a statute or treaty in the United States, the court opted to support its conclusions by relying on international principles. For example, the court found support for its ruling that international forum selection clauses are presumed valid in the proposed Hague Convention on Choice of Court Clauses. However, the court declined to follow cases that had analyzed forum selection clauses under the procedural mechanism of a Rule 12(b) motion to dismiss.

The court's holding in this case further elucidates its commitment to enforce mandatory provisions if the language in an agreement leaves little doubt as to the intent of the parties. Absent fraud or overreaching, it will be more difficult to prove under *Bremen* that the clause should not be enforced if the parties make their intentions clear. Future contracting parties who include a forum selection clause in their agreement would be well-advised to specify the exclusivity of their choice of forum. Parties should also identify a particular court to avoid litigation-spawning ambiguity. Until the United States is a party to an international agreement on choice of forum, the current standard for evaluating the enforceability of forum selection clauses announced by this case will most likely remain law.

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56. *See id*. (citing ASM Communications Inc. v. Allen, 656 F. Supp. 838, 839 (S.D.N.Y. 1987) where the court stated that in "common usage and understanding, the word 'shall' signifies a command"); *see also* Baosteel Am. Inc. v. M/V Ocean Lord, 257 F. Supp. 2d 687, 689 (S.D.N.Y. 2003) (explaining that "shall" denoted exclusive jurisdiction); Phoenix Global Ventures, LLC, 2004 WL 2360033, at *6 (S.D.N.Y. Oct. 19, 2004) (finding that the language "any proceeding 'shall' be initiated in the courts of the State of New York" clearly established exclusive jurisdiction in New York State courts.").

57. *ASM Communications*, 656 F. Supp. at 839.

58. *Baosteel*, 257 F. Supp. 2d at 689.

59. *Pheonix Global Ventures*, 2004 WL 2360033, at *6.

60. *Hongkong*, 392 F. Supp. 2d at 492.

61. *Id.*

62. *Id.*

63. *Id.* at 491–92.

This case was properly decided. United States case law has well established the legal principle that forum selection clauses should be enforced unless there is a persuasive justification to conclude otherwise. Acceptable arguments against enforcement must fit within the narrow exceptions announced in *Bremen*. This holding correctly confirms past opinions that have refused to acknowledge arguments for convenience of the challenging party as convincing enough to broaden the standard. Only when serious issues of public policy are at risk of occurring should the courts consider striking forum selection clauses from agreements made between negotiating parties. Otherwise, the clauses would soon lose their effectiveness as a means for allocating risk.

Stefanie K. Beyer

Omega Engineering, Inc. v. Omega, S.A.

432 F.3d 437 (2d Cir. 2005)

In a dispute between a domestic and a foreign corporation, a settlement agreement between the parties was held binding despite the lack of a signature of the foreign corporation.

I. Holding

In *Omega Engineering, Inc. v. Omega, S.A.*,[1] the United States Court of Appeals for the Second Circuit affirmed the judgment of the district court[2] enforcing the parties' Settlement Agreement.[3] The court found no error when the district court held defendant, Omega, S.A. (OSA), through its authorized representative, assented and agreed to be bound to the terms of the Settlement Agreement without the signatures of OSA principals in Switzerland.[4] The court also found the requirements of paragraph 2 of the Settlement Agreement not ambiguous and thus, enforceable among the parties.[5]

The defendant's claim that—its representative (the general counsel of an affiliated company) was unauthorized to bind it—did not prevail.[6] The court held that regardless of whether the representative's authority to settle had been secretly limited by OSA, the Settlement Agreement to which he assented was still binding on his employer.[7] The court also found unpersuasive the defendant's argument that the district court and magistrate judges simply assumed the Settlement Agreement was binding and inappropriately placed the burden on it.[8] The court found that only upon a factual finding that a settlement had been reached did the magistrate judge shift the burden to OSA to prove fraud, lack of actual consent, or mutual mistake.[9]

Finally, the court held that Judge Covello's refusal to recuse himself was not an abuse of discretion.[10] The court reached this conclusion because the judge's alleged personal knowledge of facts was acquired while acting within his judicial capacity and he lacked actual involvement in the negotiations.[11] The court also ruled that the defendant's recusal motion, made seven months after the motion for enforcement of the Settlement Agreement, was untimely.[12]

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1. 432 F.3d 437 (2d Cir. 2005).
2. 2004 U.S. Dist. LEXIS 27908 (D. Conn. Mar. 24, 2004).
3. *Omega*, 432 F.3d at 448.
4. *Id.* at 446.
5. *Id.* at 446–447.
6. *Id.* at 443.
7. *Id.* at 447.
8. *Id.*
9. *Id.*
10. *Id.* at 448.
11. *Id.*
12. *Id.* OSA's additional arguments for recusal were either waived or without merit.

II. Background and Procedural Posture

The plaintiff, Omega Engineering, Inc. (OE), is a Delaware corporation with its principal place of business in Stamford, Connecticut.[13] It owns trademark registrations for the "Omega" and a stylized "[OMEGA]."[14] These marks are used on scientific control and measurement devices it manufactures and markets.[15] The defendant, OSA, is a Swiss Corporation, which holds U.S. trademark registrations for the Greek symbol OMEGA and the word "Omega," but for use on its timepieces and timepiece accessories.[16]

These two companies have had a long history of trademark disputes.[17] In the 1980s, OSA brought several trademark infringement suits after OE began selling scientific and industrial timing devices under the "Omega" brand name using its stylized "[OMEGA]."[18] In 1994, a global Settlement Agreement was reached to resolve their differences.[19] This case resulted from a disagreement over the interpretation and respective rights of the parties under the 1994 Settlement Agreement.[20] District Court Judge Covello referred the parties to Magistrate Judge Thomas P. Smith for settlement discussions.[21] After selecting a date for the settlement conference, the magistrate judge required that the parties be represented by counsel and have present a representative with the authority to settle the matter.[22] At the settlement conference, OSA was represented by Neal Gordon, general counsel of OSA's affiliate Swatch Group. OE was represented by its corporate president, Betty Hollander.[23] The parties reached an agreement and informed the magistrate judge that the case was settled.[24]

The magistrate judge, along with both parties, went before the district court judge to report the settlement.[25] The magistrate judge informed Judge Covello that the matter had been settled, the terms agreed upon, and the agreement reduced to writing.[26] He also noted that the document would be signed by the appropriate OSA official in Switzerland.[27] Both OE's and

13. *Omega*, 432 F.3d at 440.

14. *Id. See*, *e.g.*, U.S. Trademark Registration No. 2,220,409 (Jan. 26, 1999); U.S. Trademark Registration No. 2,208,326 (Dec. 8, 1998); U.S. Trademark Registration No. 818,251 (Nov. 8, 1966).

15. *Id.*

16. *Omega*, 432 F.3d at 440. *See*, *e.g.*, U.S. Trademark Registration No. 660,541 (Apr. 15, 1958); U.S. Trademark Registration No. 578,041 (July 28, 1953); U.S. Trademark Registration No. 577,415 (July 14, 1953); U.S. Trademark Registration No. 25,036 (July 24, 1894).

17. *Id.*; *see also* Omega S.A. v. Omega Eng'g, Inc., 228 F. Supp. 2d 112, 115–16 (D. Conn. 2002) (reviewing the history of litigation between the parties).

18. *Id.*

19. *Id.*

20. *Id.* at 441.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 445. The parties understood the signature to be purely "ministerial." *Id.*

OSA's counsels represented to Judge Covello that the matter had been settled and an agreement reached.[28] Specifically, OSA's representative, Neal Gordon, responded "yes" when asked by the court whether he was "in control of this situation as far as being able to note this matter as closed."[29]

After the close of negotiations, OSA officers in Switzerland reviewed the terms of the Settlement Agreement and refused to sign it.[30] They concluded that the language of paragraph 2 was ambiguous and proposed a side letter clarifying this clause.[31] OE rejected the proposal and filed a motion to enforce the Settlement Agreement.[32]

Judge Covello again referred the matter to Judge Smith[33] who, after an evidentiary hearing, recommended granting the motion to enforce the Settlement Agreement against OSA.[34] During the hearing, Gordon testified that he was authorized to settle the dispute and that it was his understanding that the case was settled at the conference.[35] However, he added that his authority to settle the agreement was confined within limitations set by OSA principals.[36] Judge Smith found Gordon's testimony of no consequence.[37] He also denied OSA's mid-hearing request that he recuse himself, even though he had personal knowledge of disputed facts concerning the settlement negotiations, since his knowledge resulted solely from his judicial role.[38] The district court adopted the magistrate judge's recommendations and entered judgment enforcing the Settlement Agreement.[39] OSA appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed the judgment.[40]

III. Discussion

In support of its appeal, OSA alleged five grounds for district court error.[41] First, OSA contended that it was an error to find that it had consented to be bound by the Settlement Agreement without the signature of its principals.[42] Second, OSA argued that paragraph 2 was ambiguous, and thus it could not have consented to its terms.[43] OSA's third contention rested

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28. *Id.* at 441.
29. *Id.*
30. *Id.* at 441–42.
31. *Id.* at 442.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* The claim stated that he was required to "make certain that Omega Engineering would neither register nor use the trademarks Omega and their logo on timing devices of any sort." *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 443.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

on Gordon's inability to consent to the Settlement Agreement as drafted.[44] Fourth, OSA argued that because OE did not first establish that a valid agreement existed, the district court improperly shifted the burden, requiring it to prove that the Settlement Agreement was unenforceable.[45] Finally, OSA took issue with the magistrate judge's denial of its motion that he recuse himself.[46]

A. OSA's Consent to the Settlement Agreement Absent Signature

The Second Circuit concluded that after applying the clearly erroneous standard of review,[47] that there was sufficient evidence to find that OSA intended to be bound to the Settlement Agreement without first having it signed.[48] The court applied Connecticut law as set forth in *Klien v. Chatfield*,[49] which states that the parties' intent is determined by: (1) the language used; (2) circumstances surrounding the transaction, including the motives of the parties; and (3) purposes which they sought to accomplish.[50]

Addressing the first factor, the court found that although there was some language in the contract that suggested the expectation of a signature, there was no evidence that the contract would not be binding absent that signature.[51] Second, the court found that circumstances surrounding the transaction did not favor the requirement of a signature.[52] The court relied on the fact that the parties represented to both judges that the agreement was complete and in written form.[53] They also represented that the case was settled.[54] Importantly, the magistrate judge testified that OSA's counsel made representations that the parties understood the signature was a "ministerial" act.[55]

Finally, applying the third factor, the court found OSA's dominant purpose was to settle and avoid a trial.[56] The settlement conference was the day before the first day of trial.[57] The court found that the magistrate judge would have likely recommended that the trial proceed had the settlement been contingent upon signature by OSA's principals. Therefore, OSA did not anticipate the necessity of a signature to bind it to the agreement because that would be inconsistent with its purpose.[58]

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44. *Id.*
45. *Id.* at 447. Unenforceability can be proven by showing fraud, mutual mistake, or lack of actual consent.
46. *Id.* at 443.
47. *Id.* (citing Ciaramella v. Reader's Digest Ass'n, Inc., 131 F.3d 320, 322 (2d Cir. 1997)).
48. *Id.* at 445.
49. 347 A.2d 58 (1974).
50. *Omega*, 432 F.3d at 444 (citing Klien v. Chatfield, 347 A.2d 58, 61 (1974)).
51. *Id.* at 445.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

The Second Circuit found all factors favoring OE and held that nothing "remained to be done to establish the contractual relation[ship]"[59] between the parties.[60] The court found "no error, let alone clear error, in the district court's conclusion" that OSA assented to the Settlement Agreement and agreed to be bound absent a signature.[61]

B. OSA's Interpretation of Paragraph Two

Reviewing the terms of the Settlement Agreement de novo, the Second Circuit found paragraph 2 unambiguous.[62] Under Connecticut contract law, ambiguity is found when the language "is susceptible to more than one reasonable interpretation."[63] Conversely, "a contract is unambiguous when 'its language is clear and conveys a definite and precise intent.'"[64]

The court found that paragraph 2 was straightforward in its mandate that OE "'include a reference to Omega Engineering, Inc., Stamford, Conn.,' on timing devices, but only if it chooses to 'use . . . the name Omega Engineering or any Omega trademark on the goods themselves.'"[65] Using the state law presumption against finding ambiguity in commercial contracts, the court did not credit OSA's interpretation of paragraph 2 as "to forbid Omega Engineering from using the word 'Omega' or an Omega trademark on timers and only allow the use of the phrase 'Omega Engineering, Inc., Stamford, Conn.'"[66]

C. Gordon's Ability to Consent to the Settlement Agreement

The court gave short shrift to OSA's contention that Gordon did not have authority to settle the case.[67] The court found Gordon's testimony at the evidentiary hearing inconsistent with his prior representations.[68] The magistrate judge required that an OSA representative with the power to settle the case attend the settlement conference.[69] At the settlement conference, Gordon represented to the magistrate that OSA had empowered him to settle the matter.[70] During the conference, there was no communication to the magistrate that there were any limitations on Gordon's authority.[71] Even if Gordon did not have actual authority, the

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59. *Id.* at 446 (quoting Klein v. Chatfield, 347 A.2d 58, 61 (1974)).

60. *Id.* at 445. The court also noted: "[i]f anything, the circumstances support the conclusion reached by the magistrate judge that OSA's contentions are actually a thinly veiled attempt by OSA's principals to rewrite an agreement to which their authorized representative assented because, upon further review, they are dissatisfied with its terms and believe their representative made a mistake." *Id.*

61. *Id.* at 446.

62. *Id.*

63. *Id.* (quoting United Illuminating Co. v. Wisvest-Conn., LLC., 791 A.2d 546, 550 (2002)).

64. *Id.*

65. *Id* (quoting paragraph 2 of the Settlement Agreement).

66. *Id.*

67. *Id.* at 446–47 (dedicating only two short paragraphs, thus emphasizing that argument's superficiality).

68. *Id.* at 447.

69. *Id.* at 446–47.

70. *Id.* at 447.

71. *Id.*

court held that OSA was bound by the actions of its agent, where the other parties had no reason to believe that he was exceeding his authority.[72]

D. Propriety of Shifting the Burden

OSA argued that the Settlement Agreement should first have been found to be binding before the burden shifted, requiring it to show fraud, lack of actual consent, or mutual mistake.[73] The court agreed that this was the law.[74] However, upon reviewing the magistrate judge's recommended ruling, clear evidence was found that the existence of a binding Settlement Agreement had been determined.[75] The court concluded that only upon such a finding did the magistrate judge shift the burden to OSA.[76]

E. Denial of the Motion to Recuse the Magistrate Judge

The court reviewed Judge Smith's refusal to recuse himself for abuse of discretion,[77] determining whether "a reasonable person, knowing all the facts, [would] conclude that the trial judge's impartiality could reasonably be questioned."[78] For the governing rule, OSA cited 28 U.S.C § 455(b)(1) (2000),[79] which mandates that, "[a]ny justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding [w]here he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding[.]"[80] Relying on *Katsaros v. Cody*,[81] the court stated, "Knowledge gained from the judge's discharge of his judicial function is not a ground for disqualification under 28 U.S.C. § 455(b)(1)."[82]

The court found that Judge Smith did not actually get involved with settlement negotiations, but merely provided facilities and oversaw the conference.[83] Any knowledge gained was thus acquired while acting within his role as magistrate judge.[84] The court concluded that

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72. *Id.* (citing Int'l Telemeter Corp. v. Teleprompter Corp., 592 F.2d 49, 55 (2d Cir. 1979)) ("Every agent is likely to have secret negotiating limits dictated by the principal, but other parties may safely assume that any agreement the agent agrees to is within his authority unless there is reason to believe he is exceeding it.").

73. *Id.*

74. *Id.* (quoting Callen v. Penn. R.R. Co., 332 U.S. 625, 630 (1948)) ("One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.").

75. *Id.*

76. *Id.* The court also noted that no evidence of fraud or mistake was offered.

77. *Id.* (citing U.S. v. Yousef, 327 F.3d 56, 169 (2d Cir. 2003)).

78. *Id.* (citing U.S. v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992), and Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 333 (2d Cir. 1987)).

79. *Id.*

80. 28 U.S.C. § 455(b)(1) (2000).

81. 744 F.2d 270, 283 (2d Cir. 1984).

82. *Omega*, 432 F.3d at 447–48.

83. *Id.* at 448.

84. *Id.*

because Judge Smith's knowledge was not extrajudicial it was not an abuse of discretion to deny OSA's motion for recusal.[85]

The court also found that OSA's motion for recusal was untimely under *Gil Enters. v. Delvy*,[86] which prescribes that a motion for recusal be brought "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim."[87] The court applied the *Taylor v. Vermont Dep't of Ed.*[88] four-factor test to determine timeliness of a recusal motion: "(1) whether the party seeking recusal has participated in trial or pre-trial proceedings; (2) whether granting the motion would waste judicial resources; (3) whether judgment preceded the motion; and (4) whether the party seeking recusal can show good cause for delay."[89]

In its application of the timeliness factors, the court found that while judgment had not preceded the motion, OSA was involved in all stages of the proceeding and had all the information necessary to make its motion for recusal on the first day Judge Smith was appointed.[90] Instead of acting right away, OSA waited seven months to make its motion.[91] The court found that a recusal at that stage in the proceeding would cause a "considerable waste of judicial resources"[92] without a good cause for delay.[93]

IV. Conclusion

Often objective indicia of intent is significant; here it was critical. The most significant issue was that of OSA's assent to the Settlement Agreement absent a signature. Although the court's application of the *Klein* factors arguably could have resulted in OSA's favor, the strongest evidence for finding intent was OSA's representation that an agreement had been reached and the matter had been settled, while not clearly indicating the significance of the signature. If the signature held the weight OSA purported it did, that fact should have been explicitly stated.

The court's decision represented a current statement of the law of settlement agreements and their enforceability under Connecticut law. Settlement agreements can be binding and enforceable notwithstanding the lack of a signature by the parties.[94] Further, "a settlement

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85. *Id.* at 446.

86. 79 F.3d 24 (2d Cir. 1996).

87. *Omega,* 432 F.3d at 448 (quoting Gil Enters., Inc. v. Delvy, 79 F.3d 241, 247 (2d Cir. 1996)).

88. 313 F.3d 768 (2d Cir. 2002).

89. *Omega*, 432 F.3d at 448 (citing *Taylo*r, 313 F.3d 768, 794–95 (2d Cir. 2002)).

90. *Id.* Judge Covello referred Omega Engineering's motion to enforce the Settlement Agreement to the magistrate judge on July 15, 2003.

91. *Id.* OSA made its motion for recusal on Feb. 18, 2004.

92. *Id.*

93. *Id.*

94. *Id.* at 444; *see also* Role v. Eureka Lodge No. 434, 402 F.3d 314, 318 (2d Cir. 2005) ("[A] voluntary, clear, explicit, and unqualified stipulation of dismissal entered into by the parties in court and on the record is enforceable even if the agreement is never reduced to writing, signed, or filed.").

agreement is a contract that is interpreted according to general principles of contract law."[95] Where an agent of a corporation with the authority to settle a case is required to attend a settlement conference and an agent attends—absent notice of limitation on authority—that agent will be presumed to have authority to bind the corporation in a settlement. Although the court does not make explicit reference, this view is in line with the doctrine of authority by estoppel.[96]

Given that the feud between the parties has been ongoing for some time, it would have been helpful to know how the parties dealt with the issue of settlement signatures in the past. This objective evidence would have assisted in determining the parties' reasonable expectations.

While clarifying the law of settlement agreements, the court left unanswered the question: under what circumstances, if any, may a settlement agreement be conditioned upon further review and signature of an officer of one of the parties?

Troy A. Kennedy

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95. *Omega*, 432 F.3d at 443.

96. RESTATEMENT (SECOND) OF AGENCY § 8B(1)(b) (1956).

Ungar v. Palestine Liberation Organization

402 F.3d 274 (1st Cir. 2005), cert. denied, 126 S. Ct. 715 (2005)

In an action under the Anti-Terrorism Act against the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA): (1) no non-justiciable political questions were raised; (2) the PLO and the PA were not entitled to sovereign immunity; and (3) the defendants were not entitled to a final determination of their sovereign immunity claim (including appellate review) before being required to answer the complaint.

I. Facts and Procedural History

On June 9, 1996, Yaron Ungar, a United States citizen, and his Israeli wife, Efrat, were shot and killed while driving home from a wedding in Israel, when their car was attacked by members of the Hamas Islamic Resistance Movement (Hamas),[1] a group which the U.S. Department of State has designated a terrorist organization.[2] The attackers were apprehended and convicted in an Israeli court.[3] Thereafter, on March 13, 2000, a suit was brought on behalf of the heirs of Yaron Ungar, among other plaintiffs, in the U.S. District Court for the District of Rhode Island,[4] under the United States' Anti-Terrorism Act (ATA).[5] The ATA provides that a cause of action may be brought in favor of any "national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs."[6] The remedy for such an act is treble damages, costs, and attorney's fees.[7] The factual basis of the claims against the PA and the PLO, the defendants who were the subject of the appeal in question, was that they "failed to maintain public order and security in the territories under their control, and instead 'provided defendant Hamas and its members with safe haven, a base of operations, shelter, financial support and other material support and resources.'"[8]

Defendants moved to dismiss the claim under various theories, including lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, failure to state a claim upon which relief can be granted, inconvenient forum, and insufficient service of process.[9] In response, the court entered default judgments against some of the defendants; dismissed the claims against certain defendants for lack of personal jurisdiction; dismissed the state law claims against the remaining defendants (the PA and the PLO); and gave the plaintiffs leave to file an

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1. Ungar v. Palestine Liberation Organization, 402 F.3d 274, 276 (2005).
2. *See id.* (citing 8 U.S.C. § 1189 (2006), and Redesignation of Foreign Terrorist Organizations, 68 Fed. Reg. 56,860, 56,861 (Oct. 2, 2003)).
3. *Ungar*, 402 F.3d at 276.
4. *Id.*
5. 18 U.S.C.S. §§ 2331–2338 (2006).
6. *Id.* at § 2333(a).
7. *Id.*
8. Estate of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76, 84 (D. R.I. 2001).
9. *Id.*

amended complaint.[10] In response to plaintiffs' amended complaint, served on August 23, 2003, the PA and the PLO moved to dismiss on essentially the same grounds they asserted against the first complaint, adding a claim of non-justiciability.[11] Before a decision was reached on this motion, the defendants further moved for leave to assert defenses, although they had not yet responded to the complaint, and for the first time entered a claim of sovereign immunity.[12] The court granted a stay of discovery until decision on the motion to dismiss, but on November 4, 2002, denied the dismissal motion and dissolved the stay.[13]

Following this decision, the defendants made a series of motions asking for reconsideration of their stay of discovery motion and for reconsideration of the second decision, denying their dismissal motion, all of which were denied.[14] Meanwhile, the plaintiffs moved for a default judgment against the defendants for failure to answer the amended complaint.[15] A magistrate judge entered the default on April 21, 2003,[16] and on March 31, 2004, recommended that judgments in excess of $116,000,000 be entered against each defendant.[17] The defendants timely objected to this recommendation, but on July 12, 2004, the district court denied their objections, and ordered judgment for the plaintiffs in the recommended amounts.[18]

The First Circuit decided three questions on appeal:[19] whether the case revolves around a non-justiciable political question;[20] whether the defendants are entitled to sovereign immunity;[21] and whether the defendants were entitled to a binding determination of sovereign immunity (including any appellate process) before being compelled to answer the complaint.[22]

II. The Court's Analysis

A. The Question Whether the PA and the PLO Have Set Forth Sufficient Evidence to Support a Claim of Sovereign Immunity Is Not a Non-Justiciable Political Question

The defendants argued that the district court engaged in a political function by interpreting past United Nations resolutions and Israeli-PLO agreements in a controversial manner and

10. *Id.* at 100.
11. *Ungar*, 402 F.3d at 277.
12. *Id.*
13. *See* Estate of Ungar v. Palestinian Authority, 228 F. Supp. 2d 40, 51 (D. R.I. 2002).
14. *Ungar*, 402 F.3d at 278–79.
15. *Id.* at 278.
16. *Id.* at 279.
17. *Id.*
18. *See* Estate of Ungar v. Palestinian Authority, 325 F. Supp. 2d 15, 21–28 (D. R.I. 2004).
19. *Ungar*, 402 F.3d at 275.
20. *Id.*
21. *Id.*
22. *Id.*

that the decision amounted to a political statement.[23] The court responded to the argument that the case was centered on a non-justiciable political question by looking to the Supreme Court's decision in *Baker v. Carr*[24] and applying the six tests set forth therein.[25]

The six tests the court employed were: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[26] The First Circuit found that the defendants failed to establish a non-justiciable political question under any of the six tests.[27]

The court began by pointing to the legislative history of the ATA, the purpose of which was to grant courts the power to determine questions of sovereign immunity in a legal, as opposed to political, framework and thereby reducing the foreign policy implications of immunity decisions.[28] Therefore, it found that the first test posed no obstacle to a decision of the case.[29] As to the second and third tests, the court noted that both parties had agreed that "the definition of a 'state' under the relevant statutes was informed by an objective test rooted in international law and articulated in the Restatement (Third) of Foreign Relations."[30] Thus, the court found that the decision was particularly appropriate for a judicial determination, as the facts of the case need only be applied to the objective legal standard to reach a legal conclusion.[31] Finally, the court quickly did away with the remaining three tests, referring to the holding in *Kadic v. Karadzic*,[32] which stated that those tests are "relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."[33] It found that the ATA was established, in part, to distinguish legal determinations of sovereign immunity from political determinations of sovereignty.[34] The State Department retained the authority to file statements of interest that suggest that courts decline to exercise jurisdiction in particular sovereignty disputes.[35] Therefore, according to the First Circuit, the statute prevents the court from entering a decision that either does not accord proper respect to

23. *Id*. at 280.
24. 369 U.S. 186 (1962).
25. *Ungar*, 402 F.3d at 275.
26. *Id*. at 280; *see also Baker*, 369 U.S. at 217.
27. *Id.*
28. *Id.* at 280–81.
29. *Id.* at 281.
30. *Id.*; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987).
31. *Ungar*, 402 F.3d at 281.
32. 70 F.3d 232 (2d Cir. 1995).
33. *Id.* at 249.
34. *Ungar*, 402 F.3d at 281.
35. *Id*.

the executive branch or conflicts with earlier decisions on the same matter.[36] Under this analysis, the court found the case to be justiciable.

B. Palestine Is Not a State as Defined in the ATA, and Therefore the PA and the PLO Are Not Entitled to Sovereign Immunity

The First Circuit began its sovereign immunity analysis by examining the language of the ATA.[37] It first determined that the Foreign Sovereign Immunities Act (FSIA)[38] and the ATA contained analogous uses of the term "foreign state," although neither defined it.[39] Both statutes, which were meant to be read "in pari materia,"[40] contain language that indicates the term "foreign state" includes subdivisions and agencies of the state and their respective employees.[41] The court further determined that the definition of the term "foreign state" should be established under the standard set forth in the *Restatement (Third) of Foreign Relations*.[42]

The *Restatement* posits a four-part test for determining statehood.[43] It defines a state as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."[44] The First Circuit found the third criterion, "under the control of its own government," to be the most important of the four, exerting an influence on the other three.[45] The court went on to give a somewhat lengthy history of the area known as Palestine from 1922 until the present.[46] While this history need not be repeated here, the court chose to focus on three periods of Palestinian history for statehood analysis: (1) pre-1967 (starting with the period following the end of WW II and the United Nations' mandate placing Palestine under the tutelage of Britain[47] and culminating in the formation of the PLO and the second Arab-Israeli War);[48] (2) 1967-1994 (encompassing the U.N.'s recognition of Palestine's right to self-determination[49] and the first Israeli/PLO peace accord[50] and culminating in the establishment of the PA);[51] and (3) 1994 decision (including the

36. *Id.*

37. *Id.* at 282.

38. 28 U.S.C.S. §§ 1602–1611 (2006).

39. *Ungar*, 402 F.3d at 282.

40. *Id.* (meaning "upon the same subject").

41. *Id. Compare* Foreign Sovereign Immunities Act, 28 U.S.C.S. § 1603(a) (2006), *with* Anti-Terrorism Act, 18 U.S.C.S. § 2337(2) (2006).

42. *Ungar*, 402 F.3d at 283.

43. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987).

44. *Id.*

45. *Ungar*, 402 F.3d at 288–89.

46. *Id.* at 284–88.

47. *Id.* at 284–85.

48. *Id.* at 285–86.

49. *Id.* at 286; *see also* S.C. Res. 338, U.N. SCOR, 28th Sess., Resolutions and Decisions, at 10, U.N. Doc. S/INF/29 (1973).

50. *Ungar*, 402 F.3d at 286.

51. *Id.*

PA's first election,[52] continued altercations between the PA and Israel,[53] and the U.N.'s enhancement of Palestine's observer status[54]). The court found that Palestine failed to meet the criteria for statehood in all of these periods.[55]

Instead, the court found that during all three periods, Palestine lacked the prerequisite for the determination of statehood: control over its own government.[56] Rather, it determined that Palestine has never controlled the area since 1922, when the region has consistently been under the control of another recognized state, whether it be Britain, Jordan, Egypt, or Israel.[57] Therefore, under the court's analysis, the court held that Palestine was not a state for the purposes of the ATA and, therefore, not entitled to sovereign immunity.[58]

C. Defendants Are Not Entitled to a Final Determination of Sovereign Immunity (Including Appellate Review) Before Being Required to Bear Any of the Burdens of Litigation

Finally, the court analyzed the defendants' assertion that they were entitled to a final, binding determination of sovereign immunity, including appellate review, before they were required to bear the burdens of litigation. The court found that because the defendants had delayed in asserting their sovereign immunity defense until after they had made, and lost, two previous motions to dismiss the case based on other factors,[59] they were not entitled to halt the further process of the case by a delayed assertion of this defense.[60] The court distinguished *In re Papandreou,*[61] wherein the D.C. Circuit found that the trial court should have decided the non-merits-based defenses before compelling the defendants to produce jurisdictional discovery.[62] Instead, it analogized to the First Circuit's decision in *Guzman-Rivera v. Rivera-Cruz*,[63] where the court held that, "in exchange for the defendant's right to interrupt the judicial process, the court may expect a reasonable modicum of diligence in the exercise of that right."[64] The court found that the defendants' delay in asserting a sovereign immunity defense was strategic, and therefore, they were not entitled to any further delay in the case.[65]

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52. *Id.* at 287.
53. *Id.*
54. *Id.*
55. *Id.* at 290–92.
56. *Id.*
57. *Id.*
58. *Id.* at 292.
59. *Id.* at 292–94.
60. *Id.*
61. 139 F.3d 247 (D.C. Cir. 1998).
62. *Ungar*, 402 F.3d at 293 (citing *Papandreou*, 139 F.3d at 254).
63. 98 F.3d 664 (1st Cir. 1996).
64. *Id.* at 668–69 (quoting Kennedy v. City of Cleveland, 797 F.2d 297, 301 (6th Cir. 1986)).
65. *Ungar*, 402 F.3d at 294.

As a result of the court's negative answers to the questions before it, the First Circuit rejected the defendants' appeal and upheld the $116,000,000 judgments against the defendants.[66] The Supreme Court subsequently denied certiorari.[67]

III. Conclusion

This appears to be a case of the First Circuit trying to "have its cake and eat it too." The major flaw in the court's sovereign immunity analysis is that the initial complaint against the PLO and the PA stated that they "failed to maintain public order and security *in the territories under their control*, and instead 'provided defendant Hamas and its members with safe haven, a base of operations, shelter, financial support and other material support and resources.'"[68] This in itself is an allegation that the PLO and the PA had control of certain territories in the region. These territories under the control of the Palestinian government, or PA, by their very nature would have a defined border and population, and thus, would satisfy the first three criteria of the *Restatement*'s statehood test.[69] As to the fourth prong of the test, a government "that engages in, or has the capacity to engage in, formal relations with other such entities,"[70] would seem to be exhibited by the very existence of the Israeli/PLO peace agreements[71] and by the Wye River Memorandum,[72] both of which were recognized by the U.S. government and mentioned by the First Circuit in its analysis.[73] However, it is unclear from the decisions whether, in the plaintiffs' amended complaint, the language was changed significantly so as to remove any inference that the PA and the PLO were in control of certain territories.[74] If this were the case, it might bolster the First Circuit's analysis, but could not erase the fact that the original complaint, the basis for all future amendments and appeals, alleged that the PA and the PLO controlled at least certain territories in the area.

Further, the decision to deny the PLO and the PA sovereign immunity, regardless of the intent of Congress in enacting the ATA or the intent of the court in arriving at its decision, undoubtedly makes a political statement. If the State Department has the power to issue "statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity"[75] and chooses not to exercise that power, that inaction signifies, at best, indifference and, at worst, endorsement of the decision not to extend sovereignty. In this particular case, this conflict certainly creates the potential for embarrassment,

66. *Id.*

67. Palestine Liberation Org. v. Ungar, 126 S. Ct. 715 (2005).

68. Estate of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76, 84 (D. R.I. 2001).

69. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987).

70. *Id.*

71. *See Ungar*, 402 F.3d at 286.

72. *Id*. at 287 (citing Wye River Memorandum (Interim Agreement), Oct. 23, 1998, Isr.–PLO, 37 I.L.M. 1251).

73. *See Ungar*, 402 F.3d at 286–87.

74. *Compare* Estate of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76, 84 (D. R.I. 2001) *with* Estate of Ungar v. Palestinian Authority, 228 F. Supp. 2d 40, 42 (D. R.I. 2002) (stating, "The factual basis for each claim is essentially the same. Plaintiffs allege that the PA defendants repeatedly praised defendant Hamas and its operatives who engaged in terrorist activities and violence against Jewish civilians and Israeli targets . . . .").

75. *See Ungar*, 402 F.3d at 281 (citing Austria v. Altmann, 541 U.S. 677 (2004)).

when our government recognizes the PLO and the PA in their dealings with Israel, but not in conflicts with our own country. Therefore, this case would seem to involve a non-justiciable political question best left up to the executive branch.

The best solution to the problem of holding the PLO and PA accountable for promoting or otherwise aiding terrorist acts may lie in the state-sponsored terrorism exception to the FSIA and ATA, enacted by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[76] This Act provides that, "a foreign state which has been officially designated as a state sponsor of terrorism by the Department of State shall not be immune from suit where the foreign state, or an official, employee, or agent of the foreign state causes personal injury or death to a United States citizen as a result of an act of terrorism, or through the provision of material support and resources to an individual or entity that commits such an act."[77] If the Department of State was to so classify the PA or the PLO, it would avoid the embarrassment of denying Palestine statehood, while still availing possible plaintiffs of a remedy.

Christine M. Geier

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76. *See* Estate of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76, 93 (D. R.I. 2001).

77. *Id.* (citing 28 U.S.C. § 1605(a)(7) (2006)).

In re Royal Group Technologies Securities Litigation

2005 U.S. Dist. LEXIS 28688 (S.D.N.Y. Nov. 21, 2005)

Under the doctrine of *forum non conveniens*, when a plaintiff is not an American citizen, less deference is accorded to plaintiff's choice of forum, and when an alternative forum exists, private and public interest factors must clearly weigh in favor of the alternative forum.

I. Holding

In *In re Royal Group Technologies Securities Litigation*,[1] the U.S. District Court for the Southern District of New York granted defendant's motion to dismiss on the basis of *forum non conveniens*. The court held that: (1) plaintiff's lack of bona fide connections to the district indicated that less deference should be accorded to his choice of forum;[2] (2) Canada was an adequate alternative forum because all of the defendants were Canadian citizens who were amenable to service of process and the subject matter, the violation of federal securities laws could be litigated in Canada;[3] and (3) while public interest factors were neutral, private interest factors weighed in favor of a Canadian forum because the ease of access to evidence and the availability of a compulsory process for the attendance of unwilling witnesses.[4]

II. Background and Procedural Posture

Defendants are Royal Group Technologies Ltd. ("Royal Group") and Vic De Zen ("De Zen"), Douglas Dunsmuir, Gary Brown, Ron Goegan and Domenic D'Amico, who are either founders or directors of Royal Group.[5] Royal Group is a Canadian corporation engaged in the manufacture of construction products.[6] Lead plaintiffs John Moretto ("Moretto") and Canadian Commercial Workers Industry Pension Plan ("CCWIPP") both own shares of Royal Group purchased on the Toronto Stock Exchange.[7]

Plaintiffs brought a class action suit against Royal Group for violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act").[8] They allege that the defendants, "caused the company to engage in financial transactions either with themselves or with companies under their control."[9] The defendants failed to disclose these transactions to shareholders, as required by Securities and Exchange Commission (SEC) regulations.[10] When Canadian authorities initiated an investigation and these transactions came to light in 2004,

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1. 2005 U.S. Dist. LEXIS 28688 (S.D.N.Y. Nov. 21, 2005).
2. *Id.* at *6.
3. *Id.* at *7.
4. *Id.* at *11.
5. *Id.* at *3.
6. *Id.*
7. *Id.*
8. *Id.* at *4; *see also* Securities Exchange Act of 1934, 15 U.S.C.S. § 78a (1934).
9. *Royal Group*, 2005 U.S. Dist. LEXIS 28688, at *4.
10. *Id.*

Royal Group's stock price decreased significantly.[11] Defendants moved to dismiss on, *inter alia* alleging *forum non conveniens*, and the U.S. District Court for the Southern District of New York granted the motion.[12]

III. The Court's Analysis

As a general matter, courts must defer to a plaintiff's choice of forum.[13] The plaintiff's choice of forum should not be disturbed unless the balance of factors is strongly in favor of the defendant.[14] However, the deference accorded plaintiff's choice varies with the circumstances.[15] Thus, the court provided three steps by which to decide whether the doctrine of *forum non conveniens* requires dismissal.[16]

First, courts must determine the degree of deference accorded to plaintiff's choice of forum.[17] The court explained that one may not easily presume that a choice is convenient when a foreign plaintiff sues in a United States forum.[18] Therefore, less deference is accorded to a foreign plaintiff's choice.[19] The lack of the plaintiff's or the lawsuit's bona fide connection to the United States would make it easier for the defendant to obtain a dismissal for *forum non conveniens*.[20] Here, the court accorded less deference to plaintiff's choice because the lead plaintiffs, Moretto and CCWIPP, were Canadian citizens.[21]

Second, a court must decide whether an adequate alternative forum exists.[22] In determining the adequacy of an alternative forum, the court must consider whether the defendants are "amenable to service of process" in the alternative forum and whether it "permits litigation of the subject matter of dispute."[23] The court found that since all of the defendants were Canadian, Canada, was an adequate forum.[24] The court also agreed with the Second Circuit's conclusion that Ontario, Canada, was an adequate forum to try class actions based on violations of federal securities laws.[25] The court noted that plaintiffs had not presented any argument as to why Canadian courts were not an adequate forum.[26] Despite the plaintiffs' assertion that Can-

11. *Id.*
12. *Id.*
13. *Id.* (citing Iragorri v. United Techs. Corp., 274 F.3d 65, 70 (2d Cir. 2001)).
14. *Id.* (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).
15. *Id.* at *4.
16. *Id.* at *5.
17. *Id.*
18. *Id.*
19. *Id.* at *6 (citing Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 70 (2d Cir. 2003)).
20. *Id.*
21. *Id.* at *5.
22. *Id.*
23. *Id.* at *7.
24. *Id.* (citing *Pollux*, 329 F.3d at 75).
25. *Id.*
26. *Id.*

ada imposed different kinds of legal and procedural requirements on securities class actions and that such suits were relatively new in Canada, they did not cite any specific provision of Canadian law that would impede them from pursuing this action in Canada.[27]

If an adequate alternative forum exists, the court balances the "private and public interest" factors set forth by the Supreme Court in *Gilbert*,[28] based on the "relative hardships involved, whether the case should be adjudicated in the plaintiff's chosen forum or in the alternative forum suggested by the defendant."[29] The court relied on *DiRienzo v. Philip Servs. Corp.* to balance these factors.[30]

The court first considered the private interest factors used in *DiRienzo II.*[31] These include the ease of access to evidence, the availability of compulsory process for the attendance of unwilling witnesses, the cost of the willing witnesses' attendance, and all other factors that might make the trial quicker or less expensive.[32] The court sided with defendant's assertions that the vast majority of documents and witnesses relevant to plaintiffs' claims were located in Canada and noted that plaintiffs did not dispute that assertion.[33] Plaintiffs argued that relevant documents could be easily transported to the U.S. District Court for the Southern District of

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27. *Id.* at *7.

28. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947). The court stated:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. [B]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id.

29. Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 70 (2d Cir. 2003).

30. DiRienzo v. Philip Servs. Corp., 294 F.3d 21 (2d Cir. 2002).

31. *Royal Group*, 2005 U.S. Dist. LEXIS 28688 at *8 (explaining the importance of balancing private and public factors as articulated in *Gilbert* in order to assess adequacy of the Canadian forum. The court held that since the doctrine's strength is derived from flexibility and each case turns on its own facts, a single factor is rarely dispositive).

32. *Id.* (citing *DiRienzo*, 294 F.3d at 29–30).

33. *Id.*

New York without undue hardship, but the court was not persuaded, stating that the location of documents and witnesses still weighed in favor of a Canadian forum.[34] More importantly, the court stated that several non-party witnesses with knowledge of the underlying transaction at issue in this litigation were located outside the court's subpoena power.[35] Plaintiffs argued that depositions could be taken, but the court pointed out that live testimony was especially important in fraud actions, and therefore necessary in this case.[36]

The court then considered the public interest factors, which include: administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the local interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law.[37] The court found that both Ontario courts and the U.S. District Court for the Southern District of New York suffer from congestion.[38] While the United States has an interest in addressing allegations of fraud against corporations listed on the New York Stock Exchange, Canada has the same interest in domestic corporations and individual citizens.[39] In addition, the court found that the local interest in trying this action in the U.S. District Court for the Southern District of New York was weaker than the one found in *DiRienzo II,* where the vast majority of defendant's shares were traded on American stock exchanges,[40] whereas less than 12 percent of Royal Group's shares were traded on an American exchange during the class period.[41] Finally, a Canadian court might have to apply U.S. law to claims based on purchases of Royal Group's shares by U.S. citizens on the NYSE, and an American court would have to apply Canadian law to claims by non-resident class members who purchased securities outside the United States.[42]

Based on these factor comparisons, the court found the public interest factors to be neutral, while private interest factors were clearly in favor of a Canadian forum.[43] The court con-

34. *Id.*

35. *Id.* at *9.

36. *Id.* (recognizing that the fact-finder's evaluation of witnesses' credibility is central to the resolution of the issues and a jury in this District would be "deprived of the live testimony of Royal Group's auditors, independent directors and forensic accountants involved in the investigation of the alleged fraud").

37. *Id.* (citing *DiReinzo*, 294 F.3d at 31).

38. *Id.* at *9–10.

39. *Id.* at *9.

40. *Id.*; *see also DiRienzo,* 294 F.3d at 31 ("[P]laintiffs' amended complaint alleges the majority of their securities transactions were conducted entirely in the United States, by Americans, in American dollars, on American stock exchanges. For example, plaintiffs claim that nearly 80 percent of Philip's shares sold during the class period were traded on exchanges in the United States.").

41. *Royal Group*, 2005 U.S. Dist. LEXIS 28688, at *9.

42. *Id.* at *10 (explaining that plaintiffs' proposed class includes all persons who purchased Royal Group stock, not just those who purchased on the NYSE).

43. *Id.* at *11.

templated that the action would largely depend on the testimony and evidence of non-party witnesses, who could not be compelled to testify in the U.S. District Court for the Southern District of New York.[44] Distinguishing this case from *DiRienzo II*, in which the Second Circuit reversed a dismissal for *forum non conveniens*,[45] the court held that dismissal was warranted when weighed against the foreign plaintiffs' diminished interest in litigating in this forum.[46]

IV. Conclusion

The doctrine of *forum non conveniens* enables a court to decline, in its sound discretion, the exercise of jurisdiction over an action if it may be tried justly and conveniently in an alternative forum. This doctrine protects courts from being compelled to exercise jurisdiction when doing so may be fundamentally unfair to the courts, defendants, and public in general, as was the case in *Royal Group*, because of the lack of a bona fide connection.

The U.S. District Court for the Southern District of New York concluded that plaintiffs should be accorded less deference in their choice of forum because as Canadian citizens, they failed to present any evidence to suggest a "bona fide connection" to the United States. Further, all parties to the action were Canadians, most of the evidence and witnesses were located in Canada, and most of the non-party witnesses were outside of the court's subpoena power. In addition, only about 12 percent of the shares were traded on an American exchange during the class period; therefore, plaintiffs were less likely to succeed in pursuing suit in an American forum.

The court applied the public/private interest factors balancing test set out by the Supreme Court in *Gilbert*. Distinguishing this case from *DiRienzo II*, the court correctly concluded that the private interest factors weighed in favor of a Canadian forum, while the public interest factors were largely neutral. Both Canada and the United States had a public interest in trying this case, but here, unlike *DiRienzo II*, neither plaintiffs nor defendants had a bona fide connection to the United States to support plaintiffs' supposed great private interest in continuing the litigation in this forum. Thus, the U.S. District Court for the Southern District of New York properly dismissed the complaint on grounds of *forum non conveniens*.

Emma Nam-Kyung Oh

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44. *Id.* (stating that non-party witnesses include Royal Group's auditors, the banks involved in the underlying transactions, and the independent directors and outside consultants who investigated the alleged fraud).

45. *Id.* (citing *DiRienzo*, 294 F.3d at 31, which questions the defendants' claim that litigating in New York would be inconvenient, as some of the named plaintiffs resided in the Southern District of New York and prior to the motion for dismissal for *forum non conveniens*, defendants in *DiRienzo* petitioned the Judicial Panel on Multidistrict Litigation to transfer several parallel actions to the Southern District of New York. In addition, most plaintiffs conducted their stock transactions in the United States).

46. *Id.*

Opoku-Acheampong v. Depository Trust Co.

2005 U.S. Dist. LEXIS 16387 (S.D.N.Y. Aug. 9, 2005)

The United States District Court for the Southern District of New York granted summary judgment for the defendant when the plaintiff, a native of Ghana, failed to establish a *prima facie* case of discrimination and retaliatory discharge under Title VII of the Civil Rights Act of 1964.

I. Holding

In *Opoku-Acheampong v. Depository Trust Co.*,[1] the United States District Court for the Southern District of New York dismissed an employee's claims against his former employer, alleging termination on the basis of discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964.[2] Plaintiff failed to prove a prima facie case on both the discrimination and retaliation claims and, therefore, the employer's motion for summary judgment was granted.[3]

II. Facts and Procedural Posture

Plaintiff, a Ghanaian national, was employed by defendant, Depository Trust Company ("DTC"), from November 1983 until his termination in November 1997.[4] Plaintiff worked as an intermediate clerk in DTC's Microprocessing Department.[5] The department recorded the daily financial transactions that DTC processed 24 hours a day.[6] Plaintiff worked the third shift and often objected to the leftover work from the second shift that he had to complete.[7] These complaints resulted in citations from his manager for insubordination and verbal warnings.[8]

In 1988, plaintiff filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") against the company.[9] This charge was subsequently withdrawn in compliance with a settlement.[10]

On October 21, 1997, work remained from the previous shift to be completed during the third shift worked by the plaintiff.[11] The plaintiff, who was also responsible for "quality checking" the work done during that shift, refused to complete the work left over from the second

1. 2005 U.S. Dist. LEXIS 16387 (S.D.N.Y. Aug. 9, 2005).
2. 42 U.S.C.S. § 2000(e) (2006).
3. *See Opoku-Acheampong*, 2005 U.S. Dist. LEXIS 16387, at *1.
4. *Id.*
5. *Id.* at *4.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at *3.
10. *Id.* at *12.
11. *Id.* at *3.

shift.[12] Instead, the work was left for the supervisor, who had to remain 45 minutes after the third shift ended.[13] This refusal to perform was an act of insubordination, resulting in an investigation which revealed that the plaintiff had signed one of the columns of the production log with a co-worker's initials instead of his own.[14] This act was in direct violation of DTC's "zero tolerance policy" towards "fraudulent conduct, terminating employees for *single* acts of conduct, such as lying about reasons for absences from work and falsifying personal information on company documents."[15] Plaintiff was subsequently terminated for signing someone else's name in the log and lying about completion of the work assigned to him.[16]

Plaintiff filed a timely post-termination EEOC charge in April 1998, stating that he was unlawfully terminated, based on discrimination and in retaliation for the discrimination complaint that he had filed with the EEOC against the company nine years earlier.[17] This complaint was dismissed for, among other reasons, "failing to indicate that a violation ha[d] occurred."[18]

Under Title VII, plaintiff initiated suit on two grounds: (1) his termination was based on national origin discrimination, and (2) his termination was in retaliation for the discrimination complaint he had filed nine years earlier.[19] To support his discrimination claim, plaintiff asserted that he was the only Ghanaian-African employee and he described numerous derogatory references made to him regarding his national origin by his co-workers and supervisor.[20] He claimed that these incidents were reported to management, yet went unanswered.[21] To support his retaliation claim, plaintiff claimed there were multiple incidents.[22] In October 1998, his then-supervisor and then-manager exchanged memoranda describing plaintiff's strange and irrational behavior (him standing on chairs to observe people discussing him). A verbal warning was given to the plaintiff.[23] In 1989, the then-manager and the Human Resource Department exchanged memoranda detailing another altercation between the plaintiff and the supervisor. An investigation revealed inconsistencies in the supervisor's report, so no action was taken against the plaintiff.[24] In 1993 and 1995, a co-worker accused plaintiff of

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at *2.

16. *Id.* at *3. Plaintiff claimed that he had signed his co-worker's initials to reflect that he had done most of the work and that it was common to record someone else's initials if that other person had done the work. He also asserts that the supervisor authorized him to fill in the log this way; however, the supervisor denied this claim. *Id.*

17. *Id.* Plaintiff also included discrimination based on race and "suspending me to deny [sic] me a trans[fer] and promotion" on his complaint, but plaintiff failed to address these claims in any of his motions. Therefore, the court treated the claims as abandoned. *Id.*

18. *Id.*

19. *Id.* at *1.

20. *Id.* at *7.

21. *Id.* at *9. Plaintiff merely made vague declarations that whenever co-workers complained about him he was subject to disciplinary action. *Id.*

22. *Id.* at *12.

23. *Id.*

24. *Id.*

possessing a gun on company premises, but a search revealed no weapons.[25] In June 1997, plaintiff applied for a transfer to another department and received a three-day suspension, which DTC says was in response to another confrontation with a co-worker (plaintiff threatened to stab the co-worker with a pair of scissors).[26]

Plaintiff received notice of his right to sue in November 1998 and commenced this action in February 1999.[27] DTC moved for summary judgment on both claims and summary judgment was granted.[28]

III. Summary Judgment Standard

Summary judgment is granted to the moving party when there is a showing that no genuine issue of material fact exists and where the moving party is entitled to judgment as a matter of law.[29] A genuine issue of material facts exists if there are specific facts on which a reasonable jury could return a verdict for the nonmoving party.[30] The initial burden is on the moving party to show that there is no genuine issue of material fact. The burden then shifts to the nonmoving party to provide specific facts that show the existence of a genuine issue.[31] When reviewing a summary judgment motion, the court will view the facts in the light most favorable to the nonmoving party.[32]

IV. Title VII

Title VII prohibits an employer from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin."[33] It also prohibits an employer from discriminating against an employee for filing an EEOC charge.[34] Both discrimination and retaliation claims without direct evidence are governed by the burden-shifting framework.[35] This framework is: (1) the plaintiff bears the initial burden of establishing a *prima facie* case; (2) the defendant then bears the burden of showing a legitimate reason for the plaintiff's termination; and

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25. *Id*.

26. *Id.*

27. *See* 42 U.S.C.S. § 2000e-16(c) (2006) (stating that an applicant must wait for a notice of the right to sue from the Equal Employment Opportunity Commission); *see also* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 439 (1990) (holding that Title VII requires that a plaintiff must sue within 90 days of receiving a notice of right to sue from the EEOC).

28. *Opoku-Acheampong*, 2005 U.S. Dist. LEXIS 16387, at *1.

29. *Id.*; *see also* FED. R. CIV. P. 56.

30. *Opoku-Acheampong*, 2005 U.S. Dist. LEXIS 16387, at *1; *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

31. *Opoku-Acheampong*, 2005 U.S. Dist. LEXIS 16387, at *1.

32. *Id.*

33. 42 U.S.C.S. § 2000e-2(a) (2006).

34. *Id.*

35. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

(3) the plaintiff must then be able to show that the defendant's reason is mere pretext, and that the true motivation for termination was either discrimination or retaliation.[36]

A *prima facie* case of national origin discrimination may be shown by the plaintiff if he establishes that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the action occurred under circumstances that gave rise to an assumption of national origin discrimination.[37]

To establish a *prima facie* case of unlawful retaliatory discharge, a plaintiff must show that: (1) he participated in a protected activity known to the employer; (2) he suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action.[38]

V. The Court's Analysis

A. Title VII National Origin Discrimination Claim

Judge Daniels held that the first and third elements, his protected status as a Ghanaian national and that his termination was an adverse employment action, were undisputed.[39] Although DTC argues that the second element regarding his qualifications for the position was not met, the court ultimately did not make a decision about his credentials.[40] Instead, the court based its conclusion on the failure of the plaintiff to meet the fourth element: the action occurred under circumstances giving rise to an inference of national origin discrimination.[41]

The court held that the plaintiff failed to specify any instances of national origin discrimination in his complaint or to offer any proof supporting such a claim.[42] The plaintiff merely pointed to instances in which his co-workers made derogatory remarks to him, referring to his African origin.[43] The Southern District previously held that, "stray comments are not evidence of discrimination if they are not temporally linked to an adverse employment action or if they are made by individuals without decision-making authority."[44] "Even if these comments were

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36. *Opoku-Acheampong*, 2005 U.S. Dist. LEXIS 16387, at *7. *See generally* McCulloch v. Maryland, 17. U.S. 316, 423 (1819) (showing, in dicta, that Congress cannot use enumerated powers from the Constitution as a pretext for a power it does not have).

37. *Opoku-Acheampong*, 2005 U.S. Dist. LEXIS 16387, at *9.

38. *Id.* at *13.

39. *Id.* at *9.

40. *Id.* at *10.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See* Campbell v. Daytop Village, 97 Civ. 4362 (JSM), 1999 U.S. Dist. LEXIS 6943 (S.D.N.Y. May 7, 1999); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (stating in concurrence that, "statements made by non-decision-makers, or statements made by decision-makers unrelated to the decisional process itself" are insufficient to establish discriminatory intent).

made," the court said, "they are neither linked in time to his termination nor made by those who could terminate him."[45]

The court also held that the statement by the plaintiff that he was the only Ghanaian-African employed by DTC was inadequate proof of discrimination, since he gave no evidence that there was a difference in treatment between him and other similarly situated employees.[46]

B. Title VII Retaliation Claim

The plaintiff also claimed that he was terminated in retaliation for an EEOC charge filed against the company nine years earlier.[47] This charge was eventually withdrawn, but the plaintiff argues that management initiated a harassment campaign against him in response to the charge.[48]

The court held that the plaintiff's citations to multiple incidents of harassment during the years after the EEOC charge were all insufficient to survive a motion for summary judgment.[49] The plaintiff failed to prove the third element of a *prima facie* case, that there was a causal connection between the protected activity and the adverse employment action.[50]

The court went on to state that there are two ways to prove a causal connection: directly, through evidence of retaliation against the plaintiff by the defendant; and indirectly, by showing that discriminatory treatment closely followed after the protected treatment or by showing that other similarly situated employees of different national origins were treated differently.[51] Neither of these was present in the plaintiff's case.[52] Plaintiff's EEOC charge was in 1988 and his termination was in 1997, which was considered too great a time lapse to support a showing of the necessary causal link and, therefore, a presumption of retaliation.[53]

Judge Daniels also found that even if the plaintiff had satisfied the initial burden of proving a *prima facie* retaliation case, the defendant's evidence of a non-discriminatory reason for terminating the plaintiff's employment—that he lied, violating the company's policy—would have been sufficient to overcome it.[54] Plaintiff would then have the burden of proving that defendant's reason for termination was pretextual, which he failed to do.[55]

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45. *Opoku-Acheampong*, 2005 U.S. Dist. LEXIS 16387, at *11.
46. *Id.* at *11 (referring to other employees of other national origins as being similarly situated).
47. *Id.* at *12.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at *14 (citing DeCintio v. Westchester County Med. Ctr., 821 F.2d 111, 115 (2d Cir. 1987)).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

Opoku-Acheampong was fairly and correctly adjudicated. Considering the framework of the analysis, the court concluded that the plaintiff failed to prove a *prima facie* case of national origin discrimination because he failed to show his termination was based on national origin. The court properly continued to maintain that no discriminatory discharge claim can be based on discrimination by those without decision-making authority.

Additionally, the court concluded that the plaintiff failed to prove a *prima facie* case of retaliatory discharge since there was no causal connection between the termination and complaint. The court heavily relied on the large nine-year gap from when the complaint was issued to when the plaintiff was terminated. Had a shorter time elapsed, the claim of a causal connection might have been more plausible.

Under the burden-shifting analysis, when there was no direct evidence of retaliation or discrimination, the plaintiff not only failed to establish a *prima facie* case, but the company's reason for termination was completely legitimate, considering that the plaintiff had violated company policy and the plaintiff did not show any evidence of pretext.

The court imposes a very high standard on the plaintiff when there is no direct evidence; not only must he prove all the *prima facie* elements, but he must also prove the overall Title VII elements. Showing that a company has a legitimate purpose for termination is a very low standard to fulfill, as almost always a company will be able to show some legitimate purpose. The burden is then on the plaintiff to show that the reason was mere pretext, a much more difficult standard to meet. However, the plaintiff should bear the greater burden when there is no direct evidence, since imposing that burden on the defendant would merely open the floodgates to frivolous litigation under Title VII and the plaintiff is in a much better position to prove that discrimination was a motivating factor. Placing the burden on the defendant would allow plaintiffs to bring claims against their employers under Title VII for mere employee dissatisfaction.

While the burden on the plaintiff is high, according to the test laid out the court properly granted summary judgment in favor of the defendant.

Bena Varughese

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