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The Mountains Are High and the Courts Are Far Away

Inaccessibility of Remedy for Small-Claim Chinese Plaintiffs in a Globalizing World

Ellen C. Campbell[1] & Shanshan Zhao[2]

Introduction

In November 2015, China's government released a draft of its Thirteenth Five-Year Plan, designed to support and maintain China's development miracle.[3] This plan nominally shifts away from the exports-and-investment rocket-fuel growth model of past decades. In coming years, prosperity will be increasingly fueled by domestic consumption and innovation.[4] The "new normal" will be "medium-to-high" growth, aiming for 6.5% gross domestic product ("GDP") growth instead of the double-digits numbers of years past.[5] Some observers see increased risk for foreign businesses in this transition,[6] while others see opportunity.[7]

This paper argues that increased Chinese exposure to U.S. products (both goods and stock) will increase the risk of tort, contract, and securities fraud liability. However, liability is not an enforceable judgment. Chinese plaintiffs who have suffered damages of this sort face a very different path to obtaining legal remedies than U.S. plaintiffs who have suffered the same damages from the exact same company. In some areas of transnational law, treaties lay out unambiguous rules of engagement, as clear as the stars that light the galaxies. This paper, however, deals with the dark matter of international law. First, this paper examines the legal remedies available to Chinese plaintiffs when issues are not addressed within an international

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1. J.D., *cum laude*, 2017, New York University School of Law; M.S., Economics, 2013, Peking University Shenzhen Graduate School. Great thanks to professors Jerome Cohen, Arthur Miller, Peter Dutton, and Samuel Issacharoff for their assistance with this article.

2. In-house counsel, Bank of China New York Branch. L.L.M., 2016, New York University. Special thanks to: Jerome A. Cohen, Faculty Director of US-Asia Law Institute, Professor, New York University School of Law; and Peter A. Dutton, Professor of Strategic Studies, U.S. Naval War College, Director of the China Maritime Studies Institute, U.S. Naval War College, Adjunct Professor of Law, New York University School of Law, and Fellow at New York University School of Law, U.S.-Asia Law Institute.

3. *Highlights of Proposals for China's 13th Five Year Plan*, XINHUANET (Nov. 4, 2015), http://news.xinhuanet.com/english/photo/2015-11/04/c_134783513.htm.

4. Though the plan is to increase Chinese consumption of Chinese goods, we posit, as will be explained later, that demand for foreign goods is also likely to rise with increased prosperity and consumption.

5. *The 13th Five-Year Plan: Xi Jinping Reiterates his Vision for China*, APCO WORLDWIDE (2016), http://www.apcoworldwide.com/docs/default-source/default-document-library/Thought-Leadership/13-five-year-plan-think-piece.pdf?sfvrsn=2.

6. *E.g.*, Martin Reeves & David He, *What China's 13th Five Year Plan Means for Business*, HAR. BUS. REV. (Dec. 7, 2015), https://hbr.org/2015/12/what-chinas-13th-five-year-plan-means-for-business ("For foreign companies . . . who have profited from a benevolent market environment . . . lower aggregate growth, structural economic shifts and more competitive markets will . . . require them to rethink their China strategies.").

7. *E.g.*, *China's 13th Five Year Plan: 2016-2020: What Does It Mean for Your Business*, LEHMANBROWN INT'L ACCOUNTANTS (2016), http://www.lehmanbrown.com/ insights-newsletter/the-13th-five-year-plan-2016-2020-what-does-it-mean-for-your-business ("More western levels of free trade coupled with increased access to Chinese markets represent at face value increasing business opportunities.").

agreement. Second, this paper offers recommendations for the U.S.-China Bilateral Investment Treaty, which is currently continuing in protracted negotiation.[8]

Part One: Increased Chinese Exposure to U.S. Products and Services

Due to the limited Chinese exposure to U.S. products, litigation is uncommon. As a result, the path to obtaining legal remedies in both U.S. and Chinese courts is complex and uncertain. However, while the U.S.-China trade deficit is still profound, U.S. companies currently export more goods to China than in any previous decade.[9] China has a large and growing middle class with an appetite for U.S. products, which are seen as both prestigious and trustworthy.[10] The Chinese phrase "haitao" ("??") refers to the many Chinese consumers who search the internet to find and buy foreign products.[11] While China's central government has attempted to regulate and limit this practice, demand continues to be strong. Therefore, since the central government continues to promote consumption over savings, such demand for U.S. products will likely increase.[12]

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8. *E.g.*, William Mauldin & Mark Magnier, *U.S., China Make Progress Toward Trade and Investment Deal*, WALL ST. J. (Sept. 25, 2015, 6:56 PM), https://www.wsj.com/articles/u-s-china-make-progress-toward-trade-and-investment-deal-1443208549.

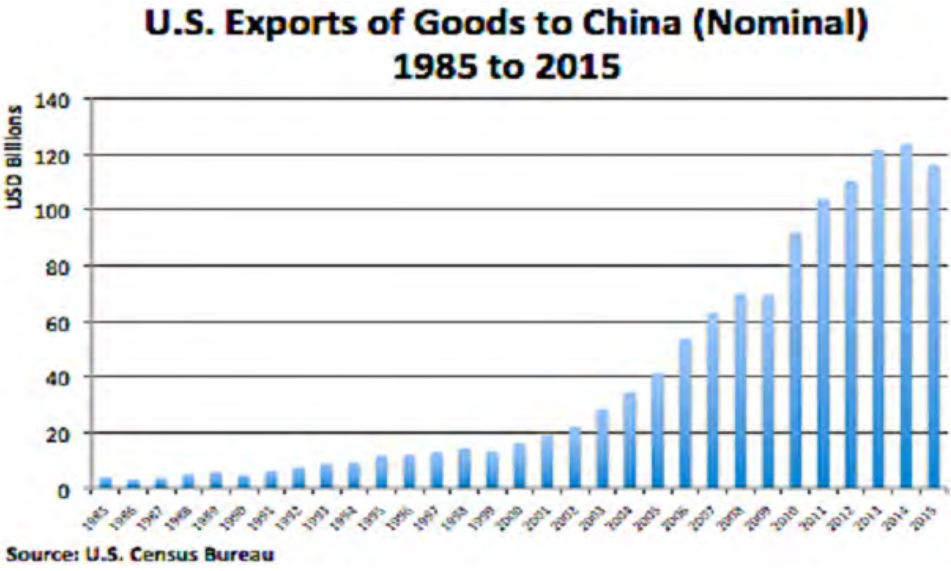
9. *See* Fig. 1, *infra*.

10. For example, in the wake of the melamine baby formula scandal, Chinese parents began importing foreign formula in mass quantities, to the point that the Chinese government eventually issued blocking regulations; *see* Lucy Hornby, *China Clamps Down on Baby Formula Imports*, FIN. TIMES (May 5, 2014), http://www.ft.com/cms/s/0/eb09d3d2-d41e-11e3-a122-00144feabdc0.html#axzz46hNuEZ9r; *see also* Ana Swanson, *China's Growing Gray Market for All That's Foreign*, FOREIGN POLICY (Aug. 20, 2014), http://foreignpolicy.com/2014/08/20/chinas-growing-gray-market-for-all-thats-foreign/ ("In a country with a track record of pumping out shoddy or even toxic products, foreign goods have long been synonymous with quality and prestige in China.").

11. *See, e.g.*, Ernie Diaz, *Here are your options for hitting the $35B Chinese cross-border shopping market*, VENTUREBEAT (Jan. 11, 2015, 1:00 AM), https://venturebeat.com/2015/01/11/here-are-your-options-for-hitting-the-35b-chinese-cross-border-shopping-market/.

12. Two recent rules coupled with stronger implementation have caused concern as to whether the e-commerce boom will continue in the future. Circular on Tax Policy for Cross-Border E-commerce Retail Imports ("E-commerce Tax Circular"), effective Apr. 8, 2016, significantly changed the preferential tax policies that had been applied to cross-border e-commerce transactions. A second more serious challenge to cross-border e-commerce involves a so-called "Positive List." On Apr. 7, 2016, eleven PRC government departments (covering all major government bodies relating to business trading, food and drug control, customs and tax) jointly published a "cross-border e-commerce retail list of imported goods," which led to prohibition of e-commerce sales of certain categories of goods. *See* Mark Schaub, Chen Bing, & Martyn Huckerby, *New Challenges in China Cross-Border E-commerce*, CHINA LAW INSIGHT (Apr. 13, 2016), http://www.chinalawinsight.com/2016/04/articles/corporate/new-challenges-in-china-cross-border-e-commerce/. China should be careful in applying these rules, since China agreed to increase market access for U.S. and other foreign companies by reducing tariff rates following WTO accession.

Figure 1: Increasing Exports of U.S. Goods to China



Increased potential for investment by small Chinese investors in U.S. stock markets mirrors the trend in the exportation of U.S. goods to China. New applications such as JimuStock, Tiger, and MiCai are giving small-time Chinese investors access to U.S. capital markets in a historically unprecedented way.[13] Already wild Chinese stock market volatility does not look to decrease in coming years.[14] Thus far, attempts to protect small investors have failed.[15] Savvy Chinese middle-class investors may wish to put more of their savings into foreign stocks in an attempt to diversify and access the benefits of foreign securities regulatory systems, especially since the need to save is still high and Chinese interest rates for savings accounts remain low.[16]

In the U.S., increased exposure of this sort by minor investors or consumers would inevitably lead to class actions for products liability, defective products, and securities fraud. However, the U.S. plaintiffs' bar is unlikely to get excited about this new crop of clients. For decades, worldwide plaintiffs with access to U.S. courts have preferred to litigate in U.S.

13. Chuin-Wei Yap, *Chinese Investors Get Door to U.S.*, WALL ST. J. (Jan. 3, 2016, 7:48 PM), https://www.wsj.com/articles/chinese-investors-get-door-to-u-s-1451868537.

14. Alanna Petroff, *China to world: Get ready for more market volatility*, CNN MONEY (Jan. 20, 2016, 11:25 AM), http://money.cnn.com/2016/01/20/investing/china-market-volatility-regulator/ ("The world should get used to volatile markets in China, one of the country's top regulators said Wednesday.").

15. *Id.* ("Chinese regulators introduced a circuit breaker mechanism at the start of 2016 to try to protect small investors from big market swings. But instead of offering protection, it fueled a sense of panic and had to be withdrawn.").

16. Dexter Roberts, *The Chinese Can't Kick Their Savings Habit*, BLOOMBERG BUSINESSWEEK (Apr. 30, 2015), https://www.bloomberg.com/news/articles/2015-05-01/chinese-consumers-cling-to-saving-suppressing-spending (discussing how the average Chinese household saves approximately 30% of disposable income in comparison with 5–6% in American households); *see also Deposit Rates*, HSBC, https://www.hsbc.com.cn/1/2/misc/deposit-rates (last accessed Apr. 23, 2016) (showing that the one-year interest rate for deposits is only 1.75% before tax and not considering inflation).

courts,[17] because U.S. courts tend to be more plaintiff-friendly and award greater damages.[18] More so than in other countries, U.S. judgments fulfill a role of after-the-fact enforcement, in part by awarding damages.[19] However, U.S. judges have been shutting the door, such as they can, in recent years.[20]

Part Two: U.S. Class Actions and the Question of Access for Chinese Plaintiffs

Three bars control access to U.S. courts: personal jurisdiction, subject matter jurisdiction, and standing. While Chinese defendants can and do avail themselves of an increasingly narrow concept of personal jurisdiction to avoid being hauled into U.S. courts[21] this knife does not cut two ways. For Chinese plaintiffs looking to bring suit in U.S. court, a waiver is sufficient to satisfy personal jurisdiction.[22] Standing also poses little burden, given a real case or controversy.[23]

Foreign plaintiffs must also show that the U.S. court has subject matter jurisdiction over their claim. The court in *Bersch v. Drexel Firestone, Inc.*,[24] a securities fraud class action against a foreign defendant, dismissed foreign citizens, but did not dismiss Americans in the same class. The court reasoned that American federal securities laws "do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses," and thus found that it did not have subject matter jurisdiction over the foreign plaintiffs.[25] The Second Circuit's decision was influenced in part by a recurring theme in the treatment of foreign plaintiffs in U.S. courts: the concern for "tremendous burdens on overtaxed district courts."[26]

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17. In the seminal case *Piper Aircraft* an aircraft, owned, maintained, and leased by the British, crashed in Scotland full of Scottish passengers, and plaintiffs wished to bring suit in the United States. *See* Richard D. Freer, *Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case*, 2007 BYU L. Rev. 959, 971 (2007); *see also* P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 Duke L. J. 1002, 1003–04 (1987).

18. *See, e.g.*, Donald Earl Childress III, Michael D. Ramsey & Christopher A. Whytock, Transnational Law and Practice 997–98 (2015).

19. *See* Samuel Issacharoff, *Regulating After the Fact*, 56 DePaul L. Rev., 375 (2007); *see also* Ray Worthy Campbell & Ellen Claar Campbell, *Clash of Systems: U.S. After-the-Fact Regulation through Litigation Versus Chinese Resistance to Discovery*, 4 Peking U. Transnat'l L. Rev. 129, 134 (2016).

20. *See, e.g.*, Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 Va. J. Int'l L. 157 (2012).

21. *See* Campbell & Campbell, *supra* note 19, at 142–45, 157–72.

22. *E.g.*, Shaffer v. Heitner, 433 U.S. 186, 197 (1977).

23. Standing ensures that the case or controversy requirement of article III or the U.S. constitution is satisfied. It requires that the plaintiff have suffered an injury in fact, there is some causal connection between that injury and the defendant's actions, and there is a way to redress the injury through the court system. Some academics have argued, however, that the requirements should be more stringent for class representatives than unnamed class members. *See* Mary Kay Kane, *Standing, Mootness, and Federal Rule 23 – Balancing Perspectives*, 26 Buff. L. Rev. 83, 84–86 (1977).

24. 519 F.2d 974, 993 (2d Cir. 1975).

25. *Id*. at 993. This argument was still vibrant over thirty years later in In re Scor Holding (Switz.) AG Litig., 537 F. Supp. 2d 556, 564–65 (S.D.N.Y. 2008) (in which the court dismissed foreign investors from a securities fraud lawsuit due to same lack of subject matter jurisdiction), up until *Morrison*.

26. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975).

Recent cases have been moving towards even stricter restrictions on the international reach of U.S. law. For example, in *Morrison v. National Australian Bank, Ltd.*, foreign shareholders sued a foreign defendant based on U.S. securities laws.[27] The Supreme Court, in an eight to zero decision, endorsed the court's holding in *Bersch*, but not its analysis:[28] creating a bright-line rule that U.S. securities laws only apply to transactions in securities listed on domestic exchanges, and domestic transactions in other securities.[29] Thus, the Court dismissed the case, arguing that because U.S. securities laws did not apply to the transactions in question, the violation was not a viable legal claim that could be brought in a U.S. court.[30] This restriction on the extraterritorial application of U.S. law was expanded on in *Kiobel v. Royal Dutch Petroleum Co,* which addressed the issue of under what conditions the Alien Tort Statute (a law expressly designed to protect non-U.S. citizens) could be enforced in U.S. courts.[31] In this case, Nigerian nationals attempted to sue Dutch, British, and Nigerian corporations for aiding and abetting human rights violations in Nigeria. *Kiobel* disallowed such "foreign cubed" cases, where both plaintiffs and defendants were foreign and harm did not occur on U.S. soil.[32] However, "foreign squared" cases were not fully foreclosed, although a high standard must be met: that "where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[33]

Kiobel clarified that mere corporate presence in the United States would not lead to the U.S. wielding subject matter jurisdiction. However, for harms caused by companies headquartered and registered in the U.S., where at least some of the predicate actions were taken in the U.S., the Alien Tort Statute might still have bite, even if the harms were felt in China.[34] This is good news for our Chinese plaintiffs – *Kiobel* and *Morrison* do not block their entrance to U.S. courtrooms absolutely.[35] The loophole left in *Bersch*, which did not foreclose claims based on "losses to foreigners from sales to them within the United States," remains open.[36] However,

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27. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 247 (2010).

28. The court discarded the two tests established by Bersch's progeny for their bright line rule: "(1) an "effects test," "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens," and (2) a "conduct test," "whether the wrongful conduct occurred in the United States." *Id*. at 257.

29. *Id*. at 266.

30. *Id*. at 273.

31. Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 108 (2013).

32. *Id*. at 124–25.

33. *Id.*

34. *See* Oona Hathaway, *Kiobel Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreignsquared-cases ("[T]he end result of the Supreme Court's decision yesterday may not be the end of the ATS after all, but instead a renewed focus of ATS litigation on U.S. corporations").

35. *See* Anupam Chander, *Unshackling Foreign Corporations: Kiobel's Unexpected Legacy*, 107 AM. J. INT'L L. 829, 829 (2013) ("Kiobel favors foreign corporations over both human rights plaintiffs and American corporations. Kiobel does not spell the death of human rights litigation in U.S. courts, but rather the death of U.S. human rights litigation against foreign corporations.").

36. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975) ("Other fact situations, such as losses to foreigners from sales to them within the United States, are not before us. We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond. The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of off-shore funds thirty years later.").

given the due process problems of class actions, further procedural hurdles must be overcome if our plaintiffs are to participate.

To understand why Chinese plaintiffs with relatively small claims will have trouble accessing justice through U.S. courts, the procedural framework of the U.S. class action must now be explained and analyzed. American common law litigation is predicated on cases where every participant is a named party to the case.[37] The majority of the time, the question of whether an injured party is precluded from bringing a new suit is answered by another question, "Have you had your day in court yet?" Class actions are the exception to this rule.

A class action is an elephantine species of joinder. It occurs when an individual or small group files a lawsuit on behalf of a larger group, with the intent of binding that larger group to the judgment reached, whether or not they actively participate in the litigation.[38] Class actions are used to access efficiencies when a large number of putative claimants would otherwise bring multitudinous cases, clogging the courts.[39] These same efficiencies are also used to level the playing field and allow access to justice in situations when plaintiffs' claims are too small to make sense as individual suits, or when a well-heeled defendant would otherwise be incentivized to outspend average plaintiffs in order to avoid issue preclusion problems in the wake of *Park Lane Hosiery.*[40] The incentives given the U.S. plaintiffs' bar (such as contingency fees) informally create what one judge active in the field has called "private attorneys general", who, in pursuit of their own interests, also serve the greater societal good of ensuring enforcement of the law and deterring wrongdoing.[41]

However, "a class action is a dispreferred substitute for voluntary joinder."[42] This is in part because class actions come with huge agency costs and at the expense of plaintiffs' individual rights. Once aggregated, and possibly without their active consent, an individual plaintiff loses

37. A party is defined as "a person named as such in a legal proceeding" and includes traditional plaintiffs and defendants as well as intervenors. *See* GENERAL PRINCIPLES OF AGGREGATE LITIGATION § 1.01 (AM. LAW INST. 2010).

38. *Id*. at § 1.02, Reporters Notes, at 22–24, § 2.07.

39. *Id*. at § 1.03, comment d. Previewing the problems, we are about to work through, in comment d of this section, the ALI expressly states that "[n]or does this Section affect the possibility of aggregation when members of a putative class reside in other countries."

40. *See id*.; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–33 (1979) (allowing for offensive use of collateral estoppel in certain circumstances, and thereby changing the litigation strategies of well-heeled defendants across the fifty states). Big tobacco won hundreds of individual cases – and only began to lose when aggregation leveled the playing field. *See, e.g.,* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure,* 88 N.Y.U. L. REV. 286, 299–300 (2013).

41. Sullivan v. DB Investments, Inc., 667 F. 3d 273, 340 (2011) (Scirica, J., concurring); *see also* Miller, *supra* note 40, at 299–300 ("The efforts of public interest attorneys go well beyond the classic civil rights and legislative reapportionment battles. Asbestos is held in check by the private bar. Tobacco is cabined by the private bar. Defective pharmaceuticals such as diet drugs, Vioxx, and other products are removed from our midst. Illicit financial and market practices of companies such as Enron are halted by the private bar. Today, a number of attempts are underway to hold accountable some of those responsible for the recent financial crisis. Fewer Americans die or become incapacitated by defective products or toxic substances, and important social and economic policies are enforced because of the work of these lawyers.").

42. *See* GENERAL PRINCIPLES OF AGGREGATE LITIGATION § 1.01, Reporters Notes at 23 (AM. LAW INST. 2010).

substantial control over their own claim.[43] The court-appointed lawyer that prosecutes that individual's claim through the class action may have had no prior relationship with that plaintiff,[44] and may pursue his or her own interests at expense of the class.[45] These problems are exacerbated by the "opt-out" class.

In the U.S., since the seminal case *Phillips Petroleum v. Shutts*, class actions seeking monetary damages proceed on an "opt-out" basis, in which all class members are bound by result of the litigation, unless, after receiving notice, they affirmatively notify the court of their decision to opt out.[46] This increases the defendant's chances of obtaining a bill-of-peace, but puts the rights of these absent class members at risk.[47]

U.S. courts compromise with protection through procedure. Early cases like *Hansberry v. Lee* underlined the importance of sufficient judicial procedure to defend the rights of absent class members.[48] The original Rule 23 of the Federal Rules of Civil Procedure, arising from courts of equity,[49] did not have much in terms of formal procedural safeguards. In the mid 1960's, Rule 23 was rewritten to respond to these concerns.[50] Under Rule 23, courts must work through certain prerequisites in 23(a) and 23(b) before certifying a class.[51] Today, not just anyone can bring a class action that will bind absent parties.

Rule 23(a) lists the necessary prerequisites to bring a class action. First, under Rule 23(a)(1), the class must be so large that joinder is impractical–the idea being that there must be sufficient efficiency gain to justify class treatment over some simpler form of joinder.[52] Second, there must be questions of law or fact common to the class (although these need not be the only questions presented), and these questions must be of the sort that resolving them will

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43. This con is, of course, also a pro. *See* Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 G.W. L. Rev. 506, 507 (2011) ("On the one hand, the individual may be enveloped within the aggregate and lose the ability to speak for herself; on the other, the collective voice is far more powerful than hers alone.").

44. *See* General Principles of Aggregate Litigation § 1.02, Reporters Notes at 22–23 (Am. Law Inst. 2010).

45. *See, e.g.*, Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Penn. L. Rev. 2035, 2039 (2008) ("[A]ggregate litigation can create a serious misalignment between the interests of class counsel and the interests of the absentees they represent, a mismatch that in turn can lead class counsel to sacrifice the welfare of the class in return for personal gain."); *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995).

46. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 797 (1985).

47. Class plaintiffs are seen as needing less protection than defendants, justifying this methodology. *See Phillips* 472 U.S. at 811 (1985) ("Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants…the Due Process Clause need not and does not afford the former as much protection from state court jurisdiction as it does the latter.").

48. *See* Hansberry v. Lee, 311 U.S. 32 (1940) (determining a black family was not adequately represented by a white family in a previous class action relating to a racist zoning ordinance).

49. *See, e.g.*, Zechariah Chafee, Some Problems of Equity; five lectures delivered at the University of Michigan April 18, 19, 20, 21, and 22, 1949, 199–201 (1950).

50. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action" Problem*, 92 Harv. L. Rev. 664, 669–70 (1979).

51. Fed. R. Civ. P. 23(a), 23(b).

52. Fed. R. Civ. P. 23(a); General Principles of Aggregate Litigation § 2.02(a)(1), § 1.03, cmt. b. (Am. Law Inst. 2010).

result in the efficiency gains sought in 23(a)(1).[53] Third, the named plaintiff must be "typical" of the class. This requirement works to ensure that the named plaintiff has standing to bring this suit and it is usually easily satisfied. Fourth, given how lawyer-driven class actions tend to be, Rule 23(a)(4) requires adequacy of representation.[54] Rule 23(b) lists a *numerus clausus* of types of class action, including 23(b)(3), which allows for payment of monetary damages to class members.[55]

While *Shutts* is still good law, and there were foreign plaintiffs in that class, academics have noted that this "implied consent" by class plaintiffs to personal jurisdiction causes severe due process problems for foreign plaintiffs if they do not wish to be involved in or bound by a U.S. class action.[56] While the U.S. judiciary can plausibly claim the role of procedural protector of the rights of absent U.S. plaintiffs, they are on much shakier ground with foreign plaintiffs. Indeed, certain European countries (and China) apply an "opt-in" class action, in which all parties must choose to participate.[57] Even countries that recognize U.S. judgments may not recognize preclusion over European plaintiffs in opt-out class actions.[58]

This raises the issue of preclusion. The *Bersch* decision was strongly influenced by the concern that foreign plaintiffs would not be bound by the preclusive effects of any U.S. judgment in their home countries.[59] This concern was revisited in *In re Vivendi*.[60] Given the value of a bill-of-peace to the defendant, if the plaintiff was from a country likely to not recognize the *res judicata* effects of U.S. class actions, *Vivendi* held that such plaintiffs should be dismissed from the case.[61]

Unfortunately for our putative Chinese plaintiffs, Rule 23(b)(3), in addition to the 23(a) hoops, requires that questions of law or fact common to all class members *predominate* over any issues affecting only individual members, and that a class action be *superior* to other methods to

53. FED. R. CIV. P. 23(a); GENERAL PRINCIPLES OF AGGREGATE LITIGATION § 2.01, cmt. d. (AM. LAW INST. 2010). U.S. class actions differ from Chinese class actions in that "the disposition of common issues need not necessarily resolve all contested issues in the litigation. Individual issues may remain."

54. FED. R. CIV. P. 23(a).

55. For the purposes of this paper, we focus on 23(b)(3), the only type of class action that explicitly allows for monetary remedy. Technically, Rule 23(b)(2) allows for back wages as partial remedy, but after the blow dealt in *Walmart v. Dukes*, we feel justified in ignoring this in cases where the plaintiff seeks remuneration as primary remedy. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–61 (2011).

56. *See* Debra Lynn Bassett, *Implied Consent to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 624–37 (2004).

57. *See, e.g.,* Stephen Choi & Linda Silberman, *Transnational Litigation and Global Securities Class Actions*, WIS. L. REV. 465, 487–88 (2009); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VANDERBILT L. REV. 1, 21–26 (2009) (noting France, Germany, the U.K., Sweden, and Finland use only an opt-in procedure).

58. *See* Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 380 (2011) ("[A] review of the European class action and collective action vehicles reveals a deep reluctance to bind those who neither commence litigation in their own name nor affirmatively choose to opt in.").

59. Bersch, *supra* note 24, at 996 ("[W]hile an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty.").

60. In re Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 92 (S.D.N.Y. 2007).

61. *Id*.

fairly and efficiently resolve the controversy.[62] This "superiority" requirement presents a problem. Foreign plaintiffs from countries that do not recognize U.S. judgments retain the right to sue again in their home countries even if they lose in U.S. court.[63] Thus, their presence, from the moment of certification, means that the class action may not be able to deliver a bill-of-peace to the defendant. This means the class action will no longer be "superior" as a way to resolve the conflict.[64] Thus, in order to protect U.S. plaintiffs, and plaintiffs from countries that do recognize U.S. opt-out class actions as binding on participants, *Vivendi* ruled that such foreign plaintiffs, like our hypothetical Chinese victims, had to be dismissed from 23(b)(3) classes.

Subsequent cases, attempting to use Vivendi's rubric, have come out with different conclusions as to whether U.S. judgments would have preclusive effects for the same countries, so the methodology is imperfect.[65] Other cases have raised similar concerns, however, and this part of the *Vivendi* holding has not been challenged.[66] Practical plaintiffs' bar attorneys who want to maximize their chances of certifying a class will drop Chinese plaintiffs from any case also involving U.S. plaintiffs and plaintiffs from countries that accept and enforce the *res judicata* effects of U.S. class actions. Additionally, Chinese plaintiffs attempting to bring suit with a separate Chinese-only class action would still certainly be blocked by *Vivendi* considerations. Some commentators have challenged this, arguing that "superiority" is not the appropriate place to consider *res judicata* concerns.[67] Additionally, *Vivendi* was a securities fraud case (in which foreign plaintiffs were attempting to sue foreign defendants) of the sort subsequently blocked by *Morrison*'s bright line rule. Furthermore, it was a federal case heard at the district court level in the Southern District of New York, which, although persuasive, lacks *stare decisis* beyond those bounds. It is possible, if unlikely, that another court could today apply another analysis, and allow a Chinese-only class.

Given that the problems for foreign plaintiffs arise out of Rule 23(b)(3)'s requirement that a class action be superior to other available methods of adjudication, Chinese plaintiffs may not

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62. FED. R. CIV. P. 23(b) (emphasis added).

63. Even plaintiffs from countries who do recognize U.S. judgments may retain their right to sue again, if their country does not accept preclusionary effects of opt-out class actions. *See* Wasserman, *supra* note 58 (explaining how recognition and preclusion are inaccurately conflated by U.S. judges).

64. *See* Wasserman, *supra* note 58, at 314–15 ("In particular, defendants argue that a class action is not superior to alternative means of dispute resolution because European courts will not recognize or accord preclusive effect to an American class action judgment in the defendant's favor. Thus, defendants fear repetitive litigation on the same claim in foreign courts even if they were to prevail in an American court.").

65. *See* Matthew H. Jasilli, *A Rat Res? Questioning the Value of Res Judicata in Rule 23(b)(3) Superiority Inquiries for Foreign Cubed Class Action Securities Litigations*, 48 COLUM. J. TRANSNAT'L L. 114, 130–31 (2009) (discussing the problem presented by the conflicting determination on French consideration of U.S. judgments in *In re Alstom*).

66. *E.g.,* Kern v. Siemens Corp., 393 F.3d 120, 129 n.8 (2d Cir. 2004) (noting "significant doubts" about the superiority of a class action that included Austrian citizens when Austrian courts would not recognize *res judicata* effects); *see also* CL-Alexanders Laing & Cruikshank v. Goldfield, 127 F.R.D. 454 (S.D.N.Y. 1989) (denying certification to a class of foreign investors); Blechner v. DaimlerBenz AG, 410 F. Supp. 2d 366, 373 (D. Del. 2006) (noting the potential non-recognition problem in dismissing a securities fraud case).

67. *See* Jasilli, *supra* note 65, at 118–19.

be dismissed from 23(b)(1) or 23(b)(2) class actions.[68] These, respectively, seek to divide a limited pot, or seek only injunctive relief and perhaps back-pay.[69] However, it is hard to imagine what sort of class action Chinese plaintiffs would want to bring in U.S. courts seeking only injunctive relief.

Chinese plaintiffs dismissed from a U.S. class action might have one small relief, if they could bring a new suit on their own behalf. If the Chinese plaintiffs were included in the original U.S. class action, they would lose their right to bring another suit. However, if they are excluded deliberately from the first class action (presuming the first case is won) and later bring suit in a class of only Chinese plaintiffs in U.S. court, they may be able to use issue preclusion to compel a judgment in their favor.[70] In this way, bringing a later suit could be strategically advantageous.

However, even after jumping through the hoops of subject matter jurisdiction, consent to personal jurisdiction, standing, even if bringing claims that "touch and concern" U.S. territory in a way that satisfies *Kiobel*, even if not denied certification as a class action under the *Vivendi* analysis, Chinese plaintiffs outside the U.S. (particularly in products liability or personal injury suits) bear significant risk that their claim will be dismissed under the principle of *forum non conveniens*. *Forum non conveniens* refers to the question of whether the chosen (U.S.) forum would "establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience" or whether the U.S. forum is inappropriate because of "the court's own administrative and legal problems," referring to whether already overcrowded U.S. courts should be put to the trouble and expense of spending U.S. judicial resources on a case that could and should be dealt with by another country's judiciary.[71]

While traditionally *forum non conveniens* was a situation where a court with the authority to try a case exercised discretion in choosing not to,[72] today, a district court can dismiss a case on *forum non conveniens* grounds before jurisdiction has even been determined.[73] Under the *Piper Aircraft* standard, the trial court decides whether or not to dismiss the case, with limited review by appeals courts.[74] In order to avoid dismissal on *forum non conveniens* grounds, "the remedy provided by the alternative forum [must be] so clearly inadequate or unsatisfactory that

68. FED. R. CIV. P. 23(b)(1), (b)(2).

69. Although, an intended liberal use of the backpay provision was severely restricted in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–65 (2011).

70. Remember that the court in *Parklane Hosiery* considered important the fact that the claimants in the case could not have joined the initial SEC action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–32 (1979).

71. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981)

72. See Black's Law Dictionary (9th ed. 2009) ("a Latin phrase where a court with the authority to try a case decides to turn the matter over to another court").

73. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 428–35 (2007) (finding that a district court was allowed to dispose of an action by a *forum non conveniens* dismissal, without first determining -matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warranted, because a *forum non conveniens* determination is a threshold, non-merits issue).

74. *Piper Aircraft*, 454 U.S. at 257 ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.").

it is no remedy at all."[75] Notably for our putative Chinese plaintiffs, *Piper* clearly states that a foreign plaintiff's choice of a U.S. forum deserves less deference from the court than a U.S. plaintiff's choice.[76] Not considered in a *forum non conveniens* analysis is whether the law in the alternate forum is "less favorable to the plaintiff's chance of recovery."[77]

In *Delgado v. Shell Oil Co.*, the Fifth Circuit confronted this issue. In this case, a consolidation of multiple cases filed in Texas courts, plaintiffs were citizens of twelve foreign countries who had been exposed to dangerous chemicals while working on farms owned by American corporations in twenty-three foreign countries.[78] Shell's co-defendants included Chiquita, Dole, Del Monte, and Standard Fruit, who entered a motion to dismiss on *forum non conveniens* grounds.[79] Plaintiffs argued that "because class actions are unavailable in many of their home countries and because joinder of large numbers of actions is not customary in these countries, they will be forced to commence thousands of individual actions in hundreds of courts that are understaffed, back-logged, and ill-equipped to handle the sheer number and complexity of these cases in a timely, efficient manner."[80] Additionally, contingent fee arrangements were often not available in their home countries. Thus, remand on *forum non conveniens* grounds would mean that these plaintiffs would, practically speaking, be locked out of legal remedy.

Conceding that proceeding in the U.S. would be slightly more efficient, the district court nonetheless decided that because most of the fact witnesses were in the home countries of the plaintiffs, on balance, private interest factors favored dismissal.[81] They additionally determined that, regardless of the effectiveness or adequacy of mass action litigation in plaintiffs' home countries, these countries did have otherwise functioning legal systems, and thus "an adequate alternative forum was available."[82] The case was conditionally dismissed on *forum non conve-*

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75. *Id*. at 254.

76. *Id*. at 256.

77. *Id*. at 250.

78. Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1366 (S.D. Tex. 1995) (plaintiffs "allege that the products were defectively marketed because defendants continued manufacturing, selling, distributing, and using DBCP after they knew that it could cause the injuries the plaintiffs ultimately suffered").

79. *Id*. at 1335–36.

80. *Id*. at 1368.

81. *Id*. at 1369.

82. The burden was placed on defendants to prove that the alternative (foreign) forums were adequate forums. *Id*. at 1365.

niens grounds.[83] Plaintiffs appealed to the Fifth Circuit,[84] which affirmed the district court's decision on procedural grounds.[85]

If these companies had treated U.S. farmworkers in this fashion, litigation would have proceeded in the U.S and some settlement would have likely been reached. Given that the plaintiffs were foreign, the U.S. court was able to deflect the responsibility for enforcing behavioral norms on U.S. corporations onto foreign courts who, plaintiffs argued, were functionally not up to the task. This is not an outlier. The Second Circuit previously applied an even stricter analysis in *In re Union Carbide*, the case referencing the Bhopal chemical plant disaster in India.[86] In addition to dismissing the case because the plaintiffs were mostly located in India, although even the Indian government acknowledged its courts were not up to this task, it reversed the conclusion of the District Court that as a condition to the *forum non conveniens* dismissal, the defendant had to agree to abide by the judgment of the Indian court.[87]

While these cases are older, academics have noted that dismissal of transnational cases on *forum non conveniens* grounds has become even more common in recent years.[88] *Forum non conveniens* dismissal is most common when the plaintiff is foreign. While the public-policy deterrence interests in trying U.S. defendants in such cases ought to be strong, in practice "most courts down-play the significance of these interests in suits brought by foreign plain-

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83. The conditions required the defendants to "waive all jurisdictional and certain limitations-based defenses" and additionally required the foreign courts to accept jurisdiction over the matter. *Id.* at 1372.

84. It is worth noting that plaintiffs either wished for reversal of dismissal, or remand to state court (which the judges dismissed as "forum-shopping." Texas "law at the time of filing provided no applicable doctrine of *forum non conveniens* pursuant to which their actions could be dismissed." Delgado v. Shell Oil Co., 231 F.3d 165, 169 (5th Cir. 2000). However, it is hard to imagine a dispute worth the candle that would not satisfy the minimal diversity and $5 million amount in controversy requirements under the Class Action Fairness Act and not be removed to federal court by the defendant (or a foreign third-party defendant, as in this case) so filing in state court does not seem that it would be a good solution to the problem raised by this paper. Additionally, Texas subsequently passed a *forum non conveniens* law. *See* TEX. CIV. PRAC. & REM. § 71.051.

85. Note that "[i]n neither of the appeals . . . do Plaintiffs explicitly take umbrage with the substance of the district court's *forum non conveniens* analysis." *Delgado,* 231 F.3d at 174.

86. *See* In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195, 198 (2d Cir. 1987) ("[S]ince the plaintiffs were not residents of the United States but of a foreign country, their choice of the United States as a forum would not be given the deference to which it would be entitled if this country were their home . . . Following the dictates of *Piper*, the district court declined to compare the advantages and disadvantages to the respective parties of American versus Indian Laws or to determine the impact upon plaintiffs' claims of the laws of India, where UCC had acknowledged that it would make itself amenable to process, except to ascertain whether India provided an adequate alternative forum, as distinguished from no remedy at all. Judge Keenan reviewed thoroughly the affidavits of experts on India's law and legal system, which described in detail its procedural and substantive aspects, and concluded that, despite some of the Indian system's disadvantages, it afforded an adequate alternative forum for the enforcement of plaintiffs' claims.").

87. The district court, specifically, required that Union Carbide "agree to satisfy any judgment rendered by an Indian court against it and upheld on appeal, provided the judgment and affirmance "comport with the minimal requirements of due process." *Id.* at 198. The Second Circuit was concerned that "minimal requirements" would not result in enough process, and conversely believed that if the case was comported in fashion to satisfy the New York Foreign Money Judgments Law, this would be taken care of regardless. *Id.* at 205. The ultimate takeaway, of course is, "we won't try it here, and our company doesn't have to comply with the foreign judgment, but we probably will enforce it if your courts do a good enough job," which does not provide a great deal of comfort for plaintiffs like Bhopal's, who have little personal control over the procedural safeguards of Indian courts.

88. *See* Childress, *supra* note 20, at 165.

tiffs."[89] This is problematic.[90] A reasonable interest in preserving the resources of U.S. courts, and reasonable distaste for labeling another country's legal system "inadequate," do not justify a grant of *de facto* immunity for U.S. corporations when they have violated the rights of plaintiffs from countries with less effective legal systems[91].

These cases are particularly likely to get dismissed, for reasons of comity, in circumstances where a U.S. court would be called upon to interpret a foreign country's laws[92] – for example, if a U.S. court had to interpret Chinese products liability laws for a mass tort. However, in cases where U.S. federal law is implicated, the chances of dismissal are less.[93] In such cases, some Chinese plaintiffs have sought to bring class action on their own behalf. In one example, Chinese investors allegedly defrauded by EB-5 immigrant investor regional centers recently brought a class action suit in California.[94] This case has significant advantages in that the plaintiffs are now located in the U.S. and the case relates to U.S. immigration law and U.S. agency actions.[95]

However, even if a class of Chinese plaintiffs located in China were able to bring a U.S. class action through the certification phase all the way to settlement, avoiding dismissal on

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89. Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV 1161, 1176 (2005).

90. *See, e.g.*, Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV 87, 94–95 (2011) ("Other costs arise from the inaction of a different group of foreign citizens: those citizens from nonrecognizing countries who are excluded from the American class action and whose claims are not sufficiently valuable to commence suit in a foreign forum, even though their claims had value in the American class action. These foreign citizens fail to receive adequate compensation, and the law fails to deter wrongdoers fully-even though the American class action might have delivered a measure of both compensation and deterrence.").

91. *See, e.g.*, Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 46 (1998); *see also* Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 653 (1992).

92. *See, e.g.*, Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PENN. L. REV. 781, 783–84 (1985) (discussing how, even when jurisdiction is found, when courts cannot find reason to apply their own law, they are likely to dismiss on grounds of *forum non conveniens*).

93. *See* Simard & Tidmarsh, *supra* note 90, at 94–95.

94. *See*, *e.g.*, Cara Salvatore, *Luca Oil Co. Hit With $748M Investor Breach Of Contract Suit*, LAW360 (Aug. 7, 2015, 5:30 PM), http://www.law360.com/articles/688569/luca-oil-co-hit-with-748m-investor-breach-of-contract-suit (describing how a class of Chinese investors has filed a class action in California against a company that solicited Chinese investors' money using "extreme and unfounded" EB-5 pitches); *see also* Leslie Berestein Rojas, *Chinese Investors, Immigrants, Sue L.A. Investment Firm for Misusing Money*, S. CAL. PUB. RADIO (Aug. 7, 2015), http://www.scpr.org/news/2015/08/07/53649/chinese-investors-immigrants-sue-la-investment-fir/ (last visited June, 18, 2017). The EB-5 program is a visa program that grants legal residence in the United States to foreigners who invest at least $500,000 in a business that creates or preserves at least ten American jobs. Once a minor visa program, regional centers have caused the number of visas granted to take off since 2007. Forty-six percent of EB-5 investors have come from China over the life of the program, and that number continues to rise. *See* Audrey Singer & Camille Galdes, *Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development*, BROOKINGS INSTITUTION (Feb. 5, 2014), https://www.brookings.edu/research/improving-the-eb-5-investor-visa-program-international-financing-for-u-s-regional-economic-development/. The program has been controversial. Foreign investors have been defrauded, and investment money may come from questionable sources. *E.g.*, Alan Katz, *SEC to Target Deals Giving Visas to Rich Foreign Investors*, BLOOMBERG (Feb. 13, 2015, 9:59 AM), http://www.bloomberg.com/news/articles/2015-02-13/sec-said-to-target-deals-giving-visas-to-rich-foreign-investors.

95. Another example would be federal securities laws, as applied to U.S. companies. U.S. courts would likely not want to outsource this interpretation, which could be good news for Chinese plaintiffs wishing to bring securities class actions in U.S. courts for fraud relating to their purchases of U.S securities registered on U.S. exchanges.

forum non conveniens grounds, the requirement of notice would ultimately cause problems.[96] Notice must take place at the time a settlement is reached.[97] All class members must be given, "within the limits of practicability[,] notice . . . reasonably calculated to reach interested parties."[98] At that point, plaintiffs can choose to opt out of the class action. If they take no action, they are considered opted in and precluded from future action.[99] However, while both China and the United States are signatories to the Hague Convention on Service,[100] China has made stringent reservations to the Convention that prohibit standard methods of class action service (such as mail).[101] China does not allow foreign judgments[102] to be directly mailed to the party in China, but requires they be sent through diplomatic channels.[103] This requires the lawyers to get permission from the Chinese Ministry of Justice.[104] Alternatively, in some cases, a public announcement may also be acceptable under CPL 92.[105] Any U.S. plaintiffs' lawyer initially willing to represent Chinese plaintiffs may balk at this final hurdle.[106]

In brief conclusion, given all these barriers, it would be extremely difficult if not impossible for a group of Chinese plaintiffs to bring a class action in the U.S.

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96. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.").

97. FED. R. CIV. P. 23(e)(1) ("The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.").

98. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314–15 (1950) (The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

99. *Phillips Petroleum*, 472 U.S. at 811 (1985).

100. Status Table, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Hague Conference on Private International Law (Aug. 2, 2017), https://www.hcch.net/en/instruments/conventions/status-table/?cid=17.

101. *Id*. at China's Reservations, available at https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf.

102. *Id.* We note it is unclear whether a settlement offer would be considered an offer of judgment, a proposed voluntary dismissal combined with a payout, or a judgment under Chinese law.

103. *See* Qi Xiangquan, *Legal Conflicts and Their settlement in the Extraterritorial Service of Judicial Documents in Both China and America*, INT'L PRIVATE LAW, 99 (1999), *available at* http://www.pkulaw.cn/fulltext_form.aspx?Gid=1509964697&Db=qikan.

104. *See* Cheng Bing, *Service of American Litigation in China*, CHINA LAW, *available at* http://article.chinalawinfo.com/ArticleHtml/Article_80899.shtml.

105. *Id.*

106. This could also raise problems for the 23(b)(3) superiority analysis. *See* Simard & Tidmarsh, *supra* note 90, at 101 ("This definition of superiority might require a court to exclude some foreign class members. For instance, given the difficulty of effecting notice overseas, as well as likely difficulties in calculating and delivering a remedy to foreign citizens, the cost of including certain foreign class members might exceed the expected benefits derived from adding their claims.").

Part Three: Class Arbitrations as an Alternate Option

A solution might be class arbitration. Since China and the U.S. are both signatories to the New York Convention, both have agreed to recognize and enforce each other's arbitration decisions.[107]

Major concerns with "mandatory" arbitration clauses include that they are often not affirmatively consented to, and can strip plaintiffs of procedural and substantive rights they would have in the traditional legal system.[108] In the case of Chinese plaintiffs, who might have no other remedy within the U.S. system, these points are moot.

The American Arbitration Association has disseminated rules for class arbitration that closely track Rule 23 of the Federal Rules of Civil Procedure.[109] However, if the claim is small and there is a waiver of aggregate dispute settlement in the contract, the Chinese plaintiffs may be yet again left without remedy. The U.S. Supreme Court has recently proved unwilling to vacate contractual class action waivers, even in cases where an individual arbitration would not be cost-justified.[110]

While dissent is still rife on this issue within the United States,[111] the question is even more controversial in the realm of international arbitrations. If there were a bilateral investment treaty between the U.S. and China, which currently there is not,[112] disputes would likely be rendered to one of the international arbitration tribunals[113] rather than an American arbitrator under the Federal Arbitration Act. ICSID, one of the major centers for investment-treaty arbitration, only allowed its first class arbitration, *Abaclat v. Argentine Republic*, in 2011.[114] This decision was based on the same reasons class actions are allowed in domestic courts: efficiency

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107. China has made certain reservations to their ratification of the Convention. Specifically, they will only apply the Convention on basis of reciprocity to arbitral awards made outside of China. Additionally, the Convention will only apply to legal relationships (contractual or not) that are considered "commercial" under PRC law. *See Contracting States*, NEW YORK ARBITRATION CONVENTION, online at http://www.newyorkconvention.org/countries (last visited Apr. 22, 2016).

108. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV 1631, 1635–42 (2005).

109. *Supplementary Rules for Class Arbitration*, AMERICAN ARBITRATION ASSOCIATION (effective Oct. 8, 2003), *available at* https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf.

110. *See* American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2308 (2013) (arguing that Congressional passage of rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights", and narrowly construed the effective-vindication doctrine).

111. *Third Circuit Vacates Arbitrators' Decision on Availability of Class Arbitration,* A.B.A. (Feb. 10, 2016), http://apps.americanbar.org/litigation/committees/classactions/practice.html#03.

112. While the U.S. and China are currently negotiating a bilateral investment treaty, there is none yet in existence. *See, e.g.*, Bilateral Investment Treaty (BIT), U.S. CHINA BUSINESS COUNCIL, https://www.uschina.org/advocacy/bilateral-investment-treaty.

113. The U.S. Model BIT, for example, suggests that disputes be submitted to UNCITRAL or ICSID. 2012 U.S. Model Bilateral Investment Treaty, Article 24(3), online at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

114. S.I. Strong, *Guest Post Part III: ICSID Accepts First Ever Class-Type Arbitration*, DISPUTINGBLOG (Aug. 31, 2011), online at http://www.disputingblog.com/guest-post-part-iii-icsid-accepts-first-ever-class-type-arbitration/.

and access-to-justice.[115] The arbitral tribunal found that "not only would it be cost prohibitive for many Claimants to file individual claims but it would also be practically impossible for ICSID to deal separately with 60,000 individual arbitrations."[116]

The lead lawyer in that case, Carolyn B. Lamm, has argued that, unlike domestic arbitration, "investment treaties often contain an "open-ended" consent of the host state that provides for the possibility of multiple claimants."[117] Allowance of class arbitration in the international context would thus depend on interpretation of the specific treaty, rather than increasingly hostile American class arbitration jurisprudence. Additionally, third-party financing (including contingency fees) is on the rise in international arbitration[118] which could allow a group of plaintiffs like our intrepid Chinese to find an outside funder to financially back their case.

However, in this case, one of the arbitrators dissented strongly, arguing that silence in a BIT cannot be construed as permission of class or collective treatment.[119] This approach does not enjoy consensus even among the members of one panel, and this decision will not be binding on future panels. It cannot be presumed that a future panel would decide a similar issue in the same fashion.

Additionally, even if it was easy to enforce ICSID judgments within China,[120] ICSID deals only with investor-state arbitration. While this decision could be considered non-binding precedent for other forms of international arbitration, ICSID itself is not a solution for our putative Chinese plaintiffs.

UNCITRAL, which handles international commercial arbitration, has a broad mandate.[121] Its Arbitration Rules allow for multiple parties as claimant or respondent,[122] and some

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115. The decision cited both AT&T Mobility and Stolt-Nielsen, two U.S. Supreme Court decisions on class arbitration.

116. S.I. Strong, *Guest Post Part III: ICSID Accepts First Ever Class-Type Arbitration*, DISPUTINGBLOG (Aug. 31, 2011) (citing Award dated August 4, 2011).

117. Adam Raviv, *ITA-ASIL 2014: Mass and Class Claims in Arbitration*, KLUWER ARBITRATION BLOG (Apr. 22, 2014), http://kluwerarbitrationblog.com/2014/04/22/ita-asil-conference-mass-and-class-claims-in-arbitration/ (paraphrasing Ms. Lamm's keynote speech at ITA-ASIL 2014).

118. *See, e.g., Emerging Trends in International Arbitration*, LAW360, (June 7, 2013, 2:09 PM), http://www.law360.com/articles/447654/emerging-trends-in-international-arbitration.

119. *See*, Edward Machin, *Arbitrator Issues Strong Dissent in ICSID Class Action Case*, AFRICAN L. & BUS. (Nov. 22, 2011), https://www.africanlawbusiness.com/news/arbitrator-issues-stinging-dissent-in-icsid-class-action-case. Arbitrator Georges Abi-Saab referenced U.S. cases *Stolt-Nielsen* and *AT&T Mobility v. Concepcion*.

120. *See, e.g.*, Jerome Alan Cohen, *Settling International Business Disputes with China: Then and Now*, 47 CORNELL INT'L L. J. 555, 564 (2014) ("[T]he PRC, for almost two decades, has not taken the steps required to assure its recognition and enforcement of ICSID awards through legislation, an interpretation by the Supreme People's Court, or a government declaration that the courts can directly apply the ICSID Convention without legislative or judicial implementation. Apparently, the PRC is not eager to facilitate ICSID foreign investor arbitrations in practice. Only one has been brought to date . . . .").

121. UNCITRAL Model Law on International Commercial Arbitration, A/40/17, at Ch. 1 Art. 1(1) n. 2 (adopted June 21, 1985) (amended Jul. 7, 2006) ("The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.").

122. UNCITRAL Arbitration Rules (as revised in 2010), at art. 10(1), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

degree of joinder of claims.[123] However, they include no procedural rules relating to class action, and to the best of our research, a class arbitration has never been tried by UNCITRAL arbitrators. Therefore, UNCITRAL is not a likely solution at present.

Arbitration within China could cause problems. Prominent commentators have whistle-blown the need for reforms, which have not been entirely implemented.[124] Additionally, there are no class arbitrations in China. While some practitioners argue that China is in need of class arbitration and it will eventually be possible to build this mechanism[125], to date, only some arbitration joinder is allowe[126]d.

U.S. based class arbitrations would raise problems of due process[127] (especially in terms of required notice under the Hague Convention, as discussed above), and could be challenged, in particular, under Article V(1)(d) of the New York Convention.[128] Some academics think U.S. class arbitrations can be enforced internationally under the New York Convention nonetheless.[129] If the defendant were American, this would satisfy the Chinese requirement that the dispute be "foreign-related" if it is to be arbitrated outside China.[130] However, some academics argue that China is unlikely to enforce U.S. shrinkwrap arbitration agreements,[131] even if a U.S. arbitrator allowed class arbitration.

Given China's reservations to the New York Convention, even if this worked for contract claimants, this would still leave tort victims without a legal remedy, even those whose personal injury claims arose out of some contract. While the text of the Convention states that it shall

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123. *Id*. at art. 17(5).

124. *See* Cohen, *supra* note 120, at 562 ("I called for CIETAC to undertake many reforms in its rules and practice.31 I had become progressively disillusioned by instances of corruption, government influence over decisions, ethical deficiencies, conflicts of interest, bias against foreign companies, faulty methods of selecting arbitrators, lapses in confidentiality, failure to provide opportunity for a dissenting arbitrator's opinion, and other unfair practices . . . CIETAC has since revised its rules to eliminate several of the deficiencies I had pointed out, but many persist.").

125. *See* Ma Honghai, *Research on American Class Action*, Beijing Arbitration (2013), available at http://www.pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=1510131785&keyword=%E9%9B%86%E5%9B%A2%E4%BB%B2%E8%A3%81&EncodingName=&Search_Mode=accurate.

126. The 2015 CIETAC Arbitration Rules Article 14 allow that CIETAC may consolidate two or more arbitrations into a single arbitration if same claims come from same contract. However, they are just arbitration rules, not law and they refer to joint arbitration, not class arbitration.

127. *See*, S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. Penn. J. Int'l L. 1 (2014).

128. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that . . . (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . .").

129. *See* S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration In Cases of Contractual Silence or Ambiguity?*, 30 Mich. J. Int'l L. 1017, 1083–91 (2009).

130. *See* Sabrina Lee, *Arbitrating Chinese Disputes Abroad: A Changing Tide?*, Kluwer Arbitration Blog (Apr. 7, 2016), http://kluwerarbitrationblog.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changing-tide/.

131. Qiao Shitong & He Qisheng, *Effectiveness of Arbitration Clause in Electric Form Contract,* 2007 Wuhan Univ. Int'l Law Rev. 85 (2009) (乔仕彤，何其生，电子格式合同中仲裁条款的效力，武大国际法评论), available online at http://resources.pkulaw.cn/uploadfiles/Article/48/2007/0/200912241517379611.pdf.

apply arbitral awards arising out of differences between persons, both physical and legal[132], and U.S. courts have willingly allowed personal injury claims based in contract to be forced into arbitration[133], China's reservations to the Convention clarify that for China, the Convention will only apply decisions arising out of legal relationships (contractual or not) that are considered "commercial" under the PRC law.[134]

Regardless of all these very real issues, it is still much easier to get arbitrations enforced in China than U.S. court judgments. Accordingly, this option should be considered depending on the specific facts of the case – specifically, if there is a contract with an arbitration clause, if that arbitration clause does not include a class arbitration waiver, and if the relationship between parties is commercial in nature.

Part Four: Class Actions in China

The framework for variants of class action-type litigation in the People's Republic of China has been in place since the initial promulgation of the Civil Procedure Law of the P.R.C. ("CPL") in 1991,[135] although China's first group litigation case was brought in 1983 when 1569 families (Buyer) sued Anyue County Rice Seed Company (Seller) for a contract dispute in Sichuan Anyue.[136] The non-representative form of collective litigation under 1991 CPL Art 53 was first provided for in the 1982 CPL. However, this mechanism was soon found to be inadequate in the face of a significant intensification in the nature, number and importance of multiparty disputes arising,[137] primarily as a result of China's economic reforms from the 1980s. These led to more economic connections between individuals and intensified the need for a system to improve court efficiency and relieve plaintiff's litigation burden.[138] China's class litigation rules are drawn both from U.S. Rule 23 class actions, and Japanese-style representative action.[139]

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132. Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter "New York Convention"].

133. *See* Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 530 (2012) (forcing negligence-based wrongful death claims against a nursing home into arbitration based on an ante-mortem signed contract).

134. *See Contracting States*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/countries (last visited Apr. 22, 2016).

135. Richard W. Wigley, *Class Action-type Litigation in China*, INTELLECTUAL PROPERTY (Aug. 26, 2014), http://www.chinalawinsight.com/2014/08/articles/ip-2/class-action-type-litigation-in-china.

136. This case ultimately reached a settlement in which the seed company paid damages and court fees. Xiao Jianhua, Chen Yingbin & Song Fang, *Research on Representative Action Group Disputes Using in Securities Fraud*, Tianjin Law Review (2012) (肖建华，陈迎宾，宋芳，论我国证券欺诈代表人诉讼制度的完善，天津法学，2014), http://www.pkulaw.cn/case/pfnl_1970324837041210.html.

137. Michael Palmer & Chao Xi, *Collective and Representative Actions in China*, STANFORD GLOBAL CLASS ACTIONS EXCHANGE (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/China_National_Report.pdf.

138. Jiang Wei, Jia Changchun & Lun Jituan Susong (Xia), *On Class Action (Part II)*, 1 ZHONGGUO FAXUE [CHINA LEGAL SCIENCE] 103, 110 (1989), http://www.pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=1509949848.

139. Palmer & Xi, *supra* note 137.

Articles 53 to 55 of the current CPL provide legal basis for China's group litigation. Article 53 allows a mass litigation to be brought by elected representatives.[140] Article 54 details procedure in situations where the number of parties comprising one side of the case is large but uncertain in number at the commencement of the action,[141] while Article 55 deals with public-interest lawsuits brought by government-supported entities on behalf of the public.[142] The question of relief is not front-and-center as in the U.S. Rule 23. An Article 54 or 55 case could lead to an injunction *or* monetary damages, depending on the facts.

Article 53 procedure originally comes from Japanese representative litigation, governing group litigation suits in which the number of litigants on either side of the litigation is "large" and fixed at the time the suit is filed.[143]

Article 54 cases operate similarly to a European-style opt-in class action, where litigants must be aggregated before the case can be filed, although new litigants can opt in later in the proceedings.[144]

Article 55 cases are roughly analogous to U.S. *parens patriae* cases, in which a U.S. government attorney might bring a suit on behalf of the people, which can preclude the people from later bringing their own suit on the matter.[145] The amount of potentially affected litigants in an Article 55 class action suit is not fixed.

In 2015, the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China ("2015 Interpretation") added a section supplying instructions for public interest class actions.[146] However, for small claims unrelated to the public interest, the only way to judicial remedy is through a Rule 54 representative action.[147]

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140. Civil Procedure Law of People's Republic of China, art. 53 (2012) (hereinafter "CPL") ("Where the parties on one side of a joint action is numerous, such parties may recommend a representative or representatives to participate in the action.").

141. *Id.* at art. 54 ("Where the object of action is of the same category and the persons comprising one of the parties is large but uncertain in number at the commencement of the action, the people's court may issue a public notice, stating the particular and claims of the case and informing those entitled to participate in the action to register their rights with the people's court within a fixed period of time.").

142. *Id.* at art. 55. Article 55 particularly describes that the government supported authorities or organizations may bring suit on behalf of public for public interest such as environmental pollution or product infringes upon mass consumers: "For conduct that pollutes environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court." *Id.*

143. Palmer & Xi, *supra* note 137, at 4.

144. *See* Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (promulgated by the Sup. People's Ct. Jan. 30, 2015, effective Feb. 4, 2015), art. 73–74 (Lawinfochina 北大法律英文网), http://en.pkulaw.cn/display.aspx?cgid=242703&lib=law (last visited Apr. 18, 2016).

145. *E.g.*, Sierra Club v. Two Elk Generation Partners, 646 F.3d 1258, 1267–68 (10th Cir. 2011) (using Wyoming preclusion rules to preclude citizen suits following a *parens patriae* action).

146. *See* 2015 Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, Art. 284–91, http://chinalawtranslate.com/spccivilprovedurelawint/?lang=en (last visited Apr. 13, 2016).

147. Li Jie, Thesis on China's Representative Action (2014) (graduate dissertation, Hehai University).

While there is no official record of the total number of Class Action litigation cases in China because the Supreme People's Court does not keep statistics regarding the prevalence of class action litigation,[148] the numbers of such cases are significant. In 2015, in China, there were 78,000 environmental protection cases and 10,349 food safety cases (one category of consumer protection cases) closed at all levels of courts.[149] Though there are obstacles to the further development of class actions in China (which will be addressed in the following part), the prognosis for growth in this area of Chinese law is strong.

Rule 55 class actions in particular are on the rise.[150] In regards to environmental public interest joint litigation, the All-China Environmental Federation ("ACEF"), an organization engaged in public environmental protection, has already brought suit in a number of jurisdictions against various companies for a variety of environmental claims, so companies operating in violation of China's Environmental Protection Law ("EPL"), in certain instances, may soon face costly litigation.[151] Given the environmental challenges facing China and increasing public awareness, it may be expected that growth in such environmental public interest joint litigation will continue upward.[152]

Rule 54 class actions are also increasing. In the category of consumer product-related litigation, growing numbers of cases are being brought by individual plaintiffs against consumer products companies and retailers under the Consumer Rights Protection Law of the P.R.C. ("CRPL").[153] Additionally, it may simply be a matter of time before Chinese consumer associations, operating under Rule 55, and with the support and expertise of an increasingly sophisticated "class-action" litigation bar in China, increase their filings of joint litigation for those cases which are deemed viable.[154]

Given the increasing sophistication of Chinese jurisprudence in this area, on the down side, it will be hard for Chinese plaintiffs to argue that Chinese forums are inadequate for purposes of a U.S. court's *forum non conveniens* analysis. On the positive side, there may be access to justice within China for Chinese plaintiffs who have suffered small-scale harms inflicted by U.S. defendant companies. For an example, in 2006, Dell was sued in China by a group of 19 Chinese plaintiffs who had received a processor worth about $30 less than the processor they had contracted to receive.[155] Ultimately these customers got breach damages including a refund

148. *See Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1523 n. 5 (1998), https://www.jstor.org/stable/1342190?seq=1#page_scan_tab_contents.

149. Huang Ziuan, *Supreme People's Court President Zhou Qiang for the work of the Supreme People's Court,* http://lianghui.people.com.cn/2016npc/n1/2016/0313/c403052-28194909.html (last visited Apr. 15, 2016).

150. For example, the 2015 Interpretations of the CPL gave increased guidance on how to carry out Rule 55 actions, reflecting the increased need for such information.

151. *See* Richard W. Wigley, *Class Action-type Litigation in China*, INTELLECTUAL PROPERTY (Aug. 26, 2014), http://www.chinalawinsight.com/2014/08/articles/ip-2/class-action-type-litigation-in-china.

152. *Id.*

153. *Id.*

154. *Id.*

155. Sumner Lemon, *Dell Offers Refund to Unhappy Chinese Customers*, INFOWORLD, http://www.infoworld.com/article/2656699/computer-hardware/dell-offers-refund-to-unhappy-chinese-customers.html (last visited Aug. 14, 2006).

and their lawyers' fee.[156] Dell was particularly incentivized to resolve this quickly because it wishes to remain competitive in the Chinese market.[157]

However, many obstacles remain. The Dell example was not a Rule 54 or 55 action, and it is unclear what happened to damaged customers who did not file suit. A Rule 54 action cannot be filed without finding a large number of the potential plaintiffs and obtaining their opt-in consent. Much like FRCP rule 23(a), representative action in China requires that "the number of potential claimants is very large," and "large" usually means no less than 10 people.[158] The court may publish a notice to describe the case and claims and notify right holders to register with the court within a certain period of time, but otherwise, finding sufficient plaintiffs to bear the cost of bringing the litigation is the duty of the plaintiffs.[159] This causes severe agency problems that will be discussed later.

In some circumstances, for joint litigations where the number of potential claimants is very large and where many "persons cannot be determined, the People's Court may issue a Public Notice stating the particulars of the case and requesting that claimants register with the People's Court."[160] The court's rulings in such joint litigations shall apply to not only the claimants in the suit, but "shall apply to claimants who have not registered with the court, but who institute actions during the limitation period."[161]

While "joint litigations" in China differ in form from class action lawsuits in other jurisdictions, such as under U.S. Rule 23, there are both common attributes and serious differences.[162] Unlike in the U.S., preclusive effects apply exclusively to plaintiffs who have opted in to the action, or who have filed a similar action.[163] This becomes complicated in the case of right holders who have not registered. When a right holder that has not been registered files a case application, the court shall issue a ruling to apply the judgment or ruling issued by the court, if upholding his claim.[164]

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156. *Dell "for the case of" the first instance verdict of Dell was sentenced to default refund,* SOHU (Dec. 18, 2006), http://news.sohu.com/20061218/n247095401.shtml.

157. Matthew Humphries, *Dell Sued for China Chip Mix-up*, GEEK.COM (Aug. 15, 2006, 10:16 AM), http://www.geek.com/news/dell-sued-for-china-chip-mix-up-561284/.

158. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (promulgated by the Sup. People's Ct. Jan. 30, 2015, effective Feb. 4, 2015), art. 75 (Lawinfochina 北大法律英文网), http://en.pkulaw.cn/display.aspx?cgid=242703&lib=law (last visited Apr. 18, 2016).

159. *Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1534 (1998).

160. This is stipulated under Rule 54, but it applies to Rule 55 as well, since 55 is a special occasion for public interest of representative litigation. *See* Civil Procedure Law of People's Republic of China, art. 54 (2012)

161. *Id.* at art. 55.

162. *See* Richard W. Wigley, *Class Action-type Litigation in China*, INTELLECTUAL PROPERTY (Aug. 26, 2014), http://www.chinalawinsight.com/2014/08/articles/ip-2/class-action-type-litigation-in-china.

163. "The judgment or ruling issued by the court shall bind all right holders which have registered with the court. Such a judgment or ruling shall also apply to actions instituted during the time limitation by rights holders who have not registered with the court." Civil Procedure Law of People's Republic of China, art. 53 (2012).

164. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (promulgated by the Sup. People's Ct. Jan. 30, 2015, effective Feb. 4, 2015), art. 80 (Lawinfochina 北大法律英文网), http://en.pkulaw.cn/display.aspx?cgid=242703&lib=law (last visited Apr. 18, 2016).

Much like as required by FRCP Rule 23(a)(2), to register as a member of class action, a plaintiffs' claim must have the same kind of subject matter as other plaintiffs.[165] It has been criticized that subject matter for class action in China is too narrow a concept, and therefore unfavorable for group litigants. In China, the "same subject matter" requires the same legal relationships, same facts and same claims. However, the same facts do not always lead to the same claim. For example, product quality disputes may result in claims for contract damages or personal injury. Cases of this sort are not suitable for representative litigation in China.[166] For example, in 2004, the Nanjing Middle Intermediate People's Court rejected the "Gao Er Bao" representative action, which had 1354 plaintiffs, for the reason that it was not considered suitable.[167]

Unlike in the U.S., Chinese plaintiffs must front-load proof as to their factual and legal claims.[168] A right holder, in order to register with the court under Article 54 of the CPL, must prove his legal relationship with the opposing party and the damage he has suffered. If he fails to do so, registration will not be granted.

The role of the Chinese class representative is much less pro-forma than that of the U.S. class representative. Representatives, who are not lawyers,[169] are chosen by parties who have opted in. If the parties are unable to select representatives, the court may select a representative or representatives in consultation with the right holders.[170] Representatives are responsible for fully litigating the case, and the result shall bind all the parties represented.[171] However, in order to modify or relinquish any claims, admit any claims of the opposing party or reach a settlement, representatives must obtain consent from the parties represented.[172]

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165. Civil Procedure Law of People's Republic of China, art. 53 (2012).

166. Li Jie, *Dissertation on Chinese Representative Action System*, HENAN U., (2014), http://www.cnki.net/KCMS/detail/detail.aspx?dbcode=CMFD&QueryID=17&CurRec=1&dbname=CMFD201501&filename=1014393778.nh&urlid=&yx=&v=MTczMDBlWDFMdXhZUzdEaDFUM3FUcldNMUZyQ1VSTDJmYitab0Z5dm1VcjNMVkYyNkdyQ3hIZGJMcDVFYlBJUjg=.

167. In this case, 1354 consumers brought suit for the defective "Gao Er Bao" product. It may have been considered unsuitable for class treatment because of mass plaintiffs with complicated individualized damages calculations and distribution and the difficulty of determining the appropriate defendants when "Gao Er Bao" was sold in many cities. If retailers were sued, (if they are considered liable for selling defective product), it could be difficult to allocate liability for damage among such retailers. If this was done because of the fear of complicated individualized damage assessments, this is not so far from how such determinations are made in the United States. *See generally* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) (in which a prospective class of asbestos-only plaintiffs was denied class certification); In re Rhone Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (in which a prospective class of newly HIV-positive hemophiliacs suing their blood suppliers was denied class certification).

168. U.S. courts have, indeed, been horrified at the thought of introducing a 12(b)(6) inquiry as to every claim in the class before a class may be certified. *See* Sullivan v. DB Investments, Inc., 667 F.3d 273, 305 (2011) (Rendell, J., majority). While controversial, they have gone so far as to allow class actions to be certified when it is known that some members of the class "have no legal claim whatsoever." *Id*. at 340 (Jordan, J., dissenting).

169. *See 2015 Interpretation*, *supra* note 158. Here, litigation representatives are lawyers.

170. *See* Civil Procedure Law of People's Republic of China, art. 54 (2012).

171. Representatives exist because not everyone of a large group can attend in court. However, representatives are not professional lawyers. Lawyers need consent from clients too. So the structure is that the representative gets consent from the class, and then the lawyer gets consent from the representative. In China, a group cannot directly select its lawyer as representative, since the law requires the representative to share same legal interest with group. *Id*. at art. 55.

172. *Id.* at art. 53.

Similar to the FRCP Rule 23(a)(3), the eligible representatives have to meet requirements: to begin, they must share common interest with other group members. However, additionally, Chinese class representatives have an almost fiduciary duty to take "representative's responsibility" and protect all represented members' legitimate rights,[173] by participating actively in the litigation, disclosing important progress, showing reasonable good faith, among other actions.[174] In practice, if the representative brings suit in name of all legal related members, as long as the court approves the representative's eligibility, the representative litigation shall be certified and continue to trial.

While class actions may make litigation more economically feasible in small claims cases by allowing plaintiffs to pool their resources to hire counsel and cover litigation costs,[175] there are also agency problems.[176] Individuals will be reluctant to assume the risks and efforts associated with bringing a class action when the benefits of their action will largely accrue to others, so it is often difficult to organize affected individuals into a class.[177]

Chinese class representatives face significant downside risk, in a way not shared by U.S. class representatives who contract with their lawyers based on contingency fees. For example, court fees are set according to the amount in dispute (which is *per se* larger in a class action), and the class representative is legally responsible for paying them. In practice, this fee requirement discourages individuals from serving as class representatives for fear that they will be forced to pay all of the litigation fees if the class loses. Additionally, representatives may incur a variety of other costs, including attorneys' fees, travel expenses, and costs associated with preparing evidence. All told, the time, energy, and financial risk required of class representatives dissuades individuals from organizing classes and serving as representatives.[178]

Other Chinese class members face similar agency costs to those faced by U.S. class members. For example, it is often difficult for class members to monitor the activities of their representatives. Judges can exacerbate such problems by not permitting plaintiffs to select their own representatives, instead assigning local officials to represent the class.[179]

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173. Xiao Jianhua, *Comparative Study on Class Action and Representative Action*, COMP. L. REV. (1999) (肖建华，群体诉讼与我国代表人诉讼的比较研究之二，比较法研究， 1999).

174. However, it is still unclear exactly what representatives must do to comply with their duties. *See* Li Xiuwen, Sun Liuyi, *Problems and suggestions on Representatives Litigation*, BEIJING HIGHER PEOPLE'S COURT, http://bjgy.chinacourt.org/article/detail/2015/04/id/1585212.shtml (last visited Apr. 27, 2016).

175. *See Class Action Litigation in China*, *supra* note 159, at 161.

176. Xiao Jianhua, *Comparative Study on Class Action and Representative Action*, COMP. L. REV. (1999) (肖建华，群体诉讼与我国代表人诉讼的比较研究之二，比较法研究， 1999).

177. Additionally, when the defendant is a powerful local interest or is linked to the local government, individuals may fear retaliation, particularly against the class representative. This is footnoted because this should not apply in cases where the defendant is a U.S. company – but could, if the company followed the common practice of hiring well-connected children of officials. *See, e.g.,* Ned Levin, Emily Glazer & Christopher M. Matthews, *In J.P. Morgan Emails, A Tale of China and Connections*, WALL ST. J. (Feb. 6, 2015, 11:48 PM), http://www.wsj.com/articles/in-j-p-morgan-emails-a-tale-of-china-and-connections-1423241289.

178. *See* Richard W. Wigley, *Class Action-type Litigation in China*, INTELLECTUAL PROPERTY (Aug. 26, 2014), http://www.chinalawinsight.com/2014/08/articles/ip-2/class-action-type-litigation-in-china.

179. Hong Dongying, *Suggestion of Representative,* ECUPL, http://journal.ecupl.edu.cn/ch/reader/create_pdf.aspx?file_no=201103005&year_id=2011&quarter_id=3&falg=1 (last visited Apr. 27, 2016).

The question of lawyer's compensation is treated very differently in China. While in the U.S., referrals and contingency fees have created an extremely entrepreneurial plaintiffs' bar, in China, lawyers in group litigation are forbidden from taking a "risk agency fee," which is similar to the idea of contingency fee.[180] Additionally, lawyers' compensation is much more tightly regulated and often capped at a flat amount. For example, in Beijing, since 2016, government regulation requires that each civil law case shall be limited to 10,000 RMB in legal compensation, when the lawyer's fee is calculated by number of cases. When the lawyer's fee is calculated by percentage of the target amount, the lawyer can, for example, receive only less than 10% of 100,000 RMB target amount, 2% of 10,000,000 RMB, etc. This regulation has caused lawyers to avoid complex or difficult cases.[181] The central government has a Lawyers' Fee Regulation,[182] which provides principles but not specific numbers, while different provinces or municipality cities, such as Beijing and Shanghai, have their own administrative regulations that put a ceiling on lawyers' fees based on local economic performance. For example, when Beijing government limits 10% of 100,000 RMB, Shanghai government gives a range of 8%-12% of 100,000 RMB.[183] These numbers are well below the 25-40% a U.S. plaintiff's lawyer can expect to take home, but Chinese lawyers (at least in theory) get paid whether they win or lose. While contractual aggregation through referral fees (as happens in the U.S. in mass tort cases, for example, *Vioxx*) could seem to be a solution for this, referral fees are forbidden in China.[184] Lawyers who have represented plaintiff classes in China say that such cases are rarely profitable when compared to opportunities available in commercial practice.[185]

Perversely, given this, Chinese lawyers appear to be increasingly interested in class actions. They may derive significant economic benefits from high profile cases in spite of the small fees the cases generate, as publicity from such cases may lead to future business for the attorneys.[186] In spite of this, it cannot be ignored that the incentives tying top legal talent to class actions are weaker in China than in the U.S.

It should be noted that the Chinese court itself might have reasons not to certify a class action.[187] Judges' salary, welfare and promotion depend on the gross number of cases they resolve in a certain period of time.[188] However, class actions are time consuming and involve a

180. Wang Fuhua, *Legal Fee Promoting Progress*, JURIST, 2010 (王福华，费用推动程序，法学家， 2010).

181. *Id.*

182. *Lawyer Fee Regulation*, MINISTRY OF JUSTICE, http://www.moj.gov.cn/lsgzgzzds/content/2008-07/21/content_905383.htm?node=278 (last visited Apr. 27, 2016).

183. *Shanghai lawyer service charges (the latest government guidance price)*, 66LAW.CN, http://www.66law.cn/laws/124123.aspx (last visited Apr. 27, 2016).

184. While contractual aggregation through referral fees (as happens in the U.S. in mass tort cases, for example, *Vioxx*) could seem to be a solution for this, referral fees are forbidden in China. *See* Lawyer's Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008), art. 26, available at http://en.pkulaw.cn/display.aspx?cgid=188538&lib=law; *see also* Joe Tort, *The Vioxx Settlement*, LPB NETWORK (Nov. 10, 2007) http://lawprofessors.typepad.com/mass_tort_litigation/2007/11/the-vioxx-settl.html.

185. Li Jie, *supra* note 166.

186. *See Class Action Litigation in China*, *supra* note 159.

187. On reluctance to apply Rule 54. *See* Yang Yanyan, *Research on Group Litigation*, LAW PRESS CHINA, (杨严炎, 群体诉讼研究，法律出版社) (2010).

188. Palmer & Xi, *supra* note 137, at 9.

heavy workload, including a fussy notice process and difficulties of enforcement.[189] This leaves judges reluctant to certify class actions. Nonetheless, they are statutorily required not to deny class action applications without good reasons.[190] The common solution is that a proposed class action will be split into individual cases or joint actions with fewer plaintiffs,[191] which diminishes the class action's ability to leverage group power to protect weak individuals. For example, Professor Fu Yulin discusses how one court separated a group dispute with more than 1000 plaintiffs into more than 1000 individual lawsuits.[192]

While the Chinese system, as described at present, is without doubt a functioning and adequate legal system for the purposes of *forum non conveniens* dismissal, bringing suit here could result in greater difficulty accessing legal remedy for Chinese plaintiffs. In summary, for Rule 54 cases, since lawyers do not have financial incentives to aggregate cases as in the U.S., individual plaintiffs will have to take on the initial expense of aggregation. As detailed above, these plaintiffs have significant reasons not to do this and not to take on the role of class representative. Additionally, while in the U.S. judges have a personal incentive to aggregate cases in order to streamline their own workload if there are not good rights-based reasons not to, Chinese judges face the opposite calculus. This leads to less likelihood that plaintiffs will succeed in bringing a mass suit within China if they are dismissed from U.S. court.

Clearly, within China, a Rule 55 action, brought by a local government-sponsored entity who bears the initial costs, would be more desirable for Chinese plaintiffs facing, for example a consumer products-liability case with a U.S. defendant. In Rule 55 cases, the government-sponsored entity (for example, a provincial-level consumer association) can bring suit before a People's Court to protect the public interest. Indeed, such plaintiffs may have to rely on a Rule 55 action. The recent amendment to the CPL added provisions for certain joint litigation in areas of public interest related to "pollution to the environment" and "damage legitimate rights and interests of consumers at large." In such cases of public interest joint litigation, now only certain "designated institutions" may institute proceedings.[193]

Guidance in regards to the requirements for case acceptance in such cases was provided in the 2015 Interpretations in Article 284. For our purposes, the requirement under the Interpretation requiring that there be "preliminary evidence that the public interests are damaged"[194] may pose a significant obstacle for consumer associations bringing such cases. Given the huge number of potential consumer product claims and the many consumers impacted, evidence

189. Wang Tao & Liu Xiongzhi, *China's Representative Litigation Legislative Consummator*, 6 SHANDONG JUDGMENT REV., 50, 50 (2008) (王涛，刘雄智，我国代表人诉讼的立法完善，山东审判), http://www.pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=1510140209&keyword=%E4%BB%A3%E8%A1%A8%E4%BA%BA%E8%AF%89%E8%AE%BC&EncodingName=&Search_Mode=accurate.

190. Li Jie, *supra* note 166.

191. *Id*.

192. *See* Fu Yulin, *Judicial Remedy of Group Disputes* (傅郁林 , 群体性纠纷的司法救济) (2004), http://article.chinalawinfo.com/ArticleHtml/Article_27004.shtml.

193. Civil Procedure Law of the People's Republic of China, art. 55 (1991), available at http://www.china.org.cn/english/government/207339.htm.

194. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, 2015 Sup. People's Ct. Gaz. (Sup. People's Ct. 2015) (China), available at www.ipkey.org/en/ip-law-document/download/2649/3380/23 (last visited Mar. 30, 2016).

collection in such mass consumer rights-related cases may prove to be prohibitively costly.[195] Government entity or no, the pockets of Chinese consumer associations are not necessarily deep. Additionally, as discussed later, having a Chinese government entity prosecute a U.S. corporation could be perceived as political or biased, which might have ramifications for recognition of the judgment back in the United States.

Were an action to be brought, the questions of personal and subject matter jurisdiction are relatively easy to dispose of within China, as long as the "subject matter of the action" occurred within China.[196] If the damage occurred within the U.S., as in the EB-5 case discussed above, the case could most likely be brought in U.S. court in any case. However, the Chinese court could choose to apply Chinese tort or securities law.[197]

It is also possible the Chinese government would not want to resolve this sort of issue judicially at all, and would prefer some form of before-the-fact regulation.

The Dell case shows that the Chinese judicial system can be effectively used to get legal remedy for Chinese plaintiffs. However, practically, this relied on the foreign company's interest in continuing to do business in China, not legal obligations, as will be discussed in this next section.

Part Five: Enforcing Chinese Judgments on U.S. Defendants

Let's presume our intrepid group of Chinese plaintiffs has successfully navigated through CPL Articles 54 and 55, and is now in possession of a judgment in their favor from a Chinese court. An active practitioner in the field, Dan Harris, argues that in cases where the Chinese party loses, it is possible to get a U.S. court to enforce the judgment.[198] It is less clear what

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195. *See* Richard W. Wigley, *Class Action-type Litigation in China*, INTELLECTUAL PROPERTY (Aug. 26, 2014), http://www.chinalawinsight.com/2014/08/articles/ip-2/class-action-type-litigation-in-china.

196. Civil Procedure Law of the People's Republic of China, art. 243 (1991), available at http://www.china.org.cn/english/government/207339.htm. ("Where an action is instituted against a defendant which has no domicile within the territory of the People's Republic of China for a contract dispute or any other property right or interest dispute, if the contract is signed or performed within the territory of the People's Republic of China, the subject matter of action is located within the territory of the People's Republic of China, the defendant has any impoundable property within the territory of the People's Republic of China, or the defendant has any representative office within the territory of the People's Republic of China, the people's court at the place where the contract is signed or performed, where the subject matter of action is located, where the impoundable property is located, where the tort occurs or where the domicile of the representative office is located may have jurisdiction over the action.").

197. Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 28, 2010, effective Apr. 1, 2011), art. 10, 2010 P.R.C. LAWS 36 (China), available at http://www.lawinfochina.com/display.aspx?lib=law&id=8315. The plaintiffs first choose the law they wish to apply, and bear the burden to prove that their choice of law is the best applicable under the circumstances. The Chinese court reviews this. Since U.S. law is judge made common law, a Chinese judge might have difficulty ascertaining the rule as required by Chinese law. *Id.*

198. Dan Harris, *Enforcing China Court Judgments Overseas: Yeah, It's Possible*, CHINALAWBLOG (Mar. 8, 2014), online at http://www.chinalawblog.com/2014/03/enforcing-china-court-judgments-overseas-yeah-its-possible.html ("We were successful in convincing a California State Court judge to enforce the Chinese judgment. Here's the half part though. Our California case was against a Chinese company and I have to believe that had it been a Chinese company seeking to enforce a Chinese judgment against an American company, the American company would have been well positioned to argue about the unfairness of Chinese courts.").

would happen in a case where a class of Chinese plaintiffs won against a U.S. defendant in Chinese court.

Thus far, one Chinese judgment against a U.S. defendant has been enforced by a U.S. court under somewhat extreme circumstances. In *Sanlian v. Robinson*, a U.S. company argued that a case should be sent from Los Angeles Superior Court, where it was filed, back to China, on *forum non conveniens* grounds.[199] This dismissal was granted, on the condition that the U.S. company stipulated that it would "abide by any final judgment rendered in the civil action commenced in China."[200] After failing to appear, and losing the case in Chinese court, the U.S. company returned to California court, arguing that service had been improper under the Hague Convention on Service Abroad, and thus the judgment should be vacated.[201] The U.S. District Court thoroughly reviewed the facts of the case, applying the Uniform Foreign Money Judgments Act, and determined that the Chinese court had sufficiently examined the evidence and their judgment was not a default judgment.[202] This decision was no mere rubber-stamp, and any Chinese class-action judgment against a U.S. defendant should expect similar treatment.

One Chinese academic argues, based on this case, that while a bilateral treaty is the best solution for these issues, mutual reciprocity can fill gaps in the meantime.[203] However, without a pre-emptive treaty, the recognition and enforcement of foreign judgments in the U.S. is not a federally determined matter – it is determined state by state.[204]

To date, twenty-one states and the District of Columbia have enacted the Foreign-Country Money Judgments Recognition Act (hereinafter "FCMJR Act") – the act used by California

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199. Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06–CV–01798, 2009 WL 2190187 (C.D. Cal. July 21, 2009) ("In support of its motion, RHC argued the PRC was a more suitable and convenient forum for the litigation, that the PRC has an independent judiciary, that the Chinese legal system follows due process of law, and that a Chinese court would exercise jurisdiction over the case. RHC agreed to submit to the jurisdiction of the appropriate court in China, toll the statute of limitations during the pendency of the California State Action, and to abide by any final judgment rendered in China. The motion was granted and the California State Action was stayed.").

200. Hubei Gezhouba Sanlian Indus., Co. v. Robinson Helicopter Co., No. 09–56629, 2011 WL 1130451 at *1 (9th Cir. 2011).

201. *See* Hubei Gezhouba Sanlian Indus. Co., Ltd. v. Robinson Helicopter Co., Inc., No. 2:06-CV-01798, 2009 WL 2190187 (C.D. Cal. July 21, 2009), at *4–5. "Mr. Goetz [the U.S. company's RHC's General Counsel and Chief Financial Officer] also sent the documents to RHC's Chinese dealer, and they told Mr. Goetz they would send a representative to the trial or hearing. The representative was barred from the hearing because she was not a party." *Id.* at *2.

202. *Id*. at *2–3.

203. *See* Qisheng He, *The Recognition and Enforcement of Foreign Judgments Between the United States and China: A Study of* Sanlian v. Robinson, 6 TSINGHUA CHINA L. REV. 242, 243 (2013). As this paper goes to press, the recent Chinese decision, *Liu Li v. Tao Li and Tong Wu,* in Wuhan City shows for the first time that such reciprocity between the U.S. (or at least, California) and China is possible. *See* Jie Jean Huang, *Chinese Court Unprecedentedly Recognized and Enforced a U.S. Commercial Monetary Judgment*, UNSW (Sep. 3, 2017), http://www.cibel.unsw.edu.au/cibel-blog/chinese-court-unprecedentedly-recognized-and-enforced-us-commercial-monetary-judgment.

204. *Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the Comm. on the Judiciary H.R.*, 112th Cong. 1–2 (2011) (statement of Rep. Howard Coble, Chairman).

in determining whether to allow enforcement of *Sanlian*.[205] This act includes, in particular, these mandatory bars to U.S. recognition of a foreign judgment:

> (1) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
>
> (2) The foreign court did not have personal jurisdiction over the defendant.
>
> (3) The foreign court did not have jurisdiction over the subject matter.[206]

The statute goes on to list nine additional reasons for which the state could choose to not recognize the foreign judgment, ranging from "circumstances that raise substantial doubt about the integrity of the rendering court" to serious inconvenience of forum.[207]

U.S. class actions have sometimes been emotional, politically charged matters.[208] Any situation where a large group of Chinese plaintiffs have been harmed by an American product is likely to become politicized as well. Chinese judicial independence depends strongly on whether a case is political, politically sensitive, or routine.[209] While the vast majority of products liability and securities fraud class action cases are likely to be routine, cases that are politically sensitive pose particular problems for enforcement. "Judicial independence" with Chinese characteristics is unlikely to pass the impartiality bar of the FCMJR Act under these circumstances.[210] Even in cases where the Chinese court did act impartially, and the decision was fair, suspicion might remain – particularly in Chinese Rule 55 cases, in which litigation is brought by a Chinese government-sponsored entity.[211]

U.S. companies that wish to continue to do business in China might pay their dues anyways, as Dell did, particularly if the Chinese court issues an injunction disallowing access to

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205. *Legislative Fact Sheet - Foreign-Country Money Judgments Recognition Act*, UNIFORM LAW COMMISSION (2017), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=ForeignCountry%20Money%20Judgments%20Recognition%20Act.

206. CAL. CIV. PROC. CODE § 1716 (West 2010).

207. *Id*.

208. *E.g.*, In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 145 (2d Cir. 1987). Judge Weinstein pushed a settlement through for Vietnam veterans who had been harmed by Agent Orange, in despite of the weakness of their claims, arguably for no legal reason other than it was the right thing to do. *Id.*

209. *See, e.g.*, Ray Worthy Campbell & Fu Yulin, *Moving Target: The Regulation of Judges in China's Rapidly Evolving Legal System*, *in* REGULATING JUDGES: BEYOND INDEPENDENCE AND ACCOUNTABILITY, 105, 116 (Richard Devlin & Adam Dodek eds., 2016) ("In reality, the role of the CPC is often overstated, with party involvement being not constant but situational. A more sophisticated view builds a taxonomy of cases, and evaluates independence in light of the issues in the case. Cases may be viewed as political, politically sensitive, or routine. For each kind of case, the level of independence differs.").

210. *See, e.g.*, Jerome Alan Cohen, *China's Legal Reform at the Crossroads*, FAR EASTERN ECONOMIC REVIEW, (March 2006), https://www.paulweiss.com/media/1755544/feelr.pdf (explaining that "judges are hired, paid, promoted, and fired by local officials" and "decisions in nonroutine cases are made by administrative superiors within the court rather than the customary panel of three judges who hear the case.").

211. *E.g.*, David Nakamura, *Anti-China rhetoric in campaign suggests change under a new president*, WASH. POST (Sept. 23, 2015), https://www.washingtonpost.com/politics/anti-china-rhetoric-in-campaign-suggests-change-under-a-new-president/2015/09/23/f6bb3066-61ff-11e5-b38e-06883aacba64_story.html.

Chinese markets if they don't, and similarly to how Chinese companies have done in the United States when faced with U.S. judicial injunctions.[212] However, this is not procedurally enforced access to justice – this is realpolitik. Thus, even Chinese plaintiffs who have won a judgment within the Chinese system do not have a certain remedy at law.

Conclusion

Under current law, the best solution for our Chinese plaintiffs depends on where the harm was felt. If the harm took place in the United States, as in the EB-5 class action, the best solution is to bring suit in the United States. If the harm was felt in China, however, plaintiffs should still initially bring class action in U.S., knowing it will probably get dismissed under *Vivendi* analysis or on *forum non conveniens* grounds and sent back to China. This is to be done on the premise that, presuming they manage to win a judgment in their favor from a Chinese court, as in *Sanlian*, it will then be easier to enforce the Chinese judgment in the U.S. later.

This is by no means ideal. Bringing a suit in a U.S. court is expensive, and doing it without much hope of being able to litigate to resolution is a spectacular waste of resources. It may be difficult to find a plaintiffs' attorney willing to take a case with so little chance of success. Additionally, on the other side of the ocean, bringing a class action in China is still quite difficult, and agency problems abound. The plaintiffs will have to organize much more cohesively than is typical of an American class action, without strongly personally incentivized organizers (like the U.S. plaintiffs' bar), in order to have any chance of success. In the near future, we recommend to the diplomats currently negotiating the U.S. – China Bilateral Investment Treaty that, in order to allow access to legal remedy for small-time everyman claimants, they phrase the treaty's arbitration clause in such a way as to allow for the possibility of class arbitration. Because the Chinese system will only accept mutual judicial recognition, and the U.S. judiciary is suspicious of the Chinese judiciary, U.S.-Chinese mutual judicial recognition, through treaty or practice, seems unachievable in the near future. Until then, class arbitration (in the U.S.) is the best middle ground. There are plenty of good reasons to prefer class actions to class arbitration, such as concerns that class arbitrations are not subject to an appeals process. Additionally, personal injury claimants will still be left out of this remedy, given China's reservations to the New York Convention. However, depending on the procedural rules, class arbitration will likely be cheaper and easier to get enforced than bringing class actions in two countries, and it will allow resolution at least of commercial disputes.

The authors look forward to a time when mutual judicial recognition will be possible, resolving many of these problems. Until then, however, we propose these options to fill the gaps, since in interest of mutual respect between sovereigns, international geopolitical stability, and common human decency, both the U.S. and China have reason to care about the equitable treatment of Chinese citizens who end up suffering from their consumption of U.S. goods and services.

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212. *See, e.g.*, Aaron M. Kessler, *Chinese Drywall Firm to Pay Damages*, N.Y. TIMES (Mar. 18, 2015), http://www.nytimes.com/2015/03/19/business/chinese-drywall-firm-to-pay-damages.html?_r=0;http://www.nytimes.com/2015/03/19/business/chinese-drywall-firm-to-pay-damages.html?_r=0; Campbell & Campbell, *supra* note 19.

Remedying Eternal "Inadequacy": How Anonymous Juries In The Special Criminal Court Would Preserve Ireland's Jury Trial Right

J. Raymond Mechmann, III[1]

I. Introduction

The primary role of the modern jury system is to deliver justice.[2] The accused is faced with a panel of his peers, who view and hear evidence, are instructed on the law, weigh issues of credibility, and render a verdict. For centuries, it has been a hallmark of the criminal justice system[3], and has been adapted in various way[4]s. No doubt, the jury system has also remained intact in large part due to its secondary roles: engaging the community, enhancing the legitimacy of law and order,[5] and inspiring confidence in the citizens of democracies across the globe.[6] In many ways, the jury is "the lamp that shows . . . freedom."[7]

The jury system in Ireland is prototypical. A panel of twelve jurors is randomly selected to decide the facts in a criminal case.[8] The verdict must be unanimous, with some exceptions.[9] And juries are constitutionally mandated.[10] In fact, the jury system is considered not only the "cornerstone" of the nation's criminal justice system,[11] but indeed, a "constitutional imperative."[12]

Enter Ireland's Special Criminal Court ("SCC"). The SCC, a non-jury court established to combat unrest in Northern Ireland in the first half of the twentieth century,[13] has been at the

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1. Student Writing Editor, *New York International Law Review* and *St. John's Journal of International and Comparative Law*; J.D. Candidate, 2017, St. John's University School of Law; B.A., *magna cum laude*, 2012, Manhattan College. I would like to thank Professor Martin Cerjan, my family, and my best friend, Kathryn O'Keefe, for their constant support throughout the writing of this Note.
2. Fergal Francis Davis, The History and Development of the Special Criminal Court 19 (2007).
3. Liz Campbell, *The Prosecution of Organized Crime: Removing the Jury*, 18 Int'l J. Evidence & Proof 83, 85 (2014).
4. Tom Daly, *An Endangered Species?: The Future of the Irish Criminal Jury System in Light of Taxquet v. Belgium*, 1 New J. Eur. Crim. L. 153, 158–59 (2010) (while some jury systems are "pure" in that they consist only of lay persons, others are "mixed," employing both lay persons and professional judges to decide both fact and law).
5. *Id*.
6. *Id.* at 153, 163; *see also* Davis, *supra* note 2.
7. Eamonn McCallion, *The Special Criminal Court—Reform or Abolition?*, 5 I.S.L.R. 65, 68 (1995) (quoting Devlin, P., Trial By Jury 164 (1956)).
8. Daly, *supra* note 4, at 155.
9. *Id*.
10. Ir. Const., 1937, art. 38.5, *available at* http://www.irishstatutebook.ie/eli/cons/en/html#part12 (subject to three exceptions, "no person shall be tried on any criminal charge without a jury").
11. Daly, *supra* note 4, at 153 (citing Third Party Observations of the Government of Ireland, Taxquet v. Belgium 3 (2009)).
12. Daly, *supra* note 4, at 155.
13. *See* Davis, *supra* note 2, at 89.

center of attention in Irish news during this year's general election campaign.[14] Among others, the United Nations Human Rights Commission, Sinn Féin[15] leader Gerry Adams, and Amnesty International have called for the Court's abolishment because they believe the juryless Court is inherently undemocratic.[16] Conversely, former Fine Gael[17] leader Enda Kenny has not only voiced opposition to this stance,[18] but has called for, and succeeded in establishing, a second SCC in April 2016.[19] Kenny believes that the SCC is necessary because "[w]hat's at stake is the security of [Ireland]," due to the severe "gangland," or gang-related, crime in the small Republic.[20]

The debate is one not easily resolved. One side promotes the hallmark democratic principles that the jury system has always stood for: justice by one's peers, removal of biased or tainted legal minds, and promotion of the populace's participation in government. The other side promotes the safety of Ireland's citizens, particularly in organized crime cases: protecting against witness, juror, and media intimidation.[21]

Moreover, as scholars have called for solutions to the SCC's flawed system, the anonymous jury system in American federal criminal trials, seeing great success in the United States, thrusts itself to the fore as a potential replacement.[22] As long as jurors are protected and their information is kept private, anonymous jury systems, in exceptional cases, could keep the accused's Constitutional right to a jury trial intact.[23]

This Note argues that replacing the SCC's judicial system with an anonymous jury system in organized crime cases would help resolve debates about the constitutionality and fairness of the SCC. Part I discusses the history and background of the SCC, including both the problems the Court was designed to address and the problems it actually addresses already. Part II of this Note discusses the right to a jury trial in Ireland, with special attention given to how that right has developed in the wake of the SCC. Part III discusses the function of anonymous juries, with particular attention given to how they have been successful in the United States in orga-

14. Fergal Davis, Editorial, *Special Criminal Court is Necessary in Flawed Justice System*, IRISH TIMES, Feb. 15, 2016, *available at* http://www.irishtimes.com/opinion/special-criminal-court-is-necessary-in-flawed-justice-system-1.2534450 (hereinafter *SCC Necessary*).

15. An Irish political party supportive of the left-wing, democratic socialist movement.

16. Caoimhin O. Madagain, *The Special Criminal Court*, BROPHY SOLICITORS (Feb. 22, 2016), http://brophysolicitors.ie/the-special-criminal-court/.

17. An Irish political party described generally as center-right, and more "traditional" than Sinn Féin.

18. SCC Necessary, *supra* note 14.

19. Madagain, *supra* note 16. *See also* Colin Gleeson, *Second Special Criminal Court Operational From Monday*, THE IRISH TIMES (Apr. 24, 2016, 10:34 AM), www.irishtimes.com/news/ crime-and-law/second-special-criminal-court-operational-from-monday-1.2622603.

20. SCC Necessary, *supra* note 14.

21. *See, e.g.*, *id. See also* Jane Horgan-Jones, *The Special Criminal Court Erodes Our Rights – It Needs to be Abolished*, THEJOURNAL.IE (Aug. 21, 2013, 7:00 AM), www.thejournal.ie/readme/should-we-keep-the-special-criminal-court-1046015-Aug2013.

22. Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 UNIV. S.F. L. REV. 531, 537 (2010).

23. See Laura N. Wegner, *Juror Anonymity in Criminal Trials: The Media, the Defendant, and the Juror—Providing for the Rights of All Interested Parties*, 3 ALB. GOV'T L. REV. 429, 444–45 (2010).

nized crime prosecutions. Finally, Part IV suggests that the anonymous jury system is amenable to the Irish criminal justice system and can replace the SCC in years to come.

II. History and Background

A. The SCC

1. Constitutional Authority

After two-and-a-half years, the Irish war for independence from the United Kingdom ceased in 1921 with the signing of the Anglo-Irish Treaty.[24] Under the Treaty, Britain "agreed to concede dominion status (equivalent to the constitutional status of ex-colonies like Canada)" to "southern Ireland," whose twenty-six counties would collectively be known as the Irish Free State.[25] The State would still answer to the British Crown, but could handle home affairs and could make foreign policy decisions all on its own.[26] The State would be governed by a new Constitution, ratified just a year later in 1922.[27]

Yet, war would not be at an end for the Irish people. Even in the newly independent Irish Free State, many were against the Anglo-Irish Treaty, believing that the Treaty betrayed the notion of securing a true Irish republic.[28] This disagreement led to a civil war between pro-treaty and anti-treaty groups from 1922 to 1923.[29] Anti-treaty groups were composed primarily of "new" Irish Republican Army ("IRA") members, whereas pro-treaty groups were composed mostly of "old" IRA members and were referred to as the Free State Army.[30] However, pro-treaty groups, with British forces behind them, ultimately prevailed, and established that Ireland maintain some ties to the Crown.[31]

In 1937, a majority of the Free State's people voted by referendum to replace the Constitution,[32] which many believed to be too liberal.[33] This new document not only changed the Free State's name to "Ireland," it established a President, Government, and Courts in the nation,[34] although a formal declaration of independence from the UK would not occur until 1948.[35]

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24. DAVIS, *supra* note 2, at 31.
25. Michael Morrogh, *The Anglo-Irish Treaty of 1921*, HISTORY TODAY (Dec. 2000), http://www. historytoday.com/michael-morrogh/anglo-irish-treaty-1921.
26. RAYMOND HICKEY, IRISH ENGLISH: HISTORY AND PRESENT-DAY FORMS 9 (2007).
27. DAVIS, *supra* note 2, at 32.
28. *See id.* at 34–35.
29. Morrogh, *supra* note 25.
30. Bill Kissane, *From the Outside In: The International Dimension to the Irish Civil War*, HISTORY IRELAND, (Mar./Apr. 2007), www.historyireland.com/20th-century-contemporary-history/from-the-outside-in-the-international-dimension-to-the-irish-civil-war.
31. Kissane, *supra* note 30.
32. The Constitution is called Bunreacht na hÉireann in Irish. *See* BUNREACHT NA HÉIREANN [CONSTITUTION], July 1, 1937 (Ir.).
33. DAVIS, *supra* note 2, at 33.
34. *See* Bunreacht na hÉireann [Constitution], July 1, 1937 (Ir.).
35. *See* Republic of Ireland Act (1948).

Among other notable changes—undoubtedly instituted in response to the civil war[36]—was the new Constitution's stance on "extraordinary" courts.[37] Unlike Article 70 of the original Constitution, which provided that such courts "shall not be established,"[38] Article 38.3.1° of the new document provided a procedure by which to establish "special courts."[39] It was this provision that permitted the creation of the modern SCC.

Article 38.3.1 states that "[s]pecial courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order."[40] Parsed out, the creation of "special courts" under this provision has essentially two requirements. First, a qualifying offense is needed. By the Constitution's express language, the creation of special courts requires the inadequacy of ordinary courts to try certain "offences."[41] The second requirement is the inadequacy itself. Also by the document's language, someone must determine that ordinary courts are so "inadequate," so unable to try a given offense, that *both* "secur[ing] the effective administration of justice" *and* "preserv[ing] . . . public peace and order" are at risk.[42]

Being constitutional in nature, this language is unsurprisingly vague. As a result, special courts cannot be created solely under the Constitution's authority. The government must designate a criminal offense that is so unique that it presents the need for a special court; then, it must show the inadequacy of ordinary courts. It took just two years for Ireland to develop a need for a special court, and thus, a need for legislation permitting the creation of one.

2. Legislative Authority

As noted above, the IRA played a significant role in both the pro and anti-treaty factions of the Irish Civil War. This was due in large part to IRA members' belief that they represented the values of Ireland.[43] But, as is obvious from their factional dispersal, not all IRA members possessed exactly the same values. Notably, the anti-treaty faction disavowed the existence of Northern Ireland and the Irish Free State, considering both fabrications of Imperialist Britain.[44] Accordingly, in 1939, after Britain entered World War II, IRA members sought to associate themselves with Nazi Germany so that they could obtain arms with which to attack Britain.[45] This was directly in contrast to the will of the Irish government, via then-President

36. *See* DAVIS, *supra* note 2, at 62.
37. *Id.*
38. Constitution of the Irish Free State, art. 70.
39. CONST. art. 38.3.1°. (Ir.).
40. *Id.*
41. *Id.*
42. *Id.*
43. DAVIS, *supra* note 2, 71–72.
44. *See* DAVIS, *supra* note 2, at 30–36.
45. *Id.*

Éamon de Valera, who had steadfastly declared Ireland a neutral state during World War II.[46] The violence IRA members inflicted on Britain and Northern Ireland from 1939 through the end of World War II became known as "The Emergency."[47]

This violence spurred enactment of the Offenses Against the State Act, 1939 ("OASA"). In essence, the OASA restates Article 38.3 of the Constitution, giving the government the power to create and use special courts when ordinary courts prove inadequate.[48] Particularly, a half-dozen key provisions allowed for the creation and authority of the original Special Criminal Court. These provisions attempt to address the two constitutional requirements we have posed above: (1) a qualified offense, and (2) inadequacy of the ordinary courts.

First, Part V of the OASA provides a framework that gives effect to the "inadequacy" portion of Article 38.3.1.[49] Indeed, Section 35(2) of Part V sets forth a "mechanism by which Part V of the Act can be activated."[50] It states that the government must "publish a proclamation declaring that it is satisfied that the ordinary courts are inadequate and arguing that Part V be brought into force."[51] Second, Part V gives effect to what offenses the court has the authority to try: scheduled and non-scheduled offenses.

Section 36(1) of Part V provides that, where "the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, the Government may . . . declare that offenses . . . shall be scheduled offences for the purposes of this Part of this Act."[52] In other words, one way that a criminal offense can appear before the SCC is if the government has scheduled that offense. Such offenses generally involve "subversive crime," and are heard by the court "as a matter of course."[53] Alternatively, Section 46(1) of Part V states that, for offenses that have not been scheduled by the legislature, "justice shall, if the Attorney-General," via the Director of Public Prosecutions ("DPP"), "so requests and certifies in writing that the ordinary courts are in his opinion inadequate to secure the effective administration of justice and the preservation of public peace and order . . . ," send a case to be tried by the SCC.[54] Essentially, where an offense has not been scheduled, the DPP can direct that other, non-scheduled, offenses be heard by the court by certifying the existence of Article 38.3.1's "offense" and "inadequacy" requirements.[55]

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46. *Id.* Indeed, despite much persuasion and badgering from British Prime Minister Winston Churchill, de Valera maintained neutral, because Ireland was still very weak after two wars – the War for Independence and the Civil War.

47. Fergal F. Davis, *Trial by Jury: Time for Re-Evaluation*, 32 Alternative L.J. 86, 87 (2007).

48. DAVIS, *supra* note 2, 65–66.

49. Part V, Offenses Against the State Act, 1939; *see also* DAVIS, *supra* note 2, 141

50. DAVIS, *supra* note 2, at 141.

51. *Id*.

52. Part V, Offenses Against the State Act, 1939, § 36(1).

53. Colm Keena, News, *Special Criminal Court's Focus is On Organized Crime*, IRISH TIMES, Feb. 6, 2016, http://www.irishtimes.com/news/crime-and-law/special-criminal-court-s-focus-is-on-organised-crime-1.2526152.

54. Part V, Offenses Against the State Act, 1939, § 46(1).

55. *See, e.g.,* DAVIS, *supra* note 2, at 87; David P. Boyle, *Whether DPP Obliged to Give Reasons for Decisions to Try in Special Criminal Court*, (2012) 30 I.L.T. 1.

Today, however, application of these principles is drastically different from when the Constitution was enacted. The SCC was first used during World War II solely to address IRA violence. Subsequently, the Court generally lay dormant until further IRA uprising began in 1972. In the past two decades, however, the prevalence of gangland crime has posed the questions of how, and when, to use the SCC.

B. Gangland Crime in Ireland

Although scholars cannot agree upon one definition of organized crime,[56] acts of corruption, murder, and terror are commonly associated with organized criminal enterprises.[57] In the United States, such enterprises are generally encompassed within the categories of racketeering activities and corruption.[58] Examples of the crimes that the United States prosecutes, include: "act[s] or threat[s] involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance."[59] Members commit these crimes because they believe doing so furthers their respective organizations.[60] These syndicates cause significant destruction, and plague the neighborhoods in which they reside and which they border.[61]

Ireland is no exception. Just as the IRA of World War II sought to carry out its political message with violence, several modern Irish gangs compete with one another to maintain "turf" and to keep control, primarily, of the narcotic drug market.[62] These gangs are most prominent in Ireland's most densely populated cities—Dublin and Limerick—but have a presence in other regions as well.[63] But before gangland crime became the SCC's primary focus the SCC needed to be re-established.

The stream of political uprisings in the latter half of the twentieth century is the direct cause of the modern SCC's reestablishment.[64] IRA violence began in 1969 in a time that came to be known as "The Troubles."[65] During that time violence erupted between Irish Catholic

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56. Campbell, *supra* note 3, at 84.

57. *See generally id.*

58. *See* 18 U.S.C. § 1961 (2016).

59. *Id.*

60. See Vicky Conway, *The 2009 Anti-Gangland Package: Ireland's New Security Blanket*, (2007) 17 I.C.L.J. 1.

61. *See* David McKittrick, *Gangster Wanted Over Murder of Veronica Guerin Finally Arrested*, INDEPENDENT, Sept. 2, 2010, http://www.independent.co.uk/news/uk/crime/ gangster-wanted-over-murder-of-veronica-guerin-finally-arrested-2069228.html.

62. Conor Lally, *Irish Gangland 20 Years After Veronica Guerin: Since Journalist's Murder Cycle of Violence Has Seen Many Ruthless Figures Come and Go*, IRISH TIMES, June 25, 2016, http://www.irishtimes.com/news/crime-and-law/irish-gangland-20-years-after-veronica-guerin-1.2698793.

63. Conor Lally, *Organized Crime Rates Slump with Recession: Crime Down Overall But Sexual Offences Rise by 51 Per Cent*, IRISH TIMES, March 24, 2014, http://www.irishtimes.com/news/crime-and-law/organised-crime-rates-slump-with-recession-1.1742521; *see also* Leah Hughes, *Is the Irish Media's Reportage of Gangland Crime True to Life, Despite Claims of Glorification?* (2013) http://esource.dbs.ie/bitstream/handle/10788/1096/ba_hughes_l_2013.pdf?sequence=1 (unpublished B.A. Thesis, Dublin Business School of Arts) (on file with author).

64. DAVIS, *supra* note 2, at 131.

65. *See id.* at 119.

nationalists and British Protestant unionists in Northern Ireland, with some of the worst violence manifesting itself as riots and through the use of guerilla warfare tactics against British forces.[66] The dispute was the same as it ever was: whether or not to remove Britain from Northern Ireland, and thus "unite" Northern Ireland and Ireland as a single republic.

With this violence progressing into the 1970s, the Irish government quickly realized the need to re-institute the SCC. In 1972, former member of the Irish legislature and Minister for Justice, Desmond O'Malley, announced the re-establishment of the SCC, citing the Troubles in Northern Ireland as the catalyst.[67] This SCC has never been disbanded and is used to this day.

So, where does gangland crime come in? Although organized crime in Ireland had a continuing presence after the Troubles and throughout the 1980s and 1990s,[68] the SCC's focus on trying gang members did not emerge until after the murder of Irish journalist Veronica Guerin.[69] Guerin had spent the years leading up to her death investigating the underground drug trade running rampant throughout Ireland's largest cities.[70] Her digging and revealing angered some of the underground market's leaders, and as a result, on June 26, 1996, Guerin was brutally shot six times by Irish drug lords while stopped at a red light on the outskirts of Dublin.[71] Her death not only caused a national outcry, but spurred various governmental reforms, such as the creation of Criminal Assets Bureau.[72]

One other major change resulting from Guerin's death was the approach of the SCC to organized crime cases. Guerin's death signaled to the Irish government the true power its organized crime syndicates possess: the power to intimidate and kill whoever angers them. Accordingly, the SCC's trend after Guerin's death has been to view organized crime as a category of "offenses" the Court was designed to address. In many ways, both the power these organizations possess and the danger they pose to the criminal justice system, make persuasive their instant qualification as being "inadequate[ly]" tried by the ordinary courts. That much is easy to say. But, this phenomenon that draws lines between scholars and politicians necessarily poses a question of fairness: is it fair to require that all those accused of organized crime be tried in the SCC?

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66. *See id.* at 119–30.

67. *See SCC Necessary*, *supra* note 13; *see also* Davis, *supra* note 2, at 131.

68. *See* Conway, *supra* note 60, at 2.

69. *See* Hughes, *supra* note 63; *SCC Necessary*, *supra* note 13.

70. Hughes, supra note 63; see also Barry Neild, Prime Suspect in Murder of Irish Journalist Veronica Guerin is Shot: Drug Trafficker John Gilligan in Hospital After Gun Attack, THE GUARDIAN, https://www.theguardian.com/world/2014/mar/02/veronica-guerin-suspect-shot.

71. Neild, *supra* note 62.

72. Criminal Assets Bureau, An Garda Síochána: Ireland's National Police Service, http://www.garda.ie/Controller.aspx?Page=28 ("CAB identifies assets of persons which derive, [or are suspected to derive], directly or indirectly from criminal conduct. It then takes appropriate action to deprive or deny those persons of the assets and the proceeds of their criminal conduct. The legal basis for this action is the Proceeds of Crime Act 1996, as amended by the 2005 Act, and Social Welfare and Revenue legislation").

III. The Jury Trial Right

A. Internationally and in Ireland

A biased American approach to the jury trial system is that it is the greatest democratic criminal justice creation in the world. And, in many ways, rightly so. It places the law very much in the background, removing "tainted" judges and lawyers from the picture, and instead asks a group of randomly selected citizens to employ their common sense and render the most rational decision permissible under the nation's legal framework.

The jury trial is a right whose absence was clearly noticed at the founding of the United States. Indeed, such a right was imperative to the Framers of the U.S. Constitution, who had, for years, been under the oppressive rule of King George III of England.[73] As Thomas Jefferson unabashedly proclaimed in the Declaration of Independence, King George "depriv[ed] [citizens] in many cases, of the benefits of trial by jury."[74] Ultimately, the Framers guaranteed American citizens the right to trial by jury by the way of the Sixth Amendment.[75]

But America is far from alone in its recognition of the fairness inherent in the jury trial. At least thirty other democratic countries employ some variation of the criminal jury trial. These countries employ two broad types of jury system: "pure" and "mixed."

"Pure" systems "allow juries to deliberate and issue verdicts apart from professional judges."[76] Australia, Belgium, Brazil, Canada, England, Ireland, Scotland, Spain, Switzerland, the United States, and Wales provide some form of a "pure" jury system.[77] Such variations include convictions based upon supermajority[78] verdicts, simple majority[79] verdicts, and explanatory[80] verdicts. The jury pools are composed of laypersons, and are usually randomly selected to serve on a single case.[81] "Mixed" systems are more complex, calling for both laypersons and professional judges to work together to render verdicts and issue sentences.[82] Austria, Denmark, France, Greece, Italy, and Portugal provide for variations of the "mixed" system.[83] For example, in Austria, while in some instances "two professional judges sit with two lay judges," in other cases, "three professional judges sit with eight randomly-selected jurors," and

73. *See, e.g.*, DAVID MCCULLOUGH, 1776 (2005).

74. The Declaration of Independence, para. 3 (U.S. 1776).

75. U.S. Const. Amend. VI. (". . . the accused shall enjoy the right to a . . . trial, by an impartial jury").

76. Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 635 (2007–2008).

77. *Id.* at 635–38.

78. Refers to verdict concurrences of 11-1 or 10-2 in favor, and is employed in such countries as England, Ireland, and Australia. *See id.* at 635–36.

79. Refers to verdict concurrences of as little as 7-5 in favor. In some countries, like Belgium, acquittals are permitted if the split is 6-6. *See id.* at 635.

80. In Switzerland, for example, "juries are expected to give explanations for their verdicts and are involved in assessing a sentence as well." *Id.* at 638. Spain also employs this method. *Id.* at 637.

81. *See id.* at 635–38.

82. Daly, *supra* note 4, at 158.

83. Leib, *supra* note 76, at 638–41.

sit for five days instead of one case.[84] Similarly, France empanels three professional judges and nine lay jurors that deliberate together, and Greece follows a similar method but requires jurors to serve for a period of twenty-four days.[85]

Ireland, as noted above, ordinarily employs a "pure" jury system. Ireland's right to a jury trial is guaranteed by Article 38.5 of the Constitution, which provides that, subject to three exceptions, "no person shall be tried on any criminal charge without a jury."[86] Those three exceptions are trials of minor offenses, trials by special courts, and trials by military tribunals.[87] Procedurally the nation allows supermajority verdicts, where concurrence of at least ten of twelve is required to render a verdict.[88] And ordinarily, the jury system in Ireland works perfectly fine and without issue.

However, the jury system is not the only scheme available for securing a fair criminal trial. Several democratic countries have employed non-jury criminal courts and tribunals in criminal prosecutions. Examples include Chile, the Czech Republic, Hungary, India, Israel, Mexico, the Netherlands, and South Africa.[89] For example, in the Netherlands "criminal trials are conducted by three judges without a jury."[90] Accordingly, while many consider the jury system an indispensable part of securing juridical fairness, it is not the only method.

Emergency non-jury courts are also not unheard of in other countries throughout the world. For terrorism and other similar serious types of crimes, France, Rwanda, Spain, and the former Yugoslavia have all employed non-jury courts.[91] Indeed, the International Criminal Court ("ICC") – an international tribunal sitting in the Hague, the Netherlands – employs a panel of international jurists to try crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.[92]

Furthermore, the jury system is also not without its problems. Particularly in cases associated with terrorist or other dangerous organizations, jurors have to be worried about being intimidated physically or otherwise being pressured into returning a verdict "favorable" to the offending organization.[93] Also, jurors are not perfect. Misconduct is certainly a problem that arises when a juror does not care or seeks to fulfill some ulterior motive.[94]

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84. *Id.* at 638.

85. *Id.* at 640–41.

86. CONST. art. 38.5 (Ir.).

87. *Id.*; *see also* John D. Jackson, Katie Quinn, and Tom O'Malley, *The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past*, 62 LAW AND CONTEMP. PROBS. 203, 210 (1999).

88. *Id.* at 214–15.

89. Leib, *supra* note 76, at 631–32.

90. Davis, *supra* note 2, at 13.

91. *Id.* at 14–15.

92. See generally Hand Jorg-Behrens, *Investigation, Trial, and Appeal in the International Criminal Court Statute (Parts V, VI, and VIII)*, 6 EUR. J. CRIME, CRIM. L., & CRIM. JUST 429 (1988).

93. See Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1322 (2007).

94. See Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 149 (1996).

B. How the Special Criminal Court Compromises the Jury Trial Right

But what sets the Special Criminal Court apart from these other seemingly successful non-jury criminal tribunals and courts? Primarily, it is the potential for abuse of discretion by Ireland's DPP. As noted earlier, the requirements for getting a case to the SCC are (1) a qualifying offense and (2) inadequacy of the ordinary courts to try the offense.[95] The inadequacy prong is most often invoked where the DPP is called upon to certify a case to the SCC. However, there is "no entitlement to obtain the information upon which the DPP's conclusion was arrived at, and no requirement to have an oral hearing, cross examination of witnesses, or to provide for submissions."[96] That's right: the DPP certifies, and the SCC hears the case, no questions asked.

One particular recent case is instructive on the unfettered discretion the DPP has and thus its potential opportunity for abuse. In *Murphy v. Ireland*,[97] the Supreme Court of Ireland held that the DPP did not breach plaintiff Thomas Murphy's right to fair procedures under the Constitution or the European Convention on Human Rights (ECHR) by failing to inform him of the reason for the decision to certify his case to the SCC.[98] The court reasoned that review of DPP certifications is limited, because disclosure of the reasons for such decisions would require the DPP "to place in open court information which . . . may be vital for the security of the State."[99] It continued that Murphy was not deprived of a fair trial under either the EHCR or the Constitution, because the *manner* in which a fair trial is administered is not guaranteed and all that is required is that the party generally receive a fair trial.[100]

Murphy demonstrates the norm for many DPP-certified cases. Constitutionally, the SCC cannot hear a case unless the ordinary courts are inadequate to try a qualifying offense. But, if the DPP has unfettered discretion to declare both prongs met, then the Constitutional requirement is rendered virtually moot. Notably, the Irish Council for Civil Liberties has spoken out against use of the court in this way. Referring to the SCC's recent use for organized crime, Executive Director Mark Kelly stated in October 2015 that "[t]he Special Criminal Court was created as an extraordinary court in extraordinary times; however, no reasonable person could today claim that there is a public emergency threatening the life of the nation."[101] The UN Human Rights Commission has repeatedly concurred, calling for the court's abolition.[102] As a result, Fergal Davis, a leading scholar on the SCC, has posed a warranted question: "if the ordinary courts have been inadequate for more than 40 years, is it not time to replace them with something adequate?"[103]

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95. CONST. art. 38.3.1. (Ir.).

96. Boyle, *supra* note 55, at 1.

97. [2014] I.E.S.C. 19.

98. *Id.*

99. Boyle, *supra* note 55, at 2.

100. *Id.*

101. Keena, *supra* note 53; *see also Special Criminal Court Decision "Flouts Rule of Law," Says ICCL*, Oct. 29, 2015, http://www.iccl.ie/news/2015/10/29/special-criminal-court-decision-flouts-rule-of-law-says-iccl.html.

102. Keena, *supra* note 53.

103. SCC Necessary, *supra* note 14.

Below, this Note proposes an answer to this question. In the United States organized crime is no less of a problem. Between street gangs and more sophisticated syndicates, America's largest cities have been plagued with organized crime for over 150 years.[104] Also like in Ireland, jury intimidation has pervaded organized criminal trials in America. To address many of these situations, American federal courts have employed anonymous jury systems.[105] With the identities of the jurors removed, and the applicable police departments on hand, an anonymous jury system "certainly would protect the vulnerable parties.[106]" However, the challenge arises when seeking to maintain the jurors' anonymity. Doing so may require referring to jurors numerically, housing them in a secret location, and monitoring their correspondence and visits during the proceeding[107]s. In sum, "significant police resources and time" may be required to maintain anonymous jury syste[108]ms.

Although difficult, given the SCC's limited scope and infrequent use,[109] anonymous juries can and should be the model Ireland employs. Anonymous juries should replace the current model, by which two-thirds of a three-judge panel convicts or acquits the defendant. Such a change would likely allay the concerns of those organizations that have found the SCC unfair. Whether the makeup of the jury is "pure" or "mixed," any kind of jury system would place a check on the DPP's unregulated discretion in certifying cases. It would also place the verdict in the hands of the people of Ireland, thus restoring to all criminal cases the jury trial right that is supposed to be the "cornerstone" of the Republic's criminal justice system.[110]

IV. Anonymous Juries

A. The American Method

Although some form of the jury trial has been in existence for hundreds of years,[111] anonymous juries have only been employed since the latter half of the twentieth century. To prevent too many such trials from occurring, the federal courts now employ a fairly strict test before an anonymous jury can be imposed. Although the issue has not yet come before the Supreme Court, almost every federal circuit court of appeals has permitted anonymous juries.[112]

Use of anonymous juries began in the United States with the 1977 trial of New York City crime boss and drug lord Leroy "Nicky" Barnes. In *United States v. Barnes*, an anonymous jury

104. See, e.g., Malcom W. Klein, The American Street Gang: Its Nature, Prevalence, and Control (1995).

105. See Propriety of, and procedure for, ordering names and identities of jurors to be withheld from accused in federal criminal trials—"anonymous juries", 93 A.L.R. Fed. 135 (2016) (hereinafter "Federal Anonymous Jury Cases").

106. Campbell, *supra* note 3, at 98.

107. *Id*.

108. Campbell, *supra* note 3, at 98.

109. *See SCC Necessary*, *supra* note 14 (in one year, the SCC resolved just 26 offenses).

110. Daly, *supra* note 4, n.1 at 153 (citing *Third Party Observations of the Government of Ireland, Taxquet v. Belgium* 3 (2009)).

111. American Bar Association: Division for Public Education, Dialogue on the American Jury: We the People in Action – Part I: The History of Trial by Jury (2005).

112. *See* Federal Anonymous Jury Cases, *supra* note 105.

convicted Barnes and ten of his co-defendants in the Southern District of New York.[113] The U.S. Court of Appeals for the Second Circuit upheld the defendants' convictions.[114] The court reasoned that juror anonymity did not impede jury selection, but, rather, "relieved pressure on jurors" and "protected [their] impartiality."[115] Indeed, the anonymity allayed the jurors' fears of retaliation, and as a result, the court concluded that disclosure of juror names "is not the law and should not be."[116]

It took until the 1990s for anonymous juries to grow in popularity and be used on a more widespread scale.[117] While the exceptional nature of using anonymous juries was initially anticipated,[118] subsequent cases reiterated this notion, stating that use of an anonymous jury is a "drastic," "extreme," and "extraordinary" measure.[119] As a result, before empaneling an anonymous jury a court will consider several factors.[120] These factors include the defendant's involvement in organized crime, his or her participation in a group having the capacity to harm jurors, the potential punishment that the defendant faces, the degree of publicity the trial has received, and the possibility of juror harassment.[121] As will be explored more thoroughly in Part D of this Section, several courts applying these factors have empaneled anonymous juries and, accordingly, have kept jurors free from interference and intimidation.

B. Constitutional Objections

Considering its, now, widespread application, the anonymous jury system seems like an accessible way to protect jurors from intimidation and violence in organized crime cases. But the system has its flaws. One notable flaw is the pressure it places on the Constitutional guarantees of certain interested parties. Most notable are the Sixth Amendment Right to Public Trial and the First Amendment Freedom of the Press.

The Sixth Amendment to the U.S. Constitution guarantees, among other rights, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ."[122] The U.S. Supreme Court has steadfastly upheld this guarantee,[123] and for good reason: inherent in a trial's openness is the public's ability to keep a check on court proceedings, ensuring

113. 604 F.2d 121, 133 (2d Cir. 1979).

114. Keleher, *supra* note 22, at 535.

115. *Id.* at 535 (citing *Barnes*, 604 F.2d at 142).

116. *Barnes*, 604 F.2d at 140.

117. *See* Keleher, *supra* note 22, at 537.

118. *See id.* at 539.

119. *Id.* at 537 (quoting United States v. Ochoa-Vasquez, 428 F.3d 2025, 1034 (11th Cir. 2005); United States v. Mansoori, 304 F.3d 635, 650 (7th Cir. 2002); United States v. Calabrese, 515 F. Supp. 2d 880, 884 (N.D. Ill. 2004)) (internal quotations omitted).

120. *See* Wegner, *supra* note 23, at 439.

121. *See* United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995) (*citing* United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994).

122. U.S. CONST. amend. VI.

123. *See, e.g.*, Waller v. Georgia, 467 U.S. 39 (1984).

that the judge or any other "internal" party is running proper proceedings.[124] Moreover, the Sixth Amendment guarantees a "fair trial" in general. As a result, some scholars fear that the nondisclosure of juror information will likely cause a jury to decide the case according to the public's thoughts on the issue, and thus, cause an unfair trial.[125] For example, the media placed a great deal of pressure on American juries to reach certain verdicts in the high-profile prosecutions of Casey Anthony and George Zimmerman.[126]

The First Amendment has implications as well. In pertinent part, it states that "Congress shall make no law . . . abridging the freedom . . . of the press."[127] Particularly, the Supreme Court has upheld the right of the press to have access to court proceedings because the press has a right to receive information.[128] Indeed, a right to publish news is useless unless the press has a right to "gather" news.[129] The rationale here is that the "First Amendment provides open admission to the administration of justice, guaranteeing that the judiciary works 'honestly and efficiently.'"[130] Nevertheless, the Supreme Court has ruled that the media's right of access to the jury trial is "not absolute."[131] Accordingly, "access to [the] identities of newsworthy sources and people are *not* explicitly guaranteed by the First Amendment and, therefore, when anonymous juries are empaneled, the media presumptively will *not* have a right to access or publish the identifying information about the members of the jury."[132]

C. Other Objections

In addition to these constitutional considerations, at least one scholar has recognized how anonymous juries are objectionable in other ways. Specifically, the accused often argues that use of an anonymous jury: (1) implies his guilt, because it suggests that he is too "dangerous" for a regular jury; (2) impairs the jury selection process, because jurors cannot be interrogated too deeply; and (3) prevents the discovery of juror misconduct.[133]

On the other hand, if anonymity is routine these issues are not necessarily implicated.[134] First, if "automatic or presumptive anonymity" were imposed for all such gang cases, the stigma of using anonymous juries as the "exception" would surely decrease, if not be fully elimi-

124. *See id*.

125. Wegner, *supra* note 23, at 444.

126. Scott Ritter, *Beyond the Verdict: Why Courts Must Protect Jurors From the Public Before, During, and After High-Profile Cases*, 89 IND. L. J. 911, 911–13 (2014).

127. U.S. CONST. amend. I.

128. *See* Branzburg v. Hayes, 408 U.S. 665 (1972); Pell v. Procunier, 417 U.S. 817 (1974); *see also* Comment, *The Right of the Press to Gather Information After* Branzburg *and* Pell, 124 U. PENN. L. REV. 166 (1975).

129. Wegner, *supra* note 23, at 443.

130. *Id*. (quoting Davis S. Willis, Juror Privacy: The Compromise Between Judicial Discretion and the First Amendment, 37 Suffolk U. L. Rev. 1195, 1200 (2004)).

131. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

132. Wegner, *supra* note 23, at 443 (emphasis added).

133. *See* King, *supra* note 94.

134. *Id.* at 145–51.

nated.[135] Second, it is "doubtful that a juror's name or address would lead to a challenge for cause" during jury selection; accordingly, if anything, anonymity "enhances" the jury selection process, because people will be more "forthcoming about their lives" knowing that their identities will remain anonymous.[136] Finally, there are ways to prevent and address juror misconduct where the jurors themselves are anonymous. For example, the court can supervise investigations of jurors suspected of misconduct, or can disclose the identities of jurors to only the lawyers and their investigators—not to the press and public—if an investigation is truly warranted.[137]

D. Successful Applications

Several American federal courts have employed anonymous juries in criminal trials with great success. As of the publication of this Note, four cases in the Second Circuit[138] and one case in the District of Columbia[139] have, with success, required that jurors' last names not be disclosed. Furthermore, mistrials have been granted in both the Second[140] and Fourth [141] Circuits where the accused discovered the names of jurors in anonymous jury cases. Otherwise, the First,[142] Third,[143] Fifth,[144] Seventh,[145] Eighth,[146] Ninth,[147] and Eleventh[148] Circuits have also followed suit in successfully employing anonymous juries. The Second Circuit leads the other circuits by having empaneled more than three times the number of anonymous juries than any other Circuit.[149]

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135. *Id.* at 146.

136. *Id.* at 148.

137. *Id.* at 150.

138. *See* United States v. Corrao, 1988 U.S. Dist. LEXIS 2932 (S.D.N.Y. 1988); United States v. Coonan, 671 F. Supp. 959 (S.D.N.Y. 1987); United States v. Stewart, 590 F.3d 93 (2d Cir. 2009); United States v. Tutino, 883 F.2d 1125 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990).

139. *See* United States v. Edmond, 718 F. Supp. 109 (D. D.C. 1989).

140. *See* United States v. Ruggiero, 846 F.2d 117 (2d Cir. 1988).

141. *See* United States v. Dinkins, 691 F.3d 358 (4th Cir. 2012); *see also* United States v. Hager, 721 F.3d 167 (4th Cir. 2013).

142. *See, e.g.*, United States v. Ramirez-Rivera, 800 F.3d 1, 36 (1st Cir. 2015); United States v. Marrero-Ortiz, 160 F.3d 768, 776 (1st Cir. 1998); United States v. DeLuca, 137 F.3d 24, 31 (1st Cir. 1998).

143. *See, e.g.*, United States v. Solomon, 387 Fed. App'x 258, 261 (3d Cir. 2010); United States v. Eufrasio, 935 F.2d 553, 574 (3d Cir. 1991); United States v. Scarfo, 850 F.2d 1015, 1016 (3d Cir. 1988).

144. *See, e.g.*, United States v. Herrera, 466 Fed. App'x 409, 424 (5th Cir. 2012); United States v. Edwards, 303 F.3d 606, 617 (5th Cir. 2002); United States v. Brown, 303 F.3d 582, 603 (5th Cir. 2002).

145. *See, e.g.*, United States v. White, 698 F.3d 1005, 1017 (7th Cir. 2012); United States v. Blagojevich, 612 F.3d 558, 565 (7th Cir. 2010).

146. *See, e.g.*, United States v. Peoples, 250 F.3d 630, 635–36 (8th Cir. 2001).

147. *See, e.g.*, United States v. Wagner, 264 F.2d 524, 528 (9th Cir. 1959), *cert. denied*, 360 U.S. 936 (1959).

148. *See, e.g.*, United States v. LaFond, 783 F.3d 1216, 1224 (11th Cir. 2015); United States v. Ross, 33 F.3d 1507, 1520–22 (11th Cir. 1994).

149. *See generally* Federal Anonymous Jury Cases, *supra* note 105.

Many of these cases have been prosecutions of persons associated with organized crime.[150] Indeed, some of these cases have even been newsworthy. For example, in *United States v. Gotti*,[151] an anonymous jury convicted renowned New York Gambino Crime Family boss John Gotti in 1992. The trial and conviction were highly publicized by the media, and the anonymous jury was ordered because Gotti and others had previously attempted to subvert the integrity of the judicial process.[152] Furthermore, in *United States v. Ruggiero*,[153] an anonymous jury convicted at least one member of another reputed syndicate, the Genovese Crime Family in 1993, for racketeering, kidnapping, extortion, and murder. This case was also popular with the media.[154]

These cases are just examples of how the anonymous jury system has not only been employed in the United States, but also how it has been successful, despite the pressure of the media and threats of organized crime violence.

V. Amenability of Anonymous Juries to Ireland

When it comes to Ireland, however, several questions still remain. Can anonymous juries be mended to fit the intricacies of both the Irish criminal justice system and the posture of the SCC? Can Guardaí, the Irish police, handle the protection of jurors in every SCC case? And, perhaps most importantly, is the right to a jury trial important enough that a judicial criminal court be changed to make way for it? The answer to all of these questions is a resounding "Yes." Too many people were killed in the Irish Civil War for the right to a jury trial to be so easily disposed of on account of the fear that other organized crime members will intimidate jurors. The right to a trial by jury is one that must be defended, and the anonymous jury system provides the best solution.

But the amenability of the anonymous jury system to Ireland finds root in more than Constitutional rhetoric. Both substantively and procedurally, anonymous juries can be employed in Ireland's SCC.

A. Substance and Procedure

Substantively, the jury trial right in Ireland is not much different from that in America, and thus, the anonymous jury should be easily amenable. The Irish system requires either supermajority or unanimity, depending on the facts and circumstances of the case.[155] Additionally, jurors are selected randomly.[156] And they serve for a single case.[157]

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150. *See, e.g.*, Arnold H. Lubasch, *Gotti Sentenced to Life in Prison Without the Possibility of Parole*, NEW YORK TIMES, June 24, 1992, http://www.nytimes.com/1992/06/24/nyregion/gotti-sentenced-to-life-in-prison-without-the-possibility-of-parole.html.

151. 777 F. Supp. 224, 225 (E.D.N.Y. 1991).

152. *See Gotti*, 777 F. Supp. at 226.

153. 824 F. Supp. 379, 383 (S.D.N.Y. 1993).

154. *See generally* Jan Hoffman, *Genovese Family Counselor is Convicted of Racketeering*, NEW YORK TIMES, April 24, 1997, www.nytimes.com/1997/04/24/nyregion/genovese-family-counselor-is-convicted-of-racketeering.html.

155. Lieb, *supra* note 76, at 635.

156. *Id.*

157. *Id.*

But what is required to empanel anonymous juries? In essence, as discussed in more detail below, it is the ability to withhold jurors' names from the court, and to provide police protection where required. Furthermore, at least one scholar has suggested that the problems with anonymous juries really only arise when the system is not routine.[158] Indeed, were anonymous juries a usual phenomenon, the fears of implying the defendant's guilt, potential issues during jury selection, and juror misconduct would be much less prominent.[159]

The procedural carrying-out of the anonymous jury system is what would be more of a hassle. If juries are to be truly anonymous and protected, their behavior must be closely monitored.[160] On the other hand, if jurors' information is discovered, they may have to be placed into Ireland's Witness Protection Programme, which has been in existence since 1997 for exactly the same reason as the current SCC, gangland crime.[161] These tasks may sound daunting on first glance, but once again, *routine use* of these practices will make them more acceptable.

Moreover, the size and population of Ireland is not as much of a problem as might initially be thought. The population is about 4.7 million people,[162] and the geographic size is not much different from the American state of Indiana.[163] However, Guardai's Witness Protection Unit has the power to relocate subjects overseas, and can continue to protect those persons for as long as the threat presents itself.[164] Therefore, in the extremely rare instance in which an Irish anonymous juror's identity is revealed, he can be placed into Witness Protection in a safe location.

VI. Conclusion

The modern SCC in Ireland is a body in which two out of three judges decide the fate of an accused criminal. It is a body in which the Department of Public Prosecutions has unfettered discretion to certify essentially whatever case it wishes to be heard by it. It is a body that, because of the prevalence of gangland crime in Ireland, hears a great many of *all* of the trials that Ireland hears in a given year, because most other cases are disposed of by guilty plea.[165] And it is a body that, if left unchecked, could render the jury trial right in Ireland altogether obsolete.

The SCC was initially established to address republican dissident activity during World War II, and was revived for the same purpose in the 1970s. Since Veronica Guerin's death in 1996, its primary focus has been to combat organized crime in Ireland. Recent reports show

158. *See* King, *supra* note 94, at 145–51.

159. *See id.*

160. *See* Campbell, *supra* note 3, at 98.

161. Christina Finn, *Ireland Has a Witness Protection Programme and We've Spent 400K On It This Year*, THEJOURNAL.IE, May 19, 2015, http://www.thejournal.ie/witness-protection-prog-2109793-May2015/.

162. Central Statistics Office, *Census 2016*, April 24, 2016, www.cso.ie/en/releasesandpublications/ep/p-cpr/censusofpopulation2016-preliminaryresults/

163. The Relative Size of Ireland, ANCESTRY.COM, Feb. 2007, http://www.rootsweb.ancestry.com/~irl kik/ihm/rel_-size.htm.

164. Noel Baker, *Witness Protection: History and Reality*, IRISH EXAMINER, March 27, 2012, http://www.irishexaminer.com/ireland/icrime/witness-protection-history-and-reality-188453.html.

165. See SCC Necessary, *supra* note 14.

that annual revenues from illicit, gang-related, markets estimate at about $2.5 billion dollars, and can be attributed mostly to the narcotic drug market.[166] Other gang-related crimes include human trafficking, brothels, fraud, vehicle theft, and fuel smuggling.[167] Furthermore, Guardai have identified at least nine organized crime gangs operating out of Ireland, and another forty operating throughout Europe.[168]

Since the SCC's focus on organized crime, many people have died as a result of gang violence. In the small republic, over 1,000 people have been murdered since 2004, many of them arising from gang-related disputes.[169] Indeed, at least one expert has commented on the form of such killings, likening them to that of the terrorist organization, the Islamic State of Iraq and Syria ("ISIS").[170]

Accordingly, there is no denying the risk that organized criminal enterprises pose to the Irish republic, and therefore, a need for special circumstances to deal with them. As noted above, the second SCC was implemented in April 2017 to address the significant case backlog the original court still faces.[171] But at what price are the Irish people willing to sacrifice the constitutional right to jury trial? In one recent newspaper poll, with almost 20,000 people submitting ballots, a vast majority of readers—72%—believed that the court should *not* be abolished.[172] Indeed, another poll by the Irish Times found the number to be about 67% in favor of the court as well.[173] No doubt, such vast support for the Court is due to the oppressiveness of gangland crime in Ireland, and the acknowledgement that it needs be dealt with somehow.

However, undoubtedly, not nearly as many people would support the abolishment of the jury trial right in Ireland. This is because the jury trial right is a right worth preserving. Not only does research suggest that those who serve as jurors ultimately become more active citizens, and vote more often,[174] but when citizens are more involved in government they develop a greater trust in the government and its processes.[175] In sum, because of the importance of preserving the right to a jury trial, the Irish government should adopt anonymous juries in the SCC. It has proven successful in America in combatting organized crime. Therefore, it can, and should, be used to combat the same horrors in the Emerald Isle.

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166. Jeff Burbank, *Organized Crime in Europe: A Country-by-Country Breakdown*, The Mob Museum, June 23, 2015, http://themobmuseum.org/blog/organized-crime-in-europe-a-country-by-country-breakdown/.

167. *Id.*

168. *Id.*

169. *See* Tom Clonan, *Ireland's Gang Killings are Remarkably Similar to ISIS Murders*, THEJOURNAL.IE, Jan. 29, 2016, http://www.thejournal.ie/readme/islamic-state-kenneth-obrien-organised-crime-2574728-Jan2016/.

170. *Id.*

171. Gleeson, *supra* note 19.

172. Daragh Brophy, *Poll: Do You Think the Special Criminal Court Should be Scrapped?*, THEJOURNAL.IE, Feb. 8, 2016, http://www.thejournal.ie/special-criminal-court-scrapped-2591808-Feb2016/.

173. Stephen Collins, *Poll: Strong Support for Retention of Special Criminal Court*, IRISH TIMES, Feb. 22, 2016, http://www.irishtimes.com/news/politics/poll-strong-support-for-retention-of-special-criminal-court-1.2544460.

174. SCC Necessary, *supra* note 14.

175. *Id.*

Self-Determination Through Creating the Free City of Mosul

Steven Young[1]

I. Introduction

Control for the City of Mosul and its surrounding area continues to be an important strategic target for all parties involved in the conflict in Iraq. The battle to remove the "Islamic State of Iraq and Syria" ("ISIS") is only the latest in the city's long history. During the Ottoman Empire, the Vilayet of Mosul operated within, but mostly independently from, the rest of the Empire.[2] After post-truce British aggression, Mosul was included in the territory of the new state of Iraq after World War I, under the British Mandate from the League of Nations[3]. Mosul was included in the no-fly zone designated by Western powers in Iraq from 1991 to 200[4]3. The Iraqi Army was driven from Mosul by ISIS in June 2014.[5] Since ISIS' subsequent removal from Mosul this year, Mosul has slowly begun to recover.[6]

No international attempts have been made to allow this very diverse city to determine its own destiny outside of the legally fictitious borders of the Republic of Iraq. This paper will discuss the real-world examples of creating international territories and free cities, in order to apply those examples to the idea of creating the Free City of Mosul.

Resurrecting the concepts of "international territory" and "free city" can provide Moslawis with a stronger case for a greater measure of self-determination, which will help them achieve greater independence.[7] International territories allow a region to be independent from outside control while the international community encourages its political development. So-called "free cities" may help, because municipal-level politics offer a greater voice to the inhabitants, and a greater ability to exercise the right of self-determination.[8] As discussed below, these ideas have both good and bad aspects, and some examples of international territories continue today.

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1. Steven Young recently completed his LL.M. in international law at the Fletcher School of Law and Diplomacy at Tufts University. He attended law school at the S.J. Quinney College of Law at the University of Utah, and is currently the Vice President of Legal Affairs for Planet Alpha Corporation.
2. Sarah D. Shields, *Mosul Questions: Economy, Identity, and Annexation*, *in* THE CREATION OF IRAQ: 1914–1921 51 (Reeva S. Simon et al. eds., 2004).
3. *Id.* at 54.
4. *Containment: The Iraqi no-fly zones*, BBC NEWS, (Dec. 29, 1998), http://news.bbc.co.uk/2/hi/events/crisis_in_the_gulf/forces_and_firepower/244364.stm.
5. Suadad Al-Salhy and Tim Arango, *Sunni Militants Drive Iraqi Army Out of Mosul*, N.Y. TIMES, (June 10, 2014), https://www.nytimes.com/2014/06/11/world/middleeast/militants-in-mosul.html.
6. *Recovery in Iraq's war-battered Mosul is a "tale of two cities," UN country coordinator says*, UN NEWS CENTER, (Aug. 8, 2017), http://www.un.org/apps/news/story.asp?NewsID=57329#.WgB4iRNSxQI.
7. *See* Rüdiger Wolfrum, *International Administration in Post-Conflict Situations by the United Nations and Other International Actors*, 9 MAX PLANCK Y.B. U.N. L. 649, 650–51, (2005).
8. *Id.*

Part I of this paper discusses the "continuum of sovereignty" and how there is room in the international system for more than just fully independent and recognized states. Part II discusses how an international system based on small states is preferable to one based on larger states, and why statesman should err on the side of smallness. Part III examines several examples of systems that were used to create international territories. Part IV recommends various steps to follow when creating international territories by analyzing salient examples of how international territories have succeeded and failed. Finally, Part V proposes the creation of the "Free City of Mosul."

II. The Sovereignty Continuum

A "Free City of Mosul" would not be unheard of in international law. There is an inaccurate assumption that the international community consists of only states. Traditional notions of statehood and sovereignty seem to recognize sovereignty only within recognized states.[9] This notion appears to stem from a partial reading of the 1933 Montevideo Convention on the Rights and Duties of States ("Montevideo Convention"), which provides in Article 1 that: "[t]he state as a person of international law should possess the following criteria: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[10] However, some international lawyers overlook Article 3 of the Montevideo Convention, which states that "[t]he political existence of the state is independent of recognition by other states,"[11] Article 3 is understood to mean that when a territory meets the required criteria listed in Article 1, it is a state, regardless of recognition or lack thereof, by other states.

To determine how best to help Mosul, the "simplistic understandings of how sovereignty has been exercised in practice," must be left behind.[12] By focusing on the reality of the different state-like entities of the world, how they were created, and what has led to their success, the best way forward to assist areas like Mosul suffering from conflict to develop into strong, independent states can be determined.

Stephen Krasner, professor of international relations, has written that sovereignty is made up of four elements: (1) international legal sovereignty, or mutual recognition; (2) Westphalian sovereignty, or the exclusion of external sources of authority both *de jure* (legal) and *de facto* (actual); (3) domestic sovereignty, or the authority structures within states and the ability of these structures to effectively regulate behavior; and (4) interdependence sovereignty, or the ability of states to control movement across their borders.[13] The first two factors refer to legal,

9. *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 4 (2d ed. 2006).

10. Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19; 49 Stat. 3097.

11. *Id.* at art. 3.

12. Michael Cox, Tim Dunne, & Ken Booth, *Empires, systems and states: great transformations in international politics*, 5 REV. INT'L STUD. 27, 4 (2001).

13. *See* Stephen D. Krasner, *Abiding Sovereignty,* 3 INT'L POL. SCI. REV. 22, 229–51 (2001).

de jure authority, which comes from sources external to the state itself. The latter two refer to actual control – *de facto* sovereignty, or "the state's capacity."[14]

Based on the capability of a government to be its own master, this type of sovereignty has been described as a "continuum," and "introduces the possibility of different degrees of sovereignty."[15] Rather than a binary determination based on recognition by other states or organizations, "status, capacity, and autonomy can be wholly, or partially disconnected," meaning "external sovereignty can exist without statehood *and* vice versa."[16] This continuum of sovereignty ranges from full sovereignty (a territory that exercises complete control domestically, and is the unitary actor internationally with no outside actor inhibiting its actions) to a single individual in the most oppressive regime (with no international voice, and no domestic voice, their actions are dominated completely by more powerful actors). It is doubtful that either of those extremes exists in the world today; however, there is room on the continuum between the two extremes.

Most legalist systems propose that a territory is either a state or it is not a state, but they have difficulty determining when one is created.[17] International practice of statehood is pragmatic, in that it looks both to what a state itself declares, and how it is recognized by other states.[18] The pragmatic idea of the continuum of sovereignty recognizes that a territory's government can grow and become stronger and more independent than it had been. The pragmatic position also illustrates the possibility of having one kind of sovereignty and not another. In the pragmatic framework, it is the actual power of a state (its ability to control domestic policy and act internationally) that determines a state's sovereignty.[19] Though the continuum of sovereignty is a pragmatic position, it can align with the legalist system that states purport to believe in. Using legal methods, states can be created and helped to develop more and more sovereignty until they are fully independent.

There is a place for Mosul to fit on that continuum outside of Iraq, and without aligning with the sovereignty of Kurdistan or Turkey. A legalist would not consider Mosul a sovereign, but the pragmatist will see the possibility of Mosul having sovereignty. There are various contemporary examples of entities that are on different parts of the sovereignty continuum and have corresponding rights and duties. These entities have differing levels of *de jure* and *de facto* power and recognition, and like these entities, Mosul, too, can have a certain level, as it works its way to complete sovereignty.

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14. NINA CASPERSEN, UNRECOGNIZED STATES: THE STRUGGLE FOR SOVEREIGNTY IN THE MODERN INTERNATIONAL SYSTEM 14 (2013); *see also* Milton L. Mueller & Farzaneh Badiei, *Governing Internet Territory: ICANN, Sovereignty Claims, Property Rights and Country Code Top-Level Domains*, 18 COLUM. SCI-FI. & TECH. L. REV. 435, 457 (2017).
15. CASPERSEN, *supra* note 14, at 15.
16. Id.
17. *Id.* at 13.
18. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 330 (8th ed. 2017).
19. *Id.*

A. Examples of the Continuum of Sovereignty

The continuum of sovereignty can be illustrated by examining several contemporary examples of human settlements with varying levels of international recognition and domestic power. Some of these settlements are states in all but name. Others are former colonies with special rights. And some are attempts to break away from another state. Yet, each have a measure of independence and have some measure of power in the international community.[20]

1. The State of Vatican City: The Holy See

The Holy See is the central administration of the Catholic Church and is the government over the State of Vatican City ("the Vatican") in Rome. Though not a member of the United Nations ("UN"), the Vatican is part of the Organization as a Permanent Observer.[21] The Vatican has not attempted to become a Member of the UN, nor to change its status in the international system. Despite this, it is able to enter into treaties, observe and make statements in the UN, and actively participate in many UN bodies. Furthermore, the Vatican is a member of the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), the World Health Organization ("WHO"), and the International Labour Organization ("ILO") – this, notwithstanding the Vatican's lack of full UN recognition and the fact that organizations such as UNESCO, WHO, and ILO generally require members to be States.[22]

The Vatican's claims to sovereignty are not based on the fact that it has a small amount of territory. Rather, the Vatican bases its "international personality" on "its religious and spiritual authority."[23] The international community has not overtly weighed in on whether religion alone is enough to declare the Vatican a state, mostly because, in this case, a small enclave with a minuscule permanent population exists. This factor, along with the ability to enter into agreements with other states, and a government (led by the Pope), satisfies the requirements of the Montevideo Convention, whether recognized by other states or not, for the Vatican to be a State.

2. Macau and Hong Kong

Although both Macau and Hong Kong were colonized by different powers – Macau by the Portuguese (through treaty), and Hong Kong by the British (formalized in 1898 with a 99-

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20. *See generally* CRAWFORD, *supra* note 9, at ch. 5.

21. Permanent Observers, *Non-member States*, UNITED NATIONS, https://www.un.org/en/sections/member-states/non-member-states/index.html (last visited Oct. 24, 2017).

22. *See* Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, where the only parties referred to are "states"; *see also* Constitution of the World Health Organization, art. 1, July 22, 1946, 14 U.N.T.S 185, which states that "[m]embership in the Organization shall be open to all States"; Constitution of the International Labour Organization, art. 2–3, Apr. 1, 1919, included as Part XIII of the Treaty of Versailles (June 28, 1919, 225 Parry 188; 2 Bevans 235; 13 AJIL Supp. 151, 385 (1919), specifically limiting membership to states recognized in the UN (the Treaty was updated to reflect the U.N, rather than the League of Nations in 1946).

23. LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 322 (2d ed. 2014).

year lease on Hong Kong Island) – each of their returns to the People's Republic of China ("PRC") were remarkably similar.[24] After the leases on these territories expired in the late 1990s, the sovereignty of Macau and Hong Kong was transferred back to China.[25] In an important turn, in 1972, the UN determined that Macau and Hong Kong were Chinese territories that were being temporarily occupied by outside authorities, namely Portugal and the United Kingdom ("UK").[26] This determination meant that Macau and Hong Kong were technically part of the states of the UK and Portugal, rather than officially designated non-self-governing territories (colonies). Consequentially, as they were not considered official colonies, Macau and Hong Kong's return to China could take place outside of the normal UN processes designed for non-self-governing territories.[27] Notably, the transfer did not require a showing of self-determination by the inhabitants for such a transfer to be internationally acceptable.[28]

Before the reunion with China, both areas had been acting state-like by successfully negotiating treaties and entering treaty-based organizations. Since the reunion, both seem to enjoy a greater level of autonomy than the main body of China. One of the terms of the agreement between the UK and China about Hong Kong stated that Hong Kong will "enjoy a high degree of autonomy, except in foreign and defense affairs, which are the responsibilities of the Central People's Government."[29] Following this declaration, the Constitution of the PRC and the Basic Law of Hong Kong designated Hong Kong as a "Special Administrative Region."[30]

Both Macau and Hong Kong were members of the Global Agreement on Tariffs and Trade and the World Trade Organization ("WTO") before their reunification with China, and have maintained their membership and participation since reunification.[31] Other states have treated the territories as independent for various purposes. Under United States (U.S.) law, the U.S. "should treat Hong Kong as a territory which is fully autonomous from the [PRC] with respect to economic and trade matters."[32] This was U.S. policy even before Hong Kong's reunion with China, during a time when the US considered Hong Kong fully autonomous from the UK.[33]

Macau and Hong Kong are textbook examples of the "continuum of sovereignty." Although the two territories act independently from the PRC, they are not recognized as their own sovereign. And although they arguably meet all the requirements under Article 1 of the

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24. CRAWFORD, *supra* note 9, at 249.
25. *Id.*
26. JOHN CARROLL, A CONCISE HISTORY OF HONG KONG 176 (2007); *see* G.A. Res. 2758 (14 Dec., 1972) (Hong Kong was removed from UN Chapter XI).
27. *See generally* Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal ch. 4. (1995).
28. CRAWFORD, *supra* note 9, at 249.
29. Joint Declaration on the Question of Hong Kong, U.K.–China, art. 3(2), 23 I.L.M. 1366, 1371 (1984).
30. CRAWFORD, *supra* note 9, at 249.
31. The 128 countries that had signed GATT by 1994, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Oct. 24, 2017).
32. 22 U.S.C. § 5713(3) (1954).
33. *Id.*

Montevideo Convention, their "capacity to enter into agreements with other states" is limited, as they defer to the PRC for defense and foreign relations outside of the economic sphere.

3. Palestine

Although the Palestine Liberation Organization ("PLO") declared Palestine's independence from Israel in 1988 and was quickly recognized by 50 states, it is not a full member of the UN. In 1974, the UN included Palestine as an "observer entity."[34] Then, in 2012, a 138-9 vote in the UN General Assembly upgraded Palestine's status to "non-member observer state,"[35] the same level of recognition as the Vatican. Some have seen this upgrade as "*de facto* recognition of the sovereign state of Palestine."[36] Currently, 136 UN member states (70.5% of the UN member states) along with the Vatican recognize the State of Palestine.[37]

With significant diplomatic recognition and more rights and privileges than are normally associated with states, Palestine is not merely a subunit of Israel. Palestine would meet the Montevideo criteria for statehood, but for Israel's significant involvement in Palestine.

The case of Palestine illustrates the possibility of progress on the sovereignty continuum, an important point for developing a Free City of Mosul.

4. Taiwan

Since 1949, the Republic of China ("ROC"), based in Taiwan, has claimed authority over both mainland China and Taiwan. The PRC, based in Beijing, also claims authority over both areas. While both governments insist that only one China exists, and that they are the only government representing China, the PRC government is recognized by the UN and most of the states of the world, while the ROC is not. Despite this, the ROC in Taiwan enjoys a position as an actor in the international sphere.[38]

The ROC is the tenth-largest trading partner of the U.S. and one of the world's 20 largest economies.[39] Thus, it is able to operate on fairly equal grounds with states that are recognized as being completely sovereign. Various methods have been developed to work around the lack of legal recognition of the ROC. The ROC is a member of the WTO under the official moniker "Separate customs territory of Taiwan, Penghu, Kinmen, and Matsu."[40] Additionally, some

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34. *See* G.A. Res. 3237 (XXIX) (Nov. 22, 1974).

35. *See* G.A. Res. 67/19 (Nov. 29, 2012).

36. Dan Williams, *Israel defies UN after vote on Palestine with plans for 3,000 new homes in the West Bank*, THE INDEPENDENT (Dec. 1, 2012), http://www.independent.co.uk/news/world/middle-east/israel-defies-un-after-vote-on-palestine-with-plans-for-3000-new-homes-in-the-west-bank-8372494.html.

37. Press release, *Saint Lucia establishes diplomatic relations with the State of Palestine*, SAINT LUCIA NEWS ONLINE (Sep. 16, 2015), http://www.stlucianewsonline.com/saint-lucia-establishes-diplomatic-relations-with-the-state-of-palestine/.

38. CRAWFORD, *supra* note 9, at 201.

39. DAMROSCH & MURPHY, *supra* note 23, at 325.

40. *Id.* at 326.

fishing treaties include the ROC as a "fishing entity," with most of the same rights as states within the treaties.[41]

Taiwan meets all the Montevideo Convention requirements, except that its capacity to enter into agreements with other states is hindered by the PRC's efforts to keep Taiwan from being recognized.[42] That being said, no other entity exerts control over Taiwan.[43] Although complete recognition eludes Taiwan and the ROC government, its *de facto* status on the "continuum of sovereignty" is as close to complete independent statehood as a territory can get, and its significant trading relationships and treaties give it a greater *de jure* claim to sovereignty.[44] Indeed, courts may consider Taiwan a "well-defined geographical, social, and political entity."[45]

5. Kosovo

Like the ROC, Macau, and Hong Kong, Kosovo has achieved a measure of *de facto* sovereignty through creating *de jure* relationships. Kosovo has created *de jure* recognition by gaining membership in international organizations and negotiating its own treaties.[46] Even before the 2008 Unilateral Declaration of Independence ("UDI"), Kosovo joined several international organizations under the auspices of the UN Mission in Kosovo ("UNMIK"), the UN body created to set up the Provisional Institutions of Self-Government of Kosovo in order to "develop[…] meaningful self-government in Kosovo."[47] UNMIK gained admission on behalf of Kosovo in the Regional Cooperation Council,[48] the South East Europe Transport Observatory,[49] the Energy Community,[50] the European Common Aviation Area,[51] and the Central European Free Trade Agreement.[52] Furthermore, Kosovo has several Free Trade Agreements that has been negotiated by UNMIK. Kosovo currently has agreements with Albania, Macedo-

41. *See, e.g.*, Convention on the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art. 9(2), Sept. 5, 2000, annex 1, S. Treaty Doc. No. 109-1.

42. CRAWFORD, *supra* note 9, at 218–20.

43. *Id*.

44. *Id*.

45. *AG v. Sheng Fu Shen* 31 I.L.R. 349 (1959).

46. *See* Steven C. Young, *Foreign Direct Investment Disputes with Unrecognized States: FDI Protection in Kosovo*, 33 J. INT'L ARB, 510 (2016).

47. UNMIK Reg. 2001/9 (May 15, 2001), http://www.assemblykosova.org/common/docs/FrameworkPocket_ENG_Dec2002.pdf.

48. *See* REPUBLIC OF KOSOVO MINISTRY OF FOREIGN AFFAIRS, *Hoxhaj: Anëtarësimi në RCC, historik për Kosovën*, (Feb. 28, 2013), http://www.mfa-ks.net/?page=1,4,1602 (the RCC now recognizes the Republic of Kosovo, not UNMIK, as the member-state in the RCC).

49. *See Seeto Participants*, SEETO (last visited Nov. 20, 2017), http://www.seetoint.org/links/seeto-participants/, (before 2013, only UNMIK was recognized; now the Republic of Kosovo is recognized by SEETO).

50. *See Kosovo*, ENERGY COMMUNITY (last visited Nov. 20, 2017), https://www.energy-community.org/implementation/Kosovo.html (before 2013, membership resided with UNMIK).

51. *See* EUROPEAN COMMON AVIATION AREA (Mar. 18, 2009), http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2009:072:TOC (this agreement was signed by UNMIK, has not since changed to Kosovo).

52. *CEFTA Parties*, CENTRAL EUROPEAN FREE TRADE AGREEMENT (last visited Nov. 20, 2017), https://cefta.int/cefta-parties-2/.

nia, Croatia, and Bosnia and Herzegovina.[53] This confirms that the dissolution of a state does not have to spell doom for an open market. Similarly, Mosul could benefit from a sufficient amount of independence to create its own treaties.

Since the UDI, Kosovo has become a member of various regional organizations and several key international organizations. Kosovo is now a member of the European Bank for Reconstruction and Development,[54] the Council of Europe Development Bank,[55] the European Commission for Democracy through Law (Venice Commission),[56] and the International Organisation of la Francophonie.[57] In addition to these organizations, the International Monetary Fund granted Kosovo membership.[58] Although Serbia maintains that it is the *de jure* sovereign over Kosovo, Kosovo itself meets all of the Montevideo Convention requirements.

III. Why Smaller is Greater Than Larger

The Free City of Mosul should be created because it does not naturally belong in another state, and the states around it have become too large and powerful. Removing Mosul from Iraq and giving it international protection will bring stability to the region, as states will be weaker and less capable of invading one another. An internationalized territory of Mosul could be a shining example of a small state that does not worry itself with the domination of its neighbors, as it would not be big enough to do so. Instead of focusing on domination, it would focus on the well-being of its citizens and their progress.

A. Political Advantages

Once a society is past its optimum size, its problems "must eventually outrun the growth of those human faculties which are necessary for dealing with them."[59] The international system ought to reflect a desire to maintain entities at their optimal size, and the optimal size for a polity is a city. As Aristotle said, "[t]he best limit of the population of a state is the largest number which suffices for the purposes of life, and can be taken in at a single view."[60] Benjamin Barber argues that cities should be the focus of power because "their tendencies have generally

53. *See Trade Agreements*, KOSOVO INTERNATIONAL TRADE GUIDE (last visited Oct. 24, 2017), http://www.itg-rks.com/en-us/Trade-Agreements; *see also* Free Trade Agreement, UNMIK/PISG-Alb. (2003), http://wits.worldbank.org/GPTAD/PDF/archive/Albania-UNMIK.pdf.

54. *See* MINISTRY OF FOREIGN AFF. & INT'L COOPERATION, INGRESSO DEL KOSOVO NELLA BERS (2012), http://www.esteri.it/mae/en/sala_stampa/archivionotizie/comunicati/20121119_kosbers.html.

55. See The Republic of Kosovo is Accepted as the Newest Member of Council of Europe Development Bank, REPUBLIC OF KOSOVO MINISTRY OF FOREIGN AFFAIRS (2013) http://www.mfa-ks.net/?page=2,4,1749.

56. *See Kosovo Joined the Venice Commission of the Council of Europe*, REPUBLIC OF KOSOVO (2014), http://www.mfa-ks.net/?page=2,217,2407.

57. *See Le Mexique, Le Costa Rica, et Le Kosovo ont Ete Admis Comme Membres Observateurs de L'oif*, ORGANISATION INTERNATIONALE DE LA FRANCOPHONIE (last visited Nov. 20, 2017), http://www.francophonie.org/Le-Mexique-le-Costa-Rica-et-le.html.

58. *See Press Release: Kosovo Becomes The International Monetary Fund's 186th Member*, INTERNATIONAL MONETARY FUND (June 29, 2009), https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr09240.

59. LEOPOLD KOHR, THE BREAKDOWN OF NATIONS 1 (1957).

60. THE COMPLETE WORKS OF ARISTOTLE, VOLUME 1: THE REVISED OXFORD TRANSLATION 2105 (Jonathan Barnes ed., 2014).

remained anti-ideological and, in a practical sense, democratic. Their politics are persuasive rather than peremptory, and their governors are neighbors exercising responsibility rather than remote rules wielding brute force."[61]

"The re-establishment of small-state sovereignty would . . . disintegrate the cause of most wars as if by magic."[62] Economist Leopold Kohr illustrates this by using Alsace as an example, saying that "[t]here would no longer be a question of whether disputed Alsace should be united with France or Germany. With neither a France or a Germany left to claim it, she would be Alsatian . . . With all states small, they would cease to be mere border regions of ambitious neighbors. The entire system would thus function as an automatic stabilizer."[63]

Not only would a system of smaller states provide a stabilizing effect, small state regions "would automatically dissolve a second source of constant conflict – the problem of *minorities*."[64] Politically, there could be almost no bottom limit to how small a sovereign entity could be. Switzerland is a good example of harmony and unity, constantly adapting and restructuring to avoid strife, while still able to work together.[65] Clearly, a bottom limit is conceivable, but a small state could benefit more people and give greater voice to the inhabitants therein.

Certainly, there is a lower limit on how small a state can be. "There are perils, however, in a blanket refusal of the international community to recognize the claims of legitimate ethnonationalist movements. For having deemed secession an impossibility, governments may feel no incentive to respond to the desire of ethnic groups for greater power and self-determination within the confines of the current states."[66] There needs to be a method of ensuring self-determination, even at the risk of secession, to prevent states from ignoring completely (or worse) issues that arise from their local minorities.

B. Economic Advantages

Kohr pegged the size of an optimal society at around 200,000 people, with only "size commodities, not happiness commodities" added after a city gets beyond that size.[67] There is a large amount of population growth left, however, before a city becomes "post-optimal." Kohr argues

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61. BENJAMIN R. BARBER, IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES 13 (2013).

62. KOHR, *supra* note 59, at 77.

63. *Id.*

64. *See id*.

65. *See* KOHR, *supra* note 59, at 181, (the already small Unterwalden divided into Obwalden and Nidwalden in the thirteenth century, and each operated independently as half-cantons in Switzerland until a change to the Federal Constitution eliminated "half-cantons." However, both still are still independent, each having half of a vote in the Council of States. Similarly, in 1597, Appenzell divided into Catholic and Protestant halves, Inner Rhoden and Ausser Rhoden, respectively, rather than force the groups remain together. Basel divided itself into half-cantons of Basel Stadt and Basel Landschaft in 1833 to keep the rural districts and the urban trade guilds from fighting).

66. James Habyarimana, *Is Ethnic Conflict Inevitable-Parting Ways over Nationalism and Separatism*. FOREIGN AFFAIRS (2008), https://www.foreignaffairs.com/articles/europe/2008-06-01/ethinic-conflict-inevitable.

67. LEOPOLD KOHR, THE OVERDEVELOPED NATIONS: THE DISECONOMIES OF SCALE 19 (1978) ("[A]t larger size [cities] can give us airplanes, cars, television sets. But these are principally size commodities, not happiness commodities, which we need only if our communities have grown so big that we can no longer reach the inn, the theatre, the market, the fields and streams simply by walking around the corner.").

that when a city's population grows to 15 million mark, the city's size becomes critical. Further growth increases the city's "complexities faster than man's ability to catch up with them."[68] Allowing for smaller units to gain more sovereignty will increase the number of cities that are economic and political hubs, and will allow populations to spread more evenly among these cities.

Smaller-sized sovereigns, because of the détente created from being protected by international bodies or having similarly-sized neighbors, will be able to turn inward and focus on creating inclusive institutions. According to Massachusetts Institute of Technology economist Daron Acemoglu and University of Chicago economist and political scientist James A. Robinson, "[p]olitical and economic institutions, which are ultimately the choice of society, can be inclusive and encourage economic growth. Or they can be extractive and become impediments to economic growth."[69] Inclusive economic institutions "must feature secure private property, an unbiased system of law, and a provision of public services that provides a level playing field in which people can exchange and contract."[70]

When a city-sized polity is entrusted with the right of self-determination, they can create institutions tailored for their city. These institutions will be more inclusive than a top-down order that is imposed without any self-determination aspect. One advantage of inclusive economic institutions at a smaller level is that it allows for development to be effected within the local frame of reference, rendering "development so cheap that it could be financed locally."[71] In addition to local financing being more effective, "nearly a fifth of world-wide capital flows" pass through partially independent territories.[72] These smaller, less-than-fully-sovereign entities have a place in the international market as well as greater ability to develop on their own.

The down-sizing of countries is already taking place. Over the past twenty-five years, many developing countries have increased their internal boundaries.[73] International entities have seen the benefit of some decentralization (taking power from central government and giving it to local polities). For example, the World Bank, with hopes of improving governance and public service delivery, now backs decentralization efforts in the developing world.[74] This decentralization is a way to achieve the inclusive institutions envisioned by Acemoglu and Rob-

68. *Id*. at 21.

69. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL 83 (2012), *available at* http://norayr.am/collections/books/Why-Nations-Fail-Daron-Acemoglu.pdf.

70. *Id*. at 74–75.

71. LEOPOLD KOHR, DEVELOPMENT WITHOUT AID: THE TRANSLUCENT SOCIETY 30 (1979).

72. David A. Rezvani, *Surpassing the Sovereign State: The Wealth, Self-rule, and Security Advantages of Partially Independent Territories*, 1 INT'L AFF., 44–46 (2014), https://doi.org/10.1111/1468-2346.12294.

73. *See* Guy Grossman, *Administrative Unit Proliferation*, 108(1) AM. POL. SCI. REV., 196-217 (2014), https://doi.org/10.1017/S0003055413000567.

74. *See* Gita Gopal, *Decentralization in Client Countries: An Evaluation of the World Bank Support, 1990–2007*, WORLD BANK PUBLICATIONS (2008), available at http://siteresources.worldbank.org/EXTDECENTR/Resources/Decentr_es.pdf.

inson, as subdividing administrative units can be a positive way to create patronage tools and boost construction and growth.[75]

IV. Legalist Systems of Creating International Territories

Outside of the traditional state system, but on the sovereignty continuum nonetheless, are some attempts to create territories not controlled by one state. The League of Nations Mandate system and the UN Trusteeship Council were institutionalized international attempts to help the inhabitants of colonies of the losing powers of World War I ("WWI") and II ("WWII") respectively.[76] The UN Trusteeship Council also oversaw decolonization efforts.[77] These systems were ostensibly designed to help would-be states develop their own institutions until they were able to stand on their own. Certain aspects of each system can aid in developing a "Free City of Mosul."

A. The League of Nations Mandate System

The League of Nations Mandate system outsourced nation-building efforts in the former colonies of Germany and the Ottoman Empire to the victorious nations of WWI. In an attempt to avoid being perceived as merely taking the spoils of war, the Mandate system had high ideals, in the hope that nations with more resources, experience, or a better geographic position could tutor the developing nation on behalf of the League.[78] The victors of WWI used the powers of the League of Nations that were granted to them as trustees to supplant the colonial administrators, but remained *de facto* colonial administrators with minimal League of Nations oversight.[79] Indeed, in a system that was hardly different from prior colonial rule, many of the Mandate powers used their status to gain control over the natural resources of the trustee states.[80]

1. Weaknesses of Mandates

Although the League of Nations made efforts to grant self-determination to national minorities in Europe, the people of the mandated territories still had their fates decided for them. The League of Nations set up a three-step process for creating a mandate under international law. First, the Principal Allied and Associated Powers ("Principal Allied Powers") (the victors of WWI and their allies) would confer a mandate on either one of their own or a third

75. *See* Ryan Saylor, *Ethnic Entrepreneurs and Movements for New Administrative Units: Lessons from Nigeria*, 46 PUBLIUS: J. FEDERALISM 568, 568–95 (2016) (citing Elliott Green, *Patronage, district creation, and reform in Uganda*, 45 STUD. COMP.INT'L DEV. 83–103 (2010)).

76. *See* Versailles Peace Treaty, art. 22, June, 28 1919, 2 Bevans 235, 13 A.J.I.L. Supp. 151, 385; *see* U.N. Charter chapter XII.

77. *See* U.N. Charter chapter XII.

78. *See* Versailles Peace Treaty, *supra* note 76.

79. *See, e.g.*, Nele Matz, *Civilization and the Mandate System under the League of Nations as Origin of Trusteeship*, in 9.1 MAX PLANCK Y.B. U.N. L. 47, 47–95 (2005) (the League-appointed Commissioner in Mandate-territories could report to the Mandate Council, but local leaders from the territory could not, severely skewing any reporting).

80. *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND INTERNATIONAL LAW 115–95 (2005).

state.[81] Second, the Principal Allied Powers would notify the Council of the League of Nations that a state had been appointed with a mandate over a specific territory.[82] Third, the Council of the League of Nations would recognize this appointment, inform the appointed state that the Council was vesting the mandate in it, and communicate the terms of the mandate.[83] This process is indicative of the lack of local authority in former colonies. Most of the decision-making power over the League of Nations Mandates rested with the states chosen to administer the territories. Indeed, at first no process even existed for the local people of these Mandatory territories to make petitions to the League of Nations for redress; only later was the "Procedure in Respect of Petitions" created.[84] The states that were responsible for the mandates would issue reports to the League of Nations, and much like the process employed to create these mandates under international law, local leaders were excluded in the creation of these reports.[85] Although there was significant oversight by various organs of the League, little was done on the ground to ensure that the administrating state was acting in the Mandatory territory's best interests.[86] Despite high-level ideals that the territories would be tutored and assisted into becoming strong independent states, from the outset, the actual people of the territories were left out of any process involving their homeland.[87] Indeed, the Mandate system was "far from successful."[88]

2. Success in Hatay

Even though the Mandate system was inherently flawed, there is one successful example of a people using their right to self-determination under it that is helpful in determining the best course of action for Mosul. In the Treaty of Sèvres, Hatay, then known as the Sanjak of Alexandretta, was removed from Ottoman territory and placed under the French Mandate for Syria.[89] Neither the Ottoman government, nor the Turkish government that replaced it, approved this Treaty.[90] The 1921 Angora Agreement (Ankara was then known as Angora) ended hostilities between France and Turkey, and changed the Syria-Turkey border to that in the Treaty of Sèvres.[91] Further, Article 7 of the Angora Agreement made Hatay autonomous.[92]

On January 24, 1937, the League of Nations brokered the Franco-Turkish Agreement on Alexandretta, wherein the two governments agreed to take steps to resolve the issues surround-

81. *See* QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 110–11 (1930), https://babel.hathitrust.org/cgi/pt?id=mdp.39015027342156;view=1up;seq=131;size=50 (last visited Aug. 17, 2017).

82. *Id.*

83. *Id.*

84. Matz, *supra* note 79, at 73.

85. *Id.*; *see also* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 527 (2002).

86. *Id.*

87. *See id.*

88. ANGHIE, *supra* note 85, at 528; *see also* H. DUNCAN HALL, MANDATES, DEPENDENCIES, AND TRUSTEESHIPS 198 (1948).

89. *See* WILLIAM HALE, TURKISH FOREIGN POLICY SINCE 1774 49 (3d ed. 2013).

90. *Id.* at 32.

91. *See* Franco-Turkish Agreement signed at Angora art. 7, Oct. 20, 1921, British Treaty Series, Turkey, No. 2, 1921, Cmd. 1556, http://www.hri.org/docs/FT1921/Franco-Turkish_Pact_1921.pdf (last visited Sept. 20, 2017).

92. *Id.*

ing the local Turkish population and Turkey's claim on the area (including the development of Turkish culture and official recognition of the Turkish language in the area).[93] Then, on May 29, 1939, the League of Nations adopted the Statute and Fundamental Law for the Sanjak of Alexandretta.[94] The law was approved by both the French and Turkish governments, likely because it was a "piece of international machinery" that could allow them to prevent "a valid municipal act" and "annul[] any legislative or administrative act contrary to certain international engagements."[95] Consequently, Alexandretta became semi-autonomous, but still tied to the French Mandate of Syria.[96]

The framers of the fundamental law used some elements from the regimes set up in Danzig and Memel. However, they improved on those ideas.[97] Supervision of the territory was different. The fundamental law gave greater supervisory power to the League of Nations Council, in order to "avoid difficulties which have sometimes prevented the Council from taking effective action under other instruments."[98] The Council had power over decisions regarding Hatay with just a two-thirds majority vote, as opposed to unanimity, and was free to disregard the votes of the party representatives from France, the Mandatory state.[99] The fundamental law gave the Council power over the state parties, and as a result, it was no longer a silent observer in the status of the international territory.[100] France and Turkey were required to follow the decisions and recommendations of the League of Nations Council.[101] The League of Nations also appointed a delegate of French nationality to live in Alexandretta.[102] This delegate had a partial veto power and could suspend a legislative or administrative action of the local government for up to four months if it conflicted with the fundamental law.[103] Additionally, Syria controlled Hatay's foreign affairs.[104]

To counter the significant powers vested in the administrating states, the League of Nations Council gave powers to Hatay that were not present elsewhere, including the power to liaise with Syria, the power to order a "special examination" into any international agreements relevant to Hatay, and the power to request that treaties be made on behalf of Hatay.[105] Hatay was also given "full independence in its internal affairs."[106] In sum, the control over Hatay "furnishes a good example of sovereignty being neatly divided in order to satisfy foreign interests

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93. *See* Majid Khadduri, *The Alexandretta Dispute*, 39 A.J.I.L. 406 (1945).

94. *See* League of Nations O.J., 1937, 580–89.

95. Wilfred C. Jenks, *The Statute and Fundamental Law of the Sanjak of Alexandretta*, 38 DIE FRIEDENS-WARTE 34. ¶ 3 (1938).

96. *See id.; see also* League of Nations O.J., 1937, 580089; Khadduri, *supra* note 93.

97. *Id.*; *see* section V, *infra*, for discussion of Memel and Danzig.

98. *Id.*

99. Jenks, *supra* note 95, at ¶ 2.

100. *Id.*

101. *Id.*

102. *Id.* at ¶ 3.

103. *Id.*

104. H.L., *Turkey and the Sanjak of Alexandretta*, 15 BULL. INT'L NEWS 518, 519 (1938).

105. *Id.* at ¶¶ 4, 5.

106. H.L., *supra* note 104, at 518.

and local conditions."[107] The allowances gradually increased Hatay's power *vis-a-vis* Syria, and eventually culminated in an independent Hatay with the ability to fully use its right of self-determination.[108] Notably, although the process put in place allowed for Hatay to be independent, that process was used by Turkey to promote independence from Syria.[109] Not long after achieving independence from Syria, Hatay voted to become a province of Turkey, providing an example of self-determination overcoming the limitations placed on sovereign boundaries.[110]

The motives of the League of Nations in setting up the Mandate system seem lofty and should be questioned, and most of the system's results are dubious at best.[111] Yet, there were several positive aspects to glean from the League of Nations' efforts in Hatay. Although Hatay did not have control over foreign affairs, independence and increased communication with and oversight from the League of Nations Council helped ensure individual rights. Requiring the reassessment of the situation in the Mandatory state and updating the power dynamic between the Mandatory power and the Mandated state similarly allowed for flexible solutions (evidenced by the many agreements listed above), which aided in development and self-determination.

B. United Nations Trusteeships

With few exceptions, after WWII, the remaining League of Nations Mandate territories were transferred to the United Nations Trusteeship Council.[112] The Trusteeship Council had a similar mission, but the powers over Trust Territories were delegated to individual states, with less international oversight.[113] The Trusteeship Council had a greater scope and was to lead the Trust Territories to "full statehood" through state-building, rather than just help them exercise self-determination.[114] As time progressed and territories were decolonized, the Trusteeship Council was needed less and less, and in 1994, the Council ceased operations following the independence of the last UN Trust Territory.[115] Nevertheless, the Council took into account a territory's "progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory, and its peoples and the freely expressed wishes of the peoples concerned."[116]

Recent success with using Trust-like systems reveals that there is a contemporary use for the internationalization of territories. In 1999, the United Nations intervened in East Timor (Timor-Leste) and established the United Nations Transitional Administration in East Timor

107. Khadduri, *supra* note 93, at 420.

108. *Id*. at 423.

109. *Id*.

110. *Id*.

111. H.L., *supra* note 104, at 519.

112. *See* Matz, *supra* note 79, at 87.

113. Id.

114. *Id*.

115. Trusteeship Council, UNITED NATIONS, http://www.un.org/en/sections/about-un/trusteeship-council/ (last visited Oct. 24, 2017).

116. U.N. Charter art. 76.

("UNTAET").[117] Although not under the auspices of the United Nations Trusteeship Council, UN Security Council resolution 1272 which established UNTAET is a "reinterpretation of the Trusteeship Council's mandate."[118] With respect to East Timor, UNTAET was to "hold in trust the common heritage and common interests of mankind, mainly: environment, sea, rights of peoples, human rights, and take charge of the implementation of the decisions adopted and directions taken in these areas by the Assembly."[119] This reinterpretation was broader than the original Trusteeship system. With this expanded framework, the UN established a trust that was "charged with the protection of both human rights and the human environment," which is "beyond the traditionally accepted boundaries of decolonization."[120]

Additional temporary UN Trusteeships were created for limited scope missions, usually to aid a state in transition or to keep two factions apart.[121] The Trusteeship approach can be appropriate in the right context because "the trusteeship structure can serve those entitled to self-determination and advance the international community's commitment to peaceful stability and security."[122] The UN has shown remarkable flexibility when setting up these Trusteeships. That ability to adapt to the changing situation on the ground is invaluable to any international territory with international oversight or protection.

1. Arbitration

Arbitration is most often based on consent. In other words, both parties agree to let an independent panel make the final determination, and the parties agree to uphold that determination. Although imposing arbitration on two parties will hold less domestic political sway than a mutually-consented-to arbitration, doing so will still offer the parties a legal and just alternative to continued violence. In areas where a violent outcome is likely, "arbitration can be presented as a political success in which violent conflict is subverted to an impartial legal process."[123] There is even an established process of arbitration between a state and a non-state –

117. United Nations Transitional Administration in East Timor, UNITED NATIONS, http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm (last visited Oct. 24, 2017).

118. Julie M. Tremper, *The Decolonization of Chechnya: Reviving the UN Trusteeship Council*, 15 J. PUB. & INT'L AFF. 135 (2004).

119. GUIDO DE MARCO & MICHAEL BARTOLO, A SECOND GENERATION UNITED NATIONS: FOR PEACE AND FREEDOM IN THE 21ST CENTURY 70 (1997).

120. Tremper, *supra* note 118, at 136.

121. *See e.g.*, United Nations Transitional Administration in East Timor, S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999); United Nations Interim Administration in Kosovo, S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium, S.C. Res. 1037, U.N. Doc. S/RES/1037 (Jan. 15, 1996); United Nations Transitional Authority in Cambodia, S.C. Res. 745, U.N. Doc. S/RES/745 (Feb. 28, 1992); United Nations Disengagement Observer Force, S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967); S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973); United Nations Buffer Zone in Cyprus, S.C. Res. 186, U.N. Doc. S/RES/186 (Mar. 4, 1964); United Nations Temporary Executive Authority in West New Guinea, G.A. Res. 1752 (XVII), U.N. Doc. A/RES/1752 (Oct. 1, 1962).

122. Tremper, *supra* note 118, at 134; *see also* MICHAEL GEOFFREY SMITH & MOREEN DEE, PEACEKEEPING IN EAST TIMOR: THE PATH TO INDEPENDENCE (2003).

123. MATTHEW T. PARISH, FREE CITY IN THE BALKANS: RECONSTRUCTING A DIVIDED SOCIETY IN BOSNIA 204 (2010).

the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State.[124]

If two parties do not consent to arbitration, there are methods of imposing arbitration. Article 33 of the UN Charter permits the UN Security Council ("the Security Council") to "call upon parties to settle [a] dispute by [arbitration or judicial settlement]."[125] This Article, however, is seen as mostly hortatory and not legally binding.[126] Chapter VII of the Charter grants much more power to the Security Council. When taking "[a]ction with respect to threats to the peace, breaches of the peace and acts of aggression," the Security Council may call on the parties to consent to arbitration, among other things.[127] Historically, responding to threats to the peace has been the main purview of the Security Council, and its actions under Chapter VII are seen as binding.[128] Consequentially, "[t]here seems no reason why the Security Council could not order the parties to submit a dispute to binding arbitration pursuant to Chapter VII, where there is a threat to the peace."[129]

The Security Council has actually set precedent for this type of action. In 1991, the Security Council established a boundary commission – essentially an arbitral tribunal – to determine the Kuwait-Iraq border after the first Gulf War.[130] The determination of that commission was adopted by the Security Council in 1993.[131] Similarly, arbitration was used to resolve the territorial dispute between Ethiopia and Eritrea in 2000.[132] In that instance, Ethiopia and Eritrea had improved relations with each other, until Ethiopia later renewed its claim over Eritrea, resulting in skirmishes in 2008 and 2016.[133] Another somewhat successful arbitration occurred in Sudan to determine a portion of the boundary between North and South Sudan. Although the parties agreed to arbitrate the issue, violence continues between North and South Sudan, which has resulted in the Security Council extending the mandate of the UN Interim Security Force of Abyei, its peacekeeping force in the region, until May 15, 2018.[134]

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124. Rules, PERMANENT COURT OF ARBITRATION, *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State* (1993), https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf.

125. U.N. Charter, art. 33, ¶¶ 1–2.

126. PARISH, *supra* note 123, at 204.

127. U.N. Charter art. 39.

128. PARISH, *supra* note 123, at 204.

129. Id.

130. *See* S.C. Res. 687 ¶¶ 2–4, U.N. Doc. S/RES/687 (Apr. 3, 1991).

131. *See* S.C. Res. 833 ¶¶ 4–7, U.N. Doc. S/RES/833 (May 27, 1993).

132. *See* Identical letter dated 12 December 2000 from the Representative of Algeria to the United Nations addressed to the Secretary-General and the Present of the Security Council, U.N. Doc. A/55/686 (Dec. 12, 2000) (The agreement ended hostilities and referred the dispute to arbitration. The arbitration was resolved in 2004).

133. *See 'Significant' casualties in Eritrea and Ethiopia border battle*, DAILY MAIL (June 13, 2016, 13:22 EDT), http://www.dailymail.co.uk/wires/afp/article-3639302/Significant-casualties-Eritrea-Ethiopia-clash-Ethiopia.html.

134. *See* Meetings Coverage, Security Council, Security Council Extends Mandate of United Nations Interim Force for Abyei by 6 Months, Unanimously Adopting Resolution 2352 (2017), U.N. Meetings Coverage SC/12822 (May 15, 2017).

Arbitration has been successful when parties are truly committed to upholding arbitral determinations. For example, the District of Brčko was created when the Republics of Bosnia and Herzegovina agreed to arbitrate their border dispute. In Brčko, the other parties were not in much of a position to complain, particularly since they had consented to the arbitration.[135] The same could be said of Iraq in 1991. The Ethiopia-Eritrea and North-South Sudan conflicts both feature relatively equal adversaries, and with international oversight, the arbitration has been mostly ignored.[136] Clearly, consent-based arbitration is preferable, with a system in place to ensure that the arbitral decision is upheld.

After witnessing these prior successes, the Iraq Group Study Report recommended that Kirkuk, a very ethnically-divided city, be resolved with international arbitration.[137] In this same manner, Mosul could be a candidate for an internationally-arbitrated resolution. However, whether under a Mandate, a Trustee, or Arbitrated Agreement, the forced creation of an international territory, or Free City, will face an uphill battle.

> Such intervention from the outside faces the dilemma that by influencing or even taking over governmental authority, either totally or partially or to establish new governmental structures for that territory in turmoil such intervention interferes with the right of self-determination of the respective population to decide on its political and economic future. However, without assisting activities from the outside the population would not be able to exercise its right to self-determination due to the lack of representative institutions.[138]

When a territory changes hands, there will inevitably be a party that will not be pleased. Efforts should be taken to limit a state's displeasure and to ensure that there is no further violence. Again, these determinations should all be made while considering the voice of the people in the territory affected. A delicate balance must be struck between a people's right of self-determination and the existence of a state. In the past, arbitration has successfully struck this balance by bringing interested parties together to make a determination that more justly balances interests.

V. Internationalized Territories

Perhaps the most overlooked type of entity that appears somewhere on the sovereignty continuum is that of the "internationalized territory." When created for municipalities, internationalized territories are referred to as "free" or "international" cities. Since the 1648 Peace of Westphalia, which ushered in the belief that sovereign states are the prime actor in the international sphere, at various periods in our history international organizations or groups of states have declared certain territories as pertaining to no particular state and having limited international recognition of their own. Different kinds of regimes were established in attempts to balance the rights of the citizens of these territories against the rights of the states claiming the

135. PARISH, *supra* note 123, at 105.

136. *See 'Significant' casualties in Eritrea and Ethiopia border battle, supra* note 133.

137. *See* James A. Baker III & Lee H. Hamilton, The Iraq Study Group Report 65 (2006).

138. Wolfrum, *supra* note 7.

territories as their own. Most of these efforts were attempts at solving issues of "multi-ethnic regions in Europe in which two competing sovereign states had legitimate interests."[139]

Success has been difficult, although not impossible, to attain. Nevertheless, various aspects of a number of these regimes can be resurrected to establish Mosul as an international territory, protected from surrounding states, able to exercise self-determination, and fully sovereign.

A. Attempts of Varying Success

The internationalized territories that were established in the past have had varying levels of autonomy and international recognition. The territories were set up under different types of "international protection, supervision, or guarantee."[140] Some areas, such as the Memel Territory, were left within a state but granted autonomy from that state and given international protection.[141] A modern version of this scheme was attempted in Kosovo, when the UN set up UNMIK[142] and sent stabilization forces to protect Kosovo within the Federal Republic of Yugoslavia.[143]

Most attempts at international territories are made by separating a territory from a state. The island of Crete became an international entity in 1897, after the Congress of Berlin separated it from the Ottoman Empire. The Ottomans had formal sovereignty over Crete, but with the caveat that other states would supervise Crete's domestic affairs without interference.[144] Similarly, the Free City of Cracow, as established by the Congress of Vienna, was "a free, independent City, strictly neutral, under the protection of Russia, Austria and Prussia."[145] Although Cracow did not remain a Free City, it maintained its Free City status for more than thirty years before being annexed by Austria.[146]

The idea of establishing a Free City was attempted again after WWII, when the UN tried to set up the Free City of Trieste on the Italy-Yugoslavia border. Trieste was to remain separate from both states and would be protected by the UN Security Council.[147] Unlike other international territories, the plan for Trieste called for its own foreign affairs powers,[148] while simultaneously having an "international governor" with sweeping powers.[149] However, the plan for the

139. *See* PARISH, *supra* note 123, at 110.

140. *See* CRAWFORD, *supra* note 9, at 233.

141. *Id.* at 234.

142. Mandate, UNITED NATIONS MISSION IN KOSOVO, available at https://unmik.unmissions.org/ (last visited Sept. 6, 2017).

143. *See* Hans Binnendijk et al., Defense & Technology Paper, *Solutions for Northern Kosovo: Lessons Learned in Mostar, Eastern Slovenia, and Brčko* 32 (2006); *see also* S.C. Res. 1244, ¶ ¶ 7–11, U.N. Doc. S/RES/1244 (June 10, 1999).

144. PARISH, *supra* note 123, at 110.

145. Final Declaration of the Congress of Vienna, art. 8, June 9, 1815, 2 B.F.S.P. 12.

146. CRAWFORD, *supra* note 9, at 234.

147. Treaty of Peace with Italy, §3, Feb.10, 1947, 49 U.N.T.S. 3, 137–39.

148. *Id.*

149. PARISH, *supra* note 123, at 112.

Free City of Trieste never came to fruition and was not implemented due to disagreement within the Security Council over whom to appoint as governor. The territory was eventually split relatively amicably between Italy and Yugoslavia.[150]

When the UN General Assembly ("GA") partitioned Palestine in 1947, the GA resolution on the matter "included a proposal to make Jerusalem an international city-state" that was distinct from Israel and Palestine.[151] The draft statute prepared by the UN called for a democratically elected "legislative council," represented by both Arabs and Jews.[152] However, the Executive authority was to be held by international officials, with the UN Trusteeship Council having overall control.[153] The Arab-Israeli war of 1948-1949 put an end to that idea, however, and the city was partitioned.[154]

The attempts outlined above illustrate the variety of options that can be used when creating an internationalized territory. These international territories worked well until powerful states changed the situation, usually through force. Greater successes can be had when that aspect is taken into account and the international territories are better protected or the relevant powers have greater buy-in through an arbitral process.

B. Greater Success in The Free City of Danzig

The Free City of Danzig was an attempt by the victors at Versailles to balance Danzig's close economic ties with Poland against its significant ethnic ties to Germany and Poland's need of a port.[155] This was an effort to grant the German people of Danzig the then-new right of self-determination for minorities, thinking that they may not be safe in a Polish state, but would benefit from economic association with it.[156] However, this grant of self-determination was superficial, as the founding charter of the Free City of Danzig was created by a committee at the Treaty of Paris, and not by the local Danzigers of any nationality.[157]

Danzig was separated from both Poland and Germany, but Poland was granted access rights to Danzig's port and represented Danzig in foreign affairs. The Permanent Court of International Justice ("PCIJ") alluded to the Free City of Danzig's position in the sovereignty continuum when it held that, while Danzig was independent in all other matters, Poland still represented Danzig in foreign affairs, and "the rights of Poland as regards the foreign relations

150. *See* Meir Ydit, Internationalised territories from the "Free City of Cracow" to the "Free City of Berlin." A study in the historical development of a modern notion in international law and international relations 231–72 (1961).

151. PARISH, *supra* note 123, at 112.

152. *Id.*

153. *Id.*

154. *Id.*

155. Elizabeth Morrow Clark, Poland and the Free City of Danzig, 1926–1927: Foundations for Reconciliation 3 (1998).

156. *Id.* at 24.

157. *See* Treaty of Versailles, Germany-Allied Powers, art. 103, June 28, 1919, 2 Bevans 235, 13 A.J.I.L. Supp. 151, 385.

of the Free City [were] not absolute."[158] The PCIJ ruled that this was achieved through "a combination of an agency relationship with a right of veto."[159]

Danzig was granted various other powers generally associated with independent sovereign states, such as being entitled to appoint an *ad hoc* judge to the PCIJ for the *Polish War Vessels in the Port of Danzig* case, as any state-party to the League of Nations was if the other party had a judge already on the court.[160] Danzig was also eligible, subject to Polish veto, to join international organizations. However, any obligations made in this regard were only those of Danzig, and not Poland.[161] Considering the animosity between neighboring states and the need for protection, Danzig was placed "under the protection of the League [of Nations]."[162]

Despite the "protection" of the League of Nations, the Free City of Danzig did not survive WWII. Some scholars even suggest that it was one of the sparks that spurred German action against Poland in 1939. The attempt at having a Free City of Danzig was more successful than the attempt to have a semi-autonomous region of Memel within Lithuania, and would likely have succeeded if not for "Danzig policies toward Poland, especially those influenced by Germany," coupled with the use of aggressive force during the German invasion of Poland and the Russian "liberation" of Poland.[163]

The main takeaway from the Free City of Danzig is this: the international community actively made room within the international community for an internationalized territory. Danzig was proactively given rights that had traditionally been reserved for states, and although it was somewhat beholden to Poland, it had the power of veto over foreign affairs issues relating to Danzig.

C. The District of Brčko

Recently, an attempt at internationalizing a city, Brčko, was made in the Balkans.[164] Three distinct factors makes the Brčko example especially salient. First, the District of Brčko was "imposed by a quasi-judicial process of international territorial arbitration." Second, rather than complete separation, the Arbitral Tribunal declared that Brčko would be a condominium between the Federation of Bosnia and Herzegovina and the Republika Srpska.[165] And third, an internationally-appointed neutral Supervisor was granted unprecedented sweeping powers that

158. Free City of Danzig and ILO, Advisory Opinion, P.C.I.J. (ser. B) No. 18, at 13 (Aug. 26, 1930).

159. CRAWFORD, *supra* note 9, at 239.

160. *See* Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, Advisory Opinion, P.C.I.J. (ser. A/B) No. 43, at 7 (Dec. 11, 1931); *see also* Statute of the Permanent Court of International Justice, art. 31, Dec. 16, 1920, 6 L.N.T.S. 379, 390.

161. *See* Free City of Danzig and ILO, *supra* note 158, at 15, 22 (Judge Anzilotti's separate opinion).

162. Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, *supra* note 160, at Advisory Opinion (ser. A/B) No. 43, at 7, and documents (ser. C) No. 55, at 132.

163. CLARK, *supra* note 155.

164. *See* PARISH, *supra* note 123.

165. Arbitral Tribunal for Dispute Over Inter-Entity Boundary in Brcko Area, Final Award, Mar. 5, 1999, O.H.R. ¶ ¶ 6–7 [hereinafter "Final Award"].

enabled him to ensure that outside influence was limited.[166] These powers were also designed to fade away as the District itself began to develop its own strong internal institutions.

1. Arbitration

The Arbitral Tribunal in this case is an example of a good process for creating an international territory, as it operated with the consent of both Bosnian republics. The Tribunal's mandate was to reach the goals of "(a) encouraging and enabling displaced persons and refugees to return to their pre-war homes, (b) helping to develop democratic multi-ethnic institutions, and (c) cooperating with the international supervisory regime."[167] Although both parties agreed to the arbitration, it was still highly controversial, and was ultimately rejected by both sides. However, upon the arrival of the new High Representative for Bosnia and Herzegovina five months later, the weight of the High Representative's Office was placed behind the Arbitral Tribunal's Final Award.[168] The Tribunal's Arbitral Award created the position of "Supervisor," who would in turn "create a new 'District'…whose institutions would have complete legal independence."[169] Although the position of Supervisor was created by the Award, the position and the District it created were given extra credence when it was seen as coming from the High Representative.[170] With this shot in the arm, the situation stabilized, and the District of Brčko was internationalized.[171]

2. Condominium

Perhaps because of the strong language of the power given to the Supervisor, the Final Award softened the blow to the two Bosnian Republics by declaring the District to be a condominium shared between the two. Generally, "a condominium involves sovereignty jointly recognized by two (or more states) on the basis of equality."[172] Often thought to be temporary, "nothing in legal theory or in the nature of sovereignty [] render[s] impossible a permanent and agreed division of sovereignty as suggested by the very nature of a condominium."[173] Apart from Brčko, contemporary examples of condominiums do exist; however, most of these are for access to various bodies of water.[174]

Additionally, the Final Award stated that "the entire territory . . . will . . . be held in 'condominium' by both entities simultaneously.[175] The territory of the Republika Srpska will

166. PARISH, *supra* note 123, at 105.

167. Final Award, *supra* note 165, at ¶ 9.

168. PARISH, *supra* note 123, at 105.

169. *Id*.

170. *See id*.

171. *See id.*

172. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 209 (2012).

173. HERSCH LAUTERPACHT, INTERNATIONAL LAW: VOLUME 1, THE GENERAL WORKS: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 371 (1970).

174. *See* Case Concerning Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 16 (Sept. 11) (where the ICJ determined that no single state of the three parties had total claim, and declared that they would share it in tridominium).

175. Final Award, *supra* note 165, at ¶ 11.

encompass the entire Opstina, and so will the territory of the Federation."[176] Neither entity, however, "will exercise any authority within the boundaries of the District."[177] This District came to be known in international law as *corpus separatum*, "territorially legally and administratively completely separate from [the Federation of Bosnia and Herzegovina and the Republika Srpska].[178]

Despite the supposed condominium ownership between the two Serbian Republics, the District of Brčko is legally independent from both. Indeed, according to scholar and former UN peacekeeper Matthew Parish, the condominium language in the Final Award was "in reality a legal fiction, penned to create the appearance of consistency between the Final Award and the Constitution."[179] "The legal effect will be to permanently suspend all of the legal authority of both entities within the [Province] and to recreate it as a single administrative unit."[180] In fact, the Final Award created a third entity in Bosnia and Herzegovina, but to openly admit that fact would have weakened the constitutional backing of the Final Award. For this reason, the District is almost completely autonomous from outside rule.[181]

3. The Broad Powers of the Supervisor

The powers granted to the internationally-appointed Supervisor over Brčko were much broader than had been previously granted to the administrators of international territories. The Supervisor's powers were "virtually unlimited and unchecked."[182] Indeed, in prior attempts at international oversight of internationalized territories, the officials "had clear, if broad, legal mandates." In Brčko, the Supervisor had "absolute power."[183]

At first glance, this broad power of the Supervisor seems anathema to the idea of internationalizing a territory to protect it from stronger neighbors, and to allow it to develop on its own. However, one important limitation in the Supervisor's mandate on Brčko existed: time. "[T]he District was intended to outlast the Supervisor."[184] One argument for the broad power within the limited time frame was that the Supervisor's position "is not primarily a role of ongoing monitoring and observations, but rather of institution-building from scratch."[185] The plan was that the Supervisor would set up the domestic governance institutions, and once those were in place, the "international legal aspects of the District could simply be "lifted off."[186]

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176. *Id.*

177. *Id.* at ¶ 10–11.

178. PARISH, *supra* note 123, at 105.

179. *Id.* at 116.

180. Final Award, *supra* note 165, at ¶ 9.

181. *Id.*

182. PARISH, *supra* note 123, at 113.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

Initially, the District of Brčko had remarkable success. With international oversight and the presence of UN and US stabilization forces, $70 million in investment flowed into the District.[187] Brčko's black market turned into a thriving bazaar, and hundreds of thousands of kilometers of roads were paved. A unitary educational system brought children of all ethnicities together, while at the same time allowing for classes in their various languages.[188] Additionally, the District kept a balanced budget, financed by its own revenues.[189]

The broad powers of the Supervisor allowed close cooperation with the Office of the High Representative for Bosnia and Herzegovina, the Organization for Security and Cooperation in Europe, and the Office of the UN High Commissioner for Refugees, to create plans for refugees to the District. Within a year, "well over 4,000 families had returned to the District, accounting for just over 25% of all minority returns from the Federation to the Republika Srpska."[190] The broad powers allowed flexibility and innovation to solve specific problems faced by the area.

Despite these accomplishments, the District of Brčko is now "on the verge of collapse and its ugly dismemberment seems likely to follow."[191] The causes of the collapse seem to stem from two issues: (1) the Supervisor's departure from the District before local institutions had grown strong enough to not rely on the Supervisor's power;[192] and (2) the intermeddling of the Bosnian republics, in attempts to divide the inhabitants of Brčko on ethnic grounds.[193]

4. Issues with keeping Brčko internationalized

Several weaknesses have plagued Brčko from its inception as a District. The entire Serbian region suffered from questions around the various "competences" shared between the federal and provincial levels, especially regarding the judiciary. Issues arose from elections that were overly-complicated (one ballot was four pages long and citizens could vote for 32 of the 649 candidates) and of questionable validity.[194]

More recently, changes in the U.S. administration and the goals of the UN have hindered the work of investment and stabilization in Brčko and the rest of Bosnia. As U.S. interest started to wane, the Supervisor was pulled out, and Brčko was prematurely left without the fourth pillar of its government. Rather than ensuring that Brčko had strong institutions to con-

187. *See* Binnendijk et al., *supra* note 143, at 44.

188. *See id.* at 48.; *see also* Peter Geoghegan, *Welcome to Brčko, Europe's only free city and a law unto itself*, THE GUARDIAN (May 14, 2014, 5.00 EDT), https://www.theguardian.com/cities/2014/may/14/brcko-bosnia-europe-only-free-city.

189. Binnendijk et al., *supra* note 143, at 44.

190. *Id.* at 45.

191. PARISH, *supra* note 123, at 1.

192. *Id.* at 113.

193. *See* Peter Geoghegan, *supra* note 188.

194. PARISH, *supra* note 123, at 135–99.

tinue to build on, it was left to its own devices. Moreover, the multiethnic trend has been reversing, as the governments in the other Bosnian republics interfere in local Brčko affairs.[195]

The various attempts at "internationalization" have several things in common: first, international administration; second, a constitutional regime that is imposed by foreigners without the consent of the governed; and third, *corpus separatum*, with minimal legal ties to neighboring states. Most internationalized territories were created by "international treat[ies] supported by resolutions of the League of Nations or the United Nations," or other multi-lateral treaties, with a few stemming from arbitration.

To ensure that the systems that are set in place by way internationalizing a territory stay in place and allow the territory to develop, the local people need to have an interest. When a people's right to self-determination is used, the international administration will more accurately reflect what the local people need, and will more efficiently respond to changing circumstances. A constitutional system that reflects the local people will be stronger and last longer, even if it is initially enforced and protected by an international Supervisor of some kind. When the voices of all the states (and non-state territories) involved are heard at the bargaining table, or when they consent to arbitration, there is a much lower likelihood of post-internationalization violence. The lessons learned from the above cases must be considered when creating the Free City of Mosul.

VI. Creating the Free City of Mosul

The concept of a "Free City" is not right for every city or every people, but the international community has room for more than just states. The continuum of sovereignty has many different levels, and more people can be protected by granting more sovereignty to areas that are not traditional states. The proposed Free City of Mosul is a good idea as it does not have long-standing historical ties of being in any of the states which surround it. Furthermore, giving Mosul its own international status may act as an action to "quiet title" to those who have older claims on the region. For centuries Mosul was a multi-ethnic city, and although this was put in jeopardy by ISIS's occupation of the region, Mosul, now an ISIS-free territory, and will benefit from the type of independence that Brčko enjoyed. In fact, the local population of Mosul already see themselves as Moslawis first before their ethnicities.

A. The History of Mosul

For centuries, Mosul was based on regional trade. Although items currently traded differ from what was traded historically, Mosul is still an economically integral hub of the region. Under the Ottomans, Mosul was considered "the most independent district" within the Middle East, following the Roman model of indirect rule through local notables.[196] Although it was nominally independent, "Ottoman legal institutions provided protection and confirmed contracts." And while Mosul was an entity unto itself, it was still a large economic force, with "[m]erchant houses often cooperat[ing] with those in large cities hundreds of kilometers dis-

195. *Id.*

196. Nabil Al-Tikriti, *Ottoman Iraq*, 7:2 J. HIST. SOC'Y 201, 203 (2007).

tant, in Aleppo, Baghdad, Damascus, Anatolia, and Cairo."[197] Trade flourished, and "the exchange of goods was accompanied by relationships among merchants, and between merchants and producers, that did not recognize provincial boundaries."[198] "Those trade networks resulted from regional production, not from the long distance trade that historians long emphasized."[199]

After World War I, the League of Nations changed the borders of the region and "disrupted these old webs."[200] The new borders created by the League of Nations "transformed the region's merchants into smugglers, her products into contraband, and her laborers into refugees."[201] Turkey and Britain – on behalf of their Iraq Mandate – argued for control of the territory. Both sides focused on "the popular will, security, and historic affiliation."[202] It was difficult to show popular will, however, as the local right of self-determination through democratic institutions was largely ignored. Similarly, ethnic and historic affiliations were not as clear-cut as the League of Nations presumed. Differing from issues in Europe, local politics depended less on ethnicity and language than most thought[203] – Muslims, Christians, Jews, and Yezidis had lived together for centuries while sharing the same territory.[204] In addition, the people of the region showed a remarkable ability to adapt and work together. One old Turkoman said to the Commission, "[b]efore, we had been Turks, at present we are Arabs."[205]

The "Mosul Question," – to determine where Mosul was assigned – was only an issue because of the nation-state system and the relatively new European assumptions about state structures and belonging.[206] These new ideas insisted that the population of Mosul could have one – and only one – identity, that nations and state boundaries should coincide, and that states must be mutually independent. It was this set of assumptions that perceived Mosul to be a problem. The idea of statehood or nationhood, especially in the case of Mosul, was a solution in search of a problem. Moreover, the perceived problem was not even the matter of Mosul's statehood or nationhood itself; rather, it was the question of Mosul's place within another state. Eventually, the League of Nations determined that Mosul was part of Iraq, believing this determination would resolve the problem. Consequentially, the assumptions regarding Mosul's part in Iraq's statehood destroyed Mosul's economy, with outside powers exerting more influence over the region in order to control oil deposits there.

Mosul was most productive when it was free to align itself as it pleased, as within the Ottoman Empire. The League of Nations' determination took this right away. Since then, as a

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197. Shields, *supra* note 2; *see also* Sarah D. Shields, *Take-off into Self-sustained Peripheralization: Foreign Trade, Regional Trade and Middle East Historians*, 17:1 TURKISH STUD. ASS'N BULL 1–23 (1993).

198. Shields, *supra* note 2, at 52.

199. *Id.* at 50.

200. *Id*. at 52.

201. *Id.*

202. *Id*.

203. *Id.* at 50.

204. *Id.* at 54.

205. *Id.* at 56 (citing Interrogatoires of M. de Wirsen, League of Nations Archives Doc. S 15 file D 28).

206. *Id.* at 58.

part of Iraq, Mosul's fortunes have ebbed and flowed along with the rest of the country. Currently, many oil companies have waited with bated breath for the repulse of ISIS forces from Mosul in order to resume oil extraction. With ISIS forces having been driven out of Mosul, Moslawis should now have a voice in determining how that extraction takes place.

B. Competing Claims on Mosul and the Surrounding Territory

Although the region's territorial boundaries have been stable for several generations, under international law several entities have colorable claims to the City of Mosul and Vilayet of Nineveh. Iraq has a powerful claim under *uti possidetis* (as well as the adage that "possession is 9/10ths of the law"), and previous treaties. Turkey has a colorable claim, based on the argument that Iraq has bad title to the region stemming from treaty violations. The Kurds also have a claim based on self-determination.

1. Iraq's Claim

Under customary international law, sovereign states have a duty to preserve their territorial integrity.[207] Furthermore, customary international law imposes on states the additional duty to respect the territorial integrity of other states as well.[208] Not only is this concept international custom, it has been reflected in various treaties.[209]

Under the doctrine of *uti possidetis*, Iraq inherited territorial boundaries left over by the British Mandate, a quasi-Colonial entity. As such, "preference should be given to the holder of the title."[210] When there is a territorial dispute between sovereigns, "title prevails over possession, but if title is equivocal, possession under claim matters."[211] As the current borders of Iraq are drawn (based on the 1920 Treaty of Sèvres and confirmed in the 1923 Treaty of Lausanne), Iraq has a very strong claim to Mosul. However, if those treaties are de-legitimized, the title to Mosul will be more in doubt. In that case, actual possession will matter more than an old treaty.

2. Turkey's Claim

Turkey's claim to Mosul arises from a forceful breach of a treaty by the British before the Treaties of Sèvres and Lausanne were signed. On October 30, 1918, the Ottoman Empire and the UK agreed to a ceasefire that was memorialized in the Armistice of Mudros. Following the armistice, British forces invaded the Mosul Vilayet, forcing the Ottoman forces to surrender. In

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207. *Gunme v. Cameroon*, African Commission on Human & People's Rights, Comm. No. 266/03, ¶ 161 (May 27, 2009).

208. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 174 (June 27).

209. *See, e.g.*, Andean Sub-Regional Integration Agreement, Bol.-Colom.-Ecuador-Peru-Venez., May 26, 1969, World Intellectual Property Organization, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=220450; The Final Act of the Conference on Security and Co-Operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292.

210. Frontier Dispute (Burkina Faso/Mali), Judgment, 1986 I.C.J. 69 (Dec. 22); *see* CRAWFORD, *supra* note 171, at 216.

211. CRAWFORD, *supra* note 172, at 216.

the 1920 Treaty of Sèvres, the Ottomans ceded the Mosul Vilayet to Iraq.[212] The Ottoman cessation of Mosul to Great Britain was based on the illegal and forceful taking of the area by the British and the lack of bargaining power on the Ottoman side due to the fact that the British already had control of the territory. The British breach of the 1918 Armistice of Mudros invalidated the British claim to the area, as the later treaties were based on the boundary created by the illegal action. Iraq's title stems from the British title, and is equally tarnished by the British aggression.

During the Lausanne Treaty negotiations between the UK and the new Kemalist government of Turkey, the Turks maintained that they had a rightful claim to Mosul for four reasons:

> 1) race; arguing that the Arabs were only a small minority and Turks and Kurds were not racially separable; 2) economy; Turkey claimed that most of the disputed territory's trade was with Anatolia; 3) illegal occupation of [Mosul] by the British after the Mudros truce between the Allies and the Ottoman Empire; and 4) self-determination, claiming that the inhabitants wanted to join Turkey.[213]

Unable to reach an agreement, Turkey and the UK submitted it to the League of Nations. In an effort to determine which state had the rightful claim to Mosul, the League of Nations sent a commission to the region. The overall determination by the League of Nations was shaped by the recent victory over the Central Powers and the fact that Iraq (as represented by the UK) and Turkey both considered "national integrity" "to have been the most important consideration."[214] The process here is remarkably similar to the arbitration mandated by the UN in resolving the border disputes between Iraq and Kuwait, Eritrea and Ethiopia, and North and South Sudan. It differs notable, however, in several respects that delegitimizes the result. The power dynamic between Turkey, a defeated power of World War I, and the UK, the victor and Principal member of the League of Nations, makes the final determination in favor of the UK suspect. Furthermore, supposed "national unity" was preferred over common sense, as can be seen by borders that reflect imperialist ambitions rather than local factors.

The League of Nations, while giving lip service to "self-determination" and "national integrity," failed at both affording a proper voice to the local Moslawis and ensuring national integrity by combining areas that were not of the same "nation." This failure to guarantee the Moslawi people their right to self-determination is an affront to the process followed by the League of Nations and usurps the claim that the League of Nations had the power to determine Mosul's fate, putting Iraq's title over Mosul in further doubt. More controlling in international law than the right of self-determination is the question of title over the territory. Iraq's claim to title over Mosul, stemming from the UK mandate after WW I, is tarnished by the UK's violation of the 1918 Armistice. These claims are not fictional. Recently, as Turkey tried to claim

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212. *See* Percy Cox & Arnold Wilson, *The Geography of the Mosul Boundary: Discussion*, 68 GEOGRAPHICAL J 113–17 (1926).

213. Othman Ali, *The Kurds and the Lausanne Peace Negotiations*, 33 MID. E. STUD 521, 521–34 (1997).

214. Quincy Wright, *The Mosul Dispute,* 20 AM. J. INT'L L. 454 (1926).

more territory for itself after wrenching it from ISIS, President Erdogan referred to documents and maps including Mosul as part of Turkey.[215]

3. Kurdish Claims

The Kurdish claims on Mosul, similar to those of Turkey's, rely on the lack of Iraqi title to the area due to British aggression following the signing of the truce. Additionally, the Kurds may have a claim based on a long history of ethnic ties to Mosul, and the lack of self-determination during the League of Nations Commission's decision-making process. Although few locals were asked about what to do in the region, the Kurds were overtly ignored. The League of Nations Commission recognized that the Kurdish people inhabited the area around Mosul regularly (depending on the season), but declined to give them their rights to "self-determination" outside of the arbitrarily-created boundaries of Iraq.[216] The unrepresented Kurds were divided between Syria, Iraq, Turkey and Iran, and had no claim to any territory of their own, including Mosul.[217]

The Kurds have enclaves throughout the region, with the strongest being in Iraqi-Kurdistan. While Iraqi-Kurdistan is not a completely sovereign entity, it is a semi-autonomous region of Iraq. In other words, it has *de facto* independence, and operates without the oversight of the central government in Baghdad. Iraqi-Kurdistan has its own government, issues its own stamps, has its own dinar, and most importantly, enters into its own agreements to sell oil abroad, all without consulting Baghdad.[218]

Iraqi-Kurdistan's situation is similar to that of Hatay. It is a semi-autonomous region within a state with boundaries based on the victor's decisions after WWI. Like Hatay, Kurdistan should be allowed to decide which state it belongs to, if any. The question of Mosul should be addressed in a similar fashion. The Kurds have a right to self-determination that stems from the post-WW I boundaries. Therefore, they should have been given a voice in the determinations concerning Mosul. Due to Iraq's possible, yet weak, claim to Mosul, the Kurds being stripped of their right to exercise self-determination, and the fact that that right has been given retrospectively in places such as Hatay, Kurdistan has a colorable claim on Mosul.

C. Proposed Internationalization

With ISIS driven out of and no longer a threat to Mosul, the UN can use a variety of methods to establish the "Free City of Mosul" in which the surrounding states will no longer have claims to the city. The principles and cases discussed prior offer many lessons to draw from when determining how to create this "Free City of Mosul."

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215. *See* Ari Khalidi, *Erdogan invokes document that claims Mosul as part of Turkish soil*, KURDISTAN 24 (Oct. 17, 2016), http://www.kurdistan24.net/en/news/1e9e370c-0585-4aaf-b6dd-ebccb92ca93f/Erdogan-invokes-document-that-claims-Mosul-as-Turkish-soil.

216. Cox & Wilson, *supra* note 212, at 113.

217. *Id.*

218. *See* Aliza Marcus & Andrew Apostolou, *Why It's Time for a Free Kurdistan*, THE DAILY BEAST (Nov. 27, 2015, 1:00 AM), http://www.thedailybeast.com/articles/2015/11/27/the-kurds-already-have-independence.html.

Mosul already fits into the sovereignty continuum in many ways. That being said, it is still a city that is almost entirely beholden to the state that it was assigned. Rather than merely returning Mosul to Iraqi control, following ISIS's defeat in Mosul, positive lessons from the above examples should be taken to create an internationalized territory which will have a true opportunity to develop as it desires, with the right of self-determination finally being ensured there.

1. Mosul meets, or can meet, the international standards of statehood

While the continuum of sovereignty is broad, there are some requirements that are looked at to determine a territory's statehood. Mosul already meets most of the Montevideo Convention's requirements of permanent population, defined territory, effective government, and the ability to enter into agreements with other states. The areas in which it is weak are those in which an internationally-supported system for the "Free City of Mosul" comes into play.

Mosul has a permanent population: States are "aggregates of individuals," but there is no minimum population requirement to determine statehood.[219] The population should be a stable or organized community.[220] Mosul has a relatively permanent population. Although nearly a million people were driven from the area during the ISIS occupation, many desire to return.[221] In fact, many individuals stayed and tried to live under the regime. Notwithstanding this, the temporary retreat of people from Mosul, their home town, in an effort to flee a brutal war, should not change the fact that there is a permanent population in Mosul.

Mosul has a defined territory: Statehood is dependent "upon the exercise of full governmental powers with respect to some area of territory."[222] A new state satisfies this criterion, even in the face of conflicting claims to its territory.[223] Notwithstanding Turkey, Iraq, and Kurdistan claiming sovereignty over Mosul, Mosul should be considered its own territory. As the treaty negotiations between the UK (representing Iraq) and Turkey show, the territory of Mosul and the surrounding Vilayet of Nineveh has been defined for many years. It is the owner of that territory that is in question.

Mosul has had, and can have, an effective government: An effective government is the central requirement for the claim of statehood.[224] An effective government is one that has the right to exercise authority, and actually exercises that authority.[225]

Mosul has always had local governance. Whether semi-autonomously under the Ottomans or as a city in Iraq, Mosul has had its local leaders. Even under ISIS, local governance has

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219. CRAWFORD, *supra* note 9, at 52.

220. CRAWFORD, *supra* note 172, at 71–72.

221. Kelly Mclaughlin & Julian Robinson, *Life before and after ISIS*, THE DAILY MAIL (July 10, 2017, 12:36 EDT), http://www.dailymail.co.uk/news/article-4682490/How-Mosul-transformed-ISIS-occupation.html.

222. CRAWFORD, *supra* note 9, at 46.

223. *Id.* at 48.

224. *Id.* at 55.

225. *Id.* at 57.

continued. Clearly, a city the size of Mosul is large enough to support a government as it has in the past. Local efforts at governance have only been hindered by outside influences taking advantage of, and enhancing, ethnic differences.[226] Creating a Free City of Mosul with international protection can limit the effect of external actors and allow the multi-ethnic people of Mosul to use their right of self-determination to decide for themselves how to govern. With international assistance chosen by the Moslawis, the city can develop strong institutions, able to stand on their own.

Mosul can have the ability to enter into agreements with other states: The capacity of a state to enter into relations with other states means that "no other entity" accepts responsibility for the state.[227] This capacity is represented by the independence of the state from other states and its ability to act as the "sole executive and legislative authority" of its territory.[228] Mosul is in an economically advantageous position in the region. It sits on oil wells and is a hub of overland transportation. These traits make the "Free City of Mosul" an attractive business partner to other entities in the international system. With the protection that can be offered by having the status of internationalized territory, Mosul will be free to enter into agreements with other states in a manner that best suits Mosul, and not at the behest of the Iraqi central government.

With the right kinds and levels of assistance, Mosul can meet all of the requirements of statehood. Whether recognized or not, this will bring Mosul closer to full sovereignty on the continuum. Additionally, with this higher level of sovereignty, Mosul will be able to act internationally and will have the opportunity to choose its alliances, rather than be under the thumb of a relatively hostile and extractive government far away.

2. International Personality

Many types of entities on the sovereignty continuum operate internationally. The ROC in Taiwan acts in the way a sovereign state does, and has entered into many treaties and treaty-based organizations, despite its virtual lack of official recognition by other states.[229] Similarly, the Vatican has achieved international recognition and membership in various international organizations based on its widespread existence, and not on its territory (even though it does have some).[230] Macau and Hong Kong also each act internationally, although they are nominally a part of the PRC. Despite being beholden to the PRC for non-economic international relations, most of their *de facto* power comes from their economic power.[231] And, with diplo-

226. Ranj Allaldin & Sumaya Attia, *Between Iraq and a hard place: How the battle in Mosul will affect ISIS control in the region*, BROOKINGS (Oct. 25, 2016), https://www.brookings.edu/blog/markaz/2016/10/25/between-iraq-and-a-hard-place-how-the-battle-in-mosul-will-affect-isis-control-in-the-region/.

227. CRAWFORD, *supra* note 9, at 62.

228. CRAWFORD, *supra* note 172, at 72.

229. DAMROSCH & MURPHY, *supra* note 23, at 326; *see also* Convention on the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, art. 9(2) annex 1, Sept. 5, 2000, S. TREATY DOC. NO. 109-1 (2005).

230. DAMROSCH & MURPHY, *supra* note 23, at 322.

231. Joint Declaration on the Question of Hong Kong, U.K.-China, art. 3(2), Dec. 19, 1984, 23 I.L.M. 1366; *see also* 22 U.S.C. 5713(3).

matic relations with over 136 member states and "non-member observer"[232] status in the UN, Palestine has *de facto* independence and its own international personality separate from Israel.

International organizations have also helped state-like entities have international personalities. To help Kosovo progress, UNMIK had the power to enter into treaties on behalf of Kosovo.[233] These treaties and various multi-lateral organizations now recognize Kosovo, rather than UNMIK, as the signatory state.[234]

Even the Free City of Danzig had an international personality. Represented in international affairs by Poland, Danzig still had the "right of veto" over Polish decisions regarding Danzig.[235] Furthermore, in certain circumstances, Danzig was eligible to have a judge sit on the Permanent Court of International Justice.[236]

Mosul will be able to progress better when it is independent from neighboring states, and should be allowed to act internationally as well. If international oversight must initially be responsible for foreign relations, it may be acceptable if this oversight is chosen by the people of Mosul, and agreements are subject to the approval of the local people.

3. Legal creation of the Free City of Mosul

As discussed above, there are various methods of creating an "internationalized territory." The UN has set up various trusts to see regions through specific emergencies, and this seems like a reasonable possibility for this case. The UN has also established trusts "charged with the protection of both human rights and the human environment" which is "beyond the traditionally accepted boundaries of decolonization."[237] The "Free City of Mosul" can be created under a trust because "the trusteeship structure can serve those entitled to self-determination and advance the international community's commitment to peaceful stability and security."[238] It would take a UN Security Council resolution to do so, as it did when the United Nations Transitional Administration in East Timor was established.[239] This in turn would require significant external help to ensure that the trust is not usurped by powerful forces on the ground, as was the case in Ethiopia and Eritrea.

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232. *See* G.A. Res. 67/19, ¶ 2 (Nov. 29, 2012).

233. U.N. Mission in Kosovo (UNMIK), A Constitutional Framework for Provisional Self-Government in Kosovo, 2001/9 (May 15, 2001) (available at http://www.unmikonline.org/regulations/2001/reg09-01.htm)

234. The Regional Cooperation Council (RCC) recognizes Kosovo as a member-state. *See Hoxhaj: Anëtarësimi në RCC, historik për Kosovën* (Feb. 28, 2013), http://www.albeu.com/kosove/anetaresimi-ne-rcc-historik-per-kosoven/101978/.

235. Crawford, *supra* note 9, at 239; *see* Free City of Danzig and the ILO, *supra* note 157.

236. *See* Access to or Anchorage in, the Port of Danzig, of Polish War Vessels, *supra* note 159; *see also* Statute of the Permanent Court of International Justice, *supra* note 159.

237. Tremper, *supra* note 118, at 136.

238. *Id*. at 134; *see* Smith & Dee, *supra* note 122.

239. Tremper, *supra* note 118, at 135.

Arbitration is likely the best method of creating the "Free City of Mosul." A peaceful transition following the Tribunal's determination is more likely when the parties agree to arbitration, as was the case of Brčko, The UN Security Council can also order arbitration in the manner in which it did in the Iraq-Kuwait border dispute in 1991.[240] The invasion of ISIS and the fractured Iraqi response has illustrated the fact that the region is a complicated web of alliances that is based on ethnic, religious, linguistic and clan ties. In that respect, the region is very similar to the Balkans, which has experienced more peace through smaller units. As in the case of Brčko, an Arbitral Award may be better able to take into account the complexities of the situation, and overcome traditional arguments of sovereign borders and *uti possidetis*.

Regardless of the method by which a system is set up, it should involve the voice of the people affected, and its primary goal should be to enable the inhabitants of Mosul to decide on both how they want their city to be run, and how their city will be involved with other states in the region. The UN Trusteeship system, and the League of Nations Mandate system the preceded it, were not particularly successful or effective at considering the needs and desires of the local inhabitants; new methods of ensuring individual rights must be used in Mosul. The manner of establishing a Free City of Mosul should also take into account the other states involved, as the Final Award in Brčko did when giving the neighboring republics partial sovereignty over Brčko.

4. Condominium over the territory

The Free City of Brčko was set up as a condominium owned by the two republics in Bosnia and Herzegovina. This was done as a pragmatic attempt to limit the two republics from interfering in Brčko. While both republics had claim over Brčko, neither had any actual power over it.[241] In the same manner, the UN or the arbitral tribunal could declare Mosul as independent, but that Iraq, Turkey, and Kurdistan, or any combination of the three, nevertheless share a claim in Mosul in con- or tridominium. They may even determine that, like Iraqi-Kurdistan, Mosul is a semi-autonomous region.

Iraq, Turkey, and Kurdistan all want to claim Mosul as their own for economic reasons, and primarily to claim the oil in the region. A con- or tridominium, which grants an economic interest in exchange for more autonomy for Mosul, may quell the desire of these nations to have Mosul entirely within their sovereignty. This method could be seen as a compromise – providing a political win for the governments that want to claim Mosul, to take back to their constituents (the local leader could say "we can benefit from Mosul, with no cost to us"), as well as for Mosul (the Moslawi leader could say "we can have a Mosul for Moslawis, with a guaranteed trade and business with our neighbors") – and on the same token, will allow Mosul to develop on its own, eventually becoming entirely autonomous and moving further up the sovereignty continuum. This in turn would further alleviate situations where one part of a state disproportionately benefits from another economically. The less-benefitted territory could be given special consideration rather than being simply cut off economically, limiting the causes of future strife. The Moslawis should also have a voice in determining the scope of the relationship with the surrounding states. Creating a legal status, whether fully independent or a form

240. PARISH, *supra* note 123, at 204.

241. Final Award, *supra* note 165, at ¶¶ 10–11.

of shared sovereignty, is an important step to a fully independent Mosul that can protect its multiethnic citizenry.

5. International Protection

There have been many schemes to ensure protection of internationalized territories. The Free City of Danzig was officially "under the Protection of the League [of Nations]."[242] The District of Brčko had a "stabilization force" from the UN and the US.[243] The League of Nations Mandate allowed for that protection to come from a single state, often one with significant interests in the region. The UN Trusteeship system often provided protection from disinterested states, but it has many times been inadequate in its protection. The creation of the "Free City of Mosul" should permit the Moslawis to determine their protection scheme. Rather than permitting interested states to stay on, as the League of Nations did, or giving weak protection, as the UN has, there should be a bidding process. This will allow for the city to be protected, and will be another opportunity for the inhabitants of Mosul to exercise their right of self-determination.

By trading on the future stability and profitability of Mosul, Moslawis can bargain with would-be protector-states on the specifics of the type of protection (i.e. protection coming only from external sources, or an internal police force as well), the length of protection, cost, training of a local force, *etc*. The protection should be controlled by the Free City of Mosul itself, regardless of the method of protection chosen. The force would be limited by clearly-defined human rights and the use of force norms, which would be monitored by an external entity (likely the entity that created the Free City). As previous systems have not worked well, the local people should be able to determine the scope of the protection that will best aid them in developing their own institutions. Once the scope is determined, the international supervision (provided by a state or individual unaligned with the interests of the protector) will have most of the control over the protection until predetermined benchmarks are accomplished.

6. Domestic Governance

Self-determination was given little more than lip service when the map of Iraq was created in the 1920s. The idea of a free city is to allow the local people to exercise their right of self-determination without external interference. Based on "a combination of an agency relationship with a right of veto," the Free City of Danzig had its own institutions that were strong and governed the city well, until Polish and German influence changed the status quo.[244] The true mark of sovereignty is the lack of external interference. Although the Free City of Mosul may not be completely sovereign, as it may (as proposed) be subject to a condominium relationship with other Powers, it can and should be granted greater agency over its own territory and have the right to veto any decisions made by other states that affect internal Moslawi issues. The right of self-determination, in this case, should allow a significant amount of choice in the

242. Access to or Anchorage in, the Port of Danzig, of Polish War Vessels, *supra* note 160, at 132.

243. Binnendijk et al., *supra* note 143, at 42.

244. CRAWFORD, *supra* note 9, at 239.

setup of governing systems, including how internationalization will occur, for how long, and at what benchmarks the international supervisor's power will become progressively weaker.

More importantly, with local institutions set up by, and including, the local people, the risks of instability will lessen. David Rezvani declared that "partially independent territories" can be more stable in response to nationalistically distinct minority population because they necessarily embody "nationalistic compromise" and are used for sharing power by experiencing "overlapping jurisdiction and compromise on territorial control."[245] As Mosul undergoes the recovery process in the aftermath of ISIS' occupation in the region, and individual rights and protections are more guaranteed, it will once again be viewed an attractive investment for many industries. An independent and stable Free City of Mosul will be able to develop with its own interests in mind, and not just be affected by a central government far away that may not represent the interests of the local people.

7. International Supervision

The Mandate and Trustee systems were all ostensibly created to aid territories in their economic and democratic development. To ensure that this happened, the victorious powers or the UN placed Administrators or Supervisors in control over the territory, usually reporting only to the international body, and not beholden to the people they supervised. This often resulted in the territory itself not being represented in the international body, and the abuse of power by the Mandate state, or the state assigned to help the trustee.[246]

International supervision of Mosul should most closely follow the Brčko example. Broad powers of the supervisor there allowed for economic stability, refugee return, and institution-building that would not have been possible without that power. This was all accomplished with an eye toward removing the Supervisor when Brčko was stable on its own.[247] Mosul can benefit from this type of system because significant effort will be needed to rebuild institutions, jump-start the economy, and bring back many refugees.

In setting up the Free City of Mosul, international supervision is needed to ensure the local right to self-determination. A Supervisor with sweeping powers should be put in place to create the local institutions that are needed for stable governance. However, that Supervisor should be approved by the people to ensure that it is an individual who has the people's interests in mind. Additionally, the more power the Supervisor has, the less time the Supervisor should be in the position. Or alternatively, there should be a system wherein Supervisory powers diminish with time, or when specified indicia of development and stabilization are met, thus ensuring a gradual phase out of international supervision. As every situation is different, the Supervisor's power should be flexible enough to allow for the new government to take into account existing legal and quasi-legal systems, rather than trying to remove elements that already work.

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245. Rezvani, *supra* note 72, at 44–46.

246. *See* WRIGHT, *supra* note 81.

247. PARISH, *supra* note 123, at 113.

Local self-determination and governance can be assisted by the international community, so long as the Supervisor answers to the people and is empowered to set up a stable government that has a planned phase-out of power when the local institutions are able to stand on their own. International supervision should not be colonialism by another name, and should not obstruct local efforts at determining the methods of government.

VII. Conclusion

Over the centuries, free cities and internationalized territories have been created for a variety of reasons.[248] Initially to prevent minority discrimination, and subsequently as a means to prevent humanitarian disaster and protect human rights, international organizations certainly tried hard to create these free cities and internationalized territories, but oftentimes failed. Many economic and political reasons exist for creating cities with more sovereignty, with one major political reason being the right of self-determination. Creating a "Free City of Mosul" will benefit the people of Mosul both economically and politically, and embolden them with the right of self-determination.

By adopting the good lessons from prior experiences, and learning from the bad ones, the people of the Free City of Mosul can be given a full opportunity to exercise their right of self-determination. Self-determination of the Moslawi people should be the preeminent goal when creating their system for local governance, security from external entities, foreign relations, and development. International oversight should not be awarded to a state that helped Mosul achieve independence through force, as doing so has produced biased results in the past. Rather, the people of Mosul should be allowed to determine how they wish to progress, how their territory will be used in the future, and how an international protection plan would work for, and benefit, them.

Additionally, the interests of the other political entities of the region need to be considered. A Free City is a better alternative to full independence from Iraq. Creating a Free City provides more options for interested parties to bargain with. The region becomes more than just a land-grab, and allows the decision to be based on economic, political, tribal, ethnic, linguistic, religious, and many other factors.

Although ISIS has been driven from Mosul, Mosul is still a weakened city that needs help. The state of Iraq is unlikely to be in a position to give Mosul the aid and protection it needs. This protection can and must come from the international community. If the people of Mosul are granted a form of self-determination and protection from outsiders, they will prosper.

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248. Not quite as long as "time immemorial" but still quite a while.

Challenging U.S. Military Commission Jurisdiction: The Relationship Between Conspiracy Offenses and Joint Criminal Enterprise Theory

Mia Piccininni[1]

I. Introduction

In 2008, Ali Hamza Ahmad Suliman al Bahlul ("al Bahlul") was tried and sentenced to life imprisonment by a U.S. military commission at Guantanamo Bay.[2] Al Bahlul was convicted pursuant to the Military Commission Acts of 2006 and 2009 for providing material support for terrorism, conspiring to commit war crimes, and soliciting others to commit war crimes.[3] The U.S. Court of Military Commission Review upheld the conviction[4] and al Bahlul appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[5] On October 20, 2016, the D.C. Circuit, sitting en banc, upheld the conspiracy conviction 6-3, with four judges concluding that Congress had the authority to make crimes, such as inchoate conspiracy, triable before a military commission even if the crimes were not recognized as international law of war crimes.[6]

The four-judge plurality opinion concluded that Article I of the U.S. Constitution does not limit Congress's authority in determining which crimes can be tried by a military commission to only those crimes that are recognized under international law.[7] The D.C. Circuit also found that the Article III exception for military commissions to try enemy war crimes is not limited to international law of war offenses.[8]

Notably, in his concurring opinion, Judge Robert Wilkins distinguished conspiracy as a standalone crime – the inchoate crime – from conspiracy as a form of vicarious liability, pursuant to *Pinkerton v. United States*.[9] In *Pinkerton*, the Supreme Court established that an individual conspirator can be held liable for his co-conspirator's substantive criminal offenses if those offenses are "reasonably foreseeable and committed in furtherance of the conspiracy's objectives, all while the defendant was a member of the conspiracy."[10] Significantly, Judge Wilkins

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1. J.D. Candidate, 2018, St. John's University School of Law
2. Bahlul v. U.S. 840 F.3d 757, 777 (D.C. Cir. 2016) (en banc).
3. *Id.*
4. U.S. v. Bahlul, 820 F. Supp. 2d 1141 (U.S.C.M.R. 2011) (en banc).
5. Bahlul v. U.S., No. 11–1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) (per curiam).
6. *Bahlul*, 840 F.3d at 758.
7. *Id.* at 760 ("Contrary to Bahlul's argument, Article I of the Constitution does not impose international law as a limit on Congress's authority to make offenses triable by military commission.").
8. *Id.* at 770.
9. *Id.* at 798 (Wilkins, J., concurring).
10. *Id.* at 801; *see e.g.*, Pinkerton v. U.S., 328 U.S.640 (1946).

noted *Pinkerton* as the incorporation of the "joint criminal enterprise" theory of international law as a form of vicarious liability.[11]

The intersection of terrorism and the international law of war alongside the use of military commissions authority to try enemy combatants is a pressing issue that challenges federal judges, especially in the context of conspiracy.[12] This Note analyzes the D.C. Circuit's decision and supports an alternative justification embraced by Judge Wilkins for upholding the charge of conspiracy tried by the military commission. Specifically, it will analyze the charge of conspiracy to commit war crimes and distinguish between conspiracy as an inchoate crime and conspiracy as a crime of joint criminal enterprise liability. Part I provides the background and development of the Military Commissions Act to contextualize the constitutional limits that frame the legal challenges to military commission jurisdiction. Part II explores the D.C. Circuit's recent decision in *Bahlul v. U.S.* and examines Judge Wilkins' concurring opinion, which advances an alternative theory for upholding al Bahlul's conspiracy conviction. Part III introduces and summarizes the origination of joint criminal enterprise theory in international law and its incorporation into U.S. jurisprudence. Part IV distinguishes the inchoate crime of conspiracy from conspiracy as a form of joint liability and Part V argues that military commission charges of conspiracy are analogous to joint criminal enterprise theory. Finally, this Note concludes by suggesting al Bahlul's conviction for conspiracy to commit war crimes is analogous to joint criminal enterprise theory, and therefore grants U.S. military commissions jurisdiction to try the offense.

II. Domestic Authority for Military Commissions

A military commission is a military court of law used to prosecute war crimes and other offenses committed by non-U.S. citizens pursuant to the Military Commissions Acts.[13] The authority to create military commissions originates from the Define and Punish Clause, the Declare War Clause, and the Captures Clause of Article I, Section 8 of the U.S. Constitution.[14] The Define and Punish Clause gives Congress the authority to define and impose punishment for "[o]ffenses against the Law of Nations."[15] The Declare War Clause states that Congress has the power to initiate formal declarations of war.[16] The Captures Clause provides that Congress shall have power to "make Rules concerning Captures on Land and Water . . . ."[17] In contrast, Article III establishes the judicial branch of the federal government and thus federal courts,

11. *Bahlul*, 840 F.3d at 803.

12. Alexandra Link, Note, *Trying Terrorism: Joint Criminal Enterprise, Material Support, and the Paradox of International Criminal Law*, 34 MICH. J. INT'L L. 439, 443 (2013).

13. 10 U.S.C. § 948b (2014).

14. U.S. CONST. art. I, § 8.

15. *Id*. at cl. 10.

16. *Id*. at cl. 11.

17. *Id.*

which[18] are distinct from Military Commissions and do not abide by the same constitutional requirements, as will be discussed later on.[19]

In *Ex Parte Quirin*, the Supreme Court addressed the constitutionality of placing unlawful combatants on trial before a military commission for law of war offenses during WWII.[20] The unlawful combatants were German spies who attempted to land German submarines on American land for purposes of sabotage.[21] The Supreme Court unanimously held that the Articles of War and President Roosevelt's Executive Orders allowed the President and Congress to try the offenders in a military tribunal for offenses against the law of war, such as spying.[22]

In other words, the *Quirin* Court found that the use of military commissions to prosecute war crimes was constitutional.[23] The Court specifically considered the offense of spying, and acknowledged the longstanding history of congressional authorization to try charges of spying by military commissions.[24] Moreover, the Court made a distinction between lawful and unlawful combatants, recognizing the lawful combatants subject to detention as prisoners of war, and unlawful combatants additionally subject to trial and punishment by military tribunals for law of war violations.[25] The *Quirin* Court also implied that Congress was not limited by international law because it upheld the constitutionality of prosecuting spying offenses.[26] Specifically, despite being a non-international law of war offense, the Supreme Court found the offense of spying triable by military commission, suggesting that Congress has the authority to make offenses triable by military commission even if the offense is not recognized as an international war crime.[27] This marked the Supreme Court's recognition that unlawful combatants may be prosecuted for non-international law war offenses by military tribunals. This precedent remained the law of the land for decades until it was challenged by Guantanamo Bay detainee, Salim Amhed Hamdan ("Hamdan").

In *Hamdan v. Rumsfeld*, the Supreme Court found that military commission jurisdiction was limited to violations of internationally recognized war crimes;[28] consequently, Hamdan's conviction for material support for terrorism was overturned because it was not an internationally recognized war crime.[29] Hamdan was a bodyguard and driver for Osama bin Laden, who

18. U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

19. Larkin Kittel, Note, *Trying Terrorists: The Case for Expanding the Jurisdiction of Military Commissions to U.S. Citizens*, 44 GEO. J. INT'L L. 783, 792 (2013).

20. *Ex Parte Quirin*, 317 U.S. 1, 18–19 (1942).

21. *Id.* at 20–21.

22. *Id.*at 48.

23. *Id.* at 46.

24. *Id.* at 42.

25. *Quirin*, 317 U.S. at 44.

26. *Id.* at 44–45.

27. *See id.* at 29–30; *see also* Bahlul v. U.S. 840 F.3d 757, 804 (D.C. Cir. 2016).

28. 548 U.S. 557, 557 (2006).

29. *Id.* at 559.

was captured in Afghanistan by U.S. military forces in 2001.[30] In 2004, he was charged with "conspiracy to commit offenses triable by military commission, including the law of war."[31] The Court found "the offense of 'conspiracy' to violate the law of war is not itself triable by military commission."[32] However, the Court recognized that Congress has the authority to "characterize conspiracy as a war crime."[33] Even though Congress had not promulgated a rule declaring so, the Court identified that the common law of war was sufficient to "justify trial in a military commission."[34] Whereas, the offense of spying had a "plain and unambiguous" history as a law of war offense in *Ex Parte Quirin*, the *Hamdan* Court did not believe the history of conspiracy as a law of war offense had the same degree of "plain support."[35] Therefore, Hamdan could not be tried by military commission for conspiracy.

In response to the Court's decision in *Hamdan*, Congress passed the United States Military Commission Act of 2006 ("MCA 2006"), which was signed into law by President George W. Bush.[36] The MCA 2006 gave congressional authorization to establish military tribunals to prosecute non-U.S. citizens for violations of the law of war and other offenses listed in the statute.[37]

In 2008, the Supreme Court held that the MCA 2006 was unconstitutional because it effectively restricted detainees' ability to file habeas corpus petitions.[38] In response, Congress amended the Military Commissions Act in 2009 ("MCA 2009"). The amendments to the Act included changes in the terminology of the statute and provided more procedural protections for defendants.[39] The new amendments specifically described an "unprivileged enemy belligerent" as a non-U.S. citizen who "engaged in hostilities against the United States or its coalition partners . . . purposely and materially supported hostilities against the United States or its coalition partners," or "was part of al-Qaeda at the time of the alleged offense . . . ."[40] The new provisions also prohibited self-incrimination and prevented the admissibility of statements acquired or made under duress from torture.[41] Although there has been significant improvement in the protections provided to defendants by the military commission, there are still issues that are debated and draw criticism.

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30. *Id.* at 570; Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. 1, 7 (2007).
31. Sunstein, *supra* note 30, at 7.
32. *Id.* at 14.
33. *Id.*
34. *Id.*
35. *Id.*
36. 10 U.S.C. § 948b (2014).
37. *Id.*
38. Boumediene v. Bush, 553 U.S. 723, 724 (2008)
39. Kittel, *supra* note 19, at 789.
40. 10 U.S.C. § 948a(7) (2009).
41. Kittel, *supra* note 19, at 790.

A. The Controversies over Military Commissions

Trials by military commission are controversial because they do not provide defendants with the same procedural protections that they would be afforded if tried by an Article III court.[42] Specifically, defendants have no right to a trial by jury, but are rather, tried by a military judge and a commission consisting of several other members.[43] Additionally, there is no right to a speedy trial by military commission.[44] For example, the rules of evidence for military commissions are much more lax than those of a federal court because the focus is on whether the evidence is "reliable and probative, and if its admission is in the best interest of justice."[45] Furthermore, evidence seized outside the United States without a search warrant is admissible and a defendant's statements may be admitted even though the defendant never received a *Miranda* warning.[46] These rules inherently favor the prosecution and have been of increasing concern when trying defendants charged with terrorism offenses.[47]

Despite criticism, military tribunals are used as a means to prosecute enemy combatants on the basis of national security because military commissions do not have permanent locations and are often performed in guarded facilities, like Guantanamo Bay.[48] Additionally, evidence and information disclosed during trial often consists of sensitive information that requires a degree of secrecy and confidentiality for national security concerns.[49] Although the rules of evidence used in U.S. military commissions differ from those of civilian courts, they are designed to meet practical needs and military necessity in the context of war.[50]

To avoid an ex post facto violation and prevent retroactive prosecution,[51] the D.C. Circuit held in *Hamdan v. United States* that the MCA 2006 could only apply to offenses committed before September 11, 2001 if the charges were "law of war crimes."[52] Additionally, to avoid constitutional violations the court found the MCA 2006 could not retroactively criminalize conduct that occurred before the Act's enactment.[53] The court relied on 10 U.S.C. § 821, which gave military commissions jurisdiction to try violations of the international law of war.[54] Although the court recognized that international law does proscribe crimes of terrorism, it did

42. *Boumediene*, 553 U.S. at 808.

43. Kittel, *supra* note 19, at 785.

44. *Id.*

45. *How Military Commissions Work*, DEPARTMENT OF DEFENSE OFFICE OF MILITARY COMMISSIONS, http://www.mc.mil/ABOUTUS.aspx (last visited May 13, 2017).

46. 10 U.S.C. § 949a(b)(3)(A), (B) (2011).

47. Kittel, *supra* note 19, at 783.

48. *Id.*at 785.

49. *Id.*

50. *Id.* at 795.

51. U.S. CONST. art. I, § 9, cl. 3.

52. Hamdan v. United States, 696 F.3d 1238, 1241 (D.C. Cir. 2012) (finding that "law of war" per 10 U.S.C. § 821 referred to the international law of war, as opposed to a "U.S. common law of war" crime). Therefore, providing material support for terrorism was not a violation of the international law of war, and thus Hamdan could not be tried for material support because his conduct occurred before 2006.

53. *Id.*

54. *Id.* (citing Ex Parte Quirin, 317 U.S. 1, 27–30, 35–36 (1942)).

not specifically proscribe material support for terrorism as an international war crime.[55] Therefore, Hamdan's conviction for material support for terrorism was vacated.[56]

U.S. law is neither clear nor consistent regarding which offenses military commissions have jurisdiction to try. Starting with the baseline that military commissions have jurisdiction to try international law of war offenses, lawyers have debated which offenses have, in fact, been recognized by international law. Recently, conspiracy charges have been challenged as outside the jurisdiction of military commissions because they are not recognized as international law of war crimes.

III. A Fractured D.C. Circuit

A. The Al Bahlul Saga

Ali Hamza Ahmad Suliman al Bahlul, originally a native of Yemen, traveled to Afghanistan to join the terrorist group al-Qaeda in the late 1990s.[57] Al Bahlul worked closely with Osama bin Laden as his personal assistant and secretary of public relations.[58] Al Bahlul created a recruiting video for al-Qaeda celebrating the terrorist attack of the USS *Cole,* which killed 17 American sailors on October 12, 2000,[59] and participated in the planning for the September 11, 2001 terrorist attacks.[60] Al Bahlul filmed "martyr wills" for September 11 plane hijackers Mohamad Atta and Ziad al Jarrah and used them as propaganda declarations that documented the terrorists' plans and role in the attacks.[61] Al Bahlul volunteered to participate in the 9/11 attacks himself, but Osama bin Laden found him "too important to lose."[62] After the World Trade Center attacks, al Bahlul fled to Pakistan.[63] In December 2001, he was captured in Pakistan and turned over to the U.S. military.[64]

In 2008, al Bahlul was tried and convicted by a U.S. military commission at Guantanamo Bay and sentenced to life imprisonment.[65]Al Bahlul was convicted pursuant to the Military Commission Acts of 2006 and 2009 (collectively, "Military Commission Acts")[66] for providing material support for terrorism, soliciting others to commit war crimes, and conspiring to com-

55. *Id.* at 1246.

56. *Id.* at 1241.

57. Bahlul v. United States, 840 F.3d 757, 776 (D.C. Cir. 2016).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 777. Mohamad Atta and Ziad al Jarrah were two plane hijackers who flew planes into the World Trade Center on September 11, 2001. Their "martyr wills," which were made in preparation for September 11, identified them as members of al-Qaeda and documented their role in the violent attacks*, id.* at 776.

62. *Id.* at 776.

63. *Bahlul*, 840 F.3d at 776.

64. Al Bahlul v. U.S., 767 F.3d 1, 6 (D.C. Cir. 2014).

65. *Bahlul*, 840 F.3d at 759, 777.

66. *See* 10 U.S.C. §§ 950v(b)(25), (28) (2006); *see also* § 950u.

mit war crimes.[67] The U.S. Court of Military Commission Review upheld the conviction and al Bahlul appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[68]

On July 14, 2014, an en banc Court of Appeals vacated al Bahlul's convictions for providing material support for terrorism and soliciting others to commit war crimes.[69] The court held that these convictions violated the Ex Post Facto Clause of the U.S. Constitution because the acts were committed before the implementation of the Military Commission Acts.[70] Specifically, the court found that the MCA 2006 did not authorize "retroactive prosecution for conduct committed before [its enactment] *unless* the conduct was already prohibited under existing U.S. law as a war crime triable by military commission."[71] Therefore, since providing material support for terrorism and soliciting others to commit war crimes were not previously existing international war crimes, the court vacated those convictions.[72] However, the court did not reach the same conclusion as to the conspiracy charge. Instead, it remanded the conspiracy conviction against al Bahlul for a panel to determine if conspiracy was recognized as an international law of war offense.[73]

In June 2015, the three-judge panel vacated the conspiracy conviction finding that conspiracy is not an international law of war crime and therefore not appropriate to be tried by military commission.[74] However, the D.C. Circuit granted the Government's petition for a rehearing en banc and vacated its previous panel judgment a few months later.[75]

On October 20, 2016, the D.C. Circuit sitting en banc upheld the conspiracy conviction 6-3, with four judges concluding that Congress had the authority to make inchoate conspiracy triable before a military commission, even if it was not recognized as international law of war crimes. Judges Henderson, Brown, Griffith, and Kavanaugh concluded that Articles I and III of the U.S. Constitution did not limit Congress's authority to grant military commissions jurisdiction to try conspiracy offenses.[76] The court noted, "[A]n offense's status as an international law of war offense is sufficient but not necessary to make an offense triable by U.S. military commission under the 'law of war' prong of 10 U.S.C. § 821."[77]

Judge Millet concurred, but believed that a plain error standard of review applied, and thus, it was unnecessary to reach the question of whether Congress had the authority to make

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67. *Bahlul*, 840 F.3d at 757.
68. U.S. v. Al Bahlul, 820 F. Supp. 2d 114 (U.S.C.M.R. 2011) (en banc), *conviction vacated and reh'g granted*, No. 11–1324, 2013 WL 297726, at *1153 (D.C. Cir. Jan. 25, 2013) (per curiam).
69. *Bahlul*, 767 F.3d at 1.
70. *See* U.S. CONST. art. I, § 9, cl. 3; *Bahlul*, 767 F.3d at 1.
71. *Bahlul*, 767 F.3d at 8 (quoting Hamdan v. United States, 696 F.3d 1238, 1248 (D.C. Cir. 2012)) (emphasis added).
72. *Id.* at 29–31.
73. *Id.* at 31.
74. Al Bahlul v. U.S., 792 F.3d 1, 3 (D.C. Cir. 2015).
75. Bahlul v. U.S., 840 F.3d 757, 758 (D.C. Cir. 2016).
76. *Id.*
77. *Id.* at 764.

an inchoate conspiracy offense triable by military commission.[78] Likewise, Judge Wilkins did not find it appropriate to answer the question of whether it is constitutional for an inchoate conspiracy offense to be tried in a military tribunal because al Bahlul was convicted of conspiracy under vicarious liability theory rather than inchoate conspiracy.[79]

Judges Rogers, Tatel, and Pillard dissented on the basis that Article III barred Congress from making inchoate conspiracies triable by a military commission.[80] The dissent argued that the exception to Article III for trials by military commission must be interpreted narrowly to permit only trials for offenses against the international laws of war—and that inchoate conspiracy is not such an offense.[81] The dissent made point-by-point rebuttals of the opinions of the majority and discussed the potential dangers of expanding the government's authority to abridge the judiciary's constitutional power to preside over criminal trials.[82] In a short, but significant, closing, the dissent noted that there was not a majority opinion on the rationale for upholding the defendant's conviction, and therefore the case lacked precedential value for whether conspiracy or other non-international law of war offenses could be tried in a military tribunal.[83]

B. The Concurring Opinion of Judge Robert Wilkins

Judge Wilkins upheld al Bahlul's conviction without reaching the Article III constitutional issue of whether Congress can make inchoate conspiracy triable by military commission, concluding that al Bahlul was not prosecuted for inchoate conspiracy.[84] Judge Wilkins took an "as-applied" approach to the defendant's particular challenge and reviewed the offenses that formed the basis of the criminal conviction de novo.[85] He distinguished conspiracy as a stand-alone crime—the inchoate crime—from conspiracy as a form of vicarious liability, as set forth in *Pinkerton v. U.S.*[86] Judge Wilkins concluded that al Bahlul was convicted of things he did as a part of al-Qaeda's plot to kill civilians.[87] These actions made al Bahlul criminally liable for substantive war crimes under the *Pinkerton* doctrine of conspirator vicarious liability, not of an inchoate conspiracy offense.[88]

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78. *Id.* at 758.

79. *Id.*

80. *Id.* Bahlul also raised First Amendment Free Speech and Fifth Amendment Equal Protection Clause challenges, which the court rejected without discussion.

81. *Id.* at 804–05.

82. *Id.* at 804–38.

83. *Id.* at 838.

84. *Id.* at 798.

85. *Id.* at 797–98.

86. *Bahlul,* 840 F.3d at 801 (*Pinkerton* established that a conspirator can be held liable for his co-conspirator's substantive criminal offenses if those offenses are "reasonably foreseeable and committed in furtherance of the conspiracy's objectives, all while the defendant was a member of the conspiracy"); *see* Pinkerton v. U.S., 328 U.S. 640 (1946).

87. *Bahlul,* 840 F.3d at 804.

88. Significantly, Judge Wilkins cited the incorporation of the *Pinkerton* doctrine in international law as a "joint criminal enterprise" theory of vicarious liability. *Bahlul*, 840 F.3d at 803.

IV. International Criminal Liability

A. Development of the Joint Criminal Enterprise Liability Doctrine

International war crimes, such as genocide, torture, and terrorism tend to be expressions of collective criminality, meaning they are committed by a group of people acting together to achieve a common purpose.[89] After the crime is perpetrated, is it is difficult to distinguish the specific contributions made by each participant and their respective degree of culpability within the criminal enterprise.[90] The concept of a joint criminal enterprise represents a form of criminal liability that encompasses "all participants in a common criminal plan."[91]

As a mode of participation liability, criminal enterprise liability is rooted in the military tribunals that were created to prosecute the atrocities of World War II.[92] Prosecutors and judges relied on a concept of liability of "group criminality" to convict criminals who committed crimes related to the Holocaust.[93] This precedent was subsequently embraced and labeled as the joint criminal enterprise theory of liability ("JCE").[94]

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") fully articulated the legal doctrine of JCE in 1999.[95] This common purpose liability JCE theory was used by the ICTY to prosecute political and military leaders as "co-perpetrators" for committing mass war crimes, such as genocide, during the Yugoslavian Wars.[96] In *Prosecutor v. Tadíc*,[97] the ICTY Appeals Chamber described the doctrine of JCE as a "fully-fledged legal construct of modes of criminal liability."[98] The JCE doctrine considers members of an organized group individually responsible for crimes committed by the group for the common plan or purpose of the group. Those involved in a JCE are referred to as "parties to a joint enterprise."[99] JCE is accepted by international criminal courts in cases of "collective criminality,"[100] which occurs when several individuals "engage in the pursuit of a common criminal plan or design."[101]

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89. Antonio Cassese, INTERNATIONAL CRIMINAL LAW 189 (2d ed. 2008).
90. *Id.*
91. *Id.* at 191.
92. Elies van Sliedregt, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 133 (2012).
93. *Id.*
94. *See* Prosecutor v. Milutinovic (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise), ICTY-99-37-AR72 (21 May 2003). This concept of liability is known under many names and "the phrases 'common purpose' doctrine on the one hand, and 'joint criminal enterprise' on the other, have been used interchangeably and they refer to one and the same thing." The term joint criminal enterprise is preferred, but it refers to the same form of liability known as the common purpose doctrine. *Id.* at para 36.
95. CASSESE, *supra* note 89, at 191.
96. *Id.* at 189, 191.
97. *See* Prosecutor v. Tadíc, Judgment, ICTY Appeals Chamber, Case No. IT-94-1-A (July 15, 1999) [hereinafter Tadíc].
98. CASSESE, *supra* note 89, at 191.
99. VAN SLIEDREGT, *supra* note 92, at 131.
100. *Id.*
101. CASSESE, *supra* note 89, at 191.

B. The Relationship Between Criminal Organizations and Enterprise Liability

Although JCE theory was articulated by the ICTY, it has roots in the Nuremberg military tribunals, where it was used to prosecute war crimes committed during WWII.[102] After World War II, the International Military Tribunals ("IMT") prosecuted Germans who participated in Nazi organizations as individual defendants as well as the Nazi party as a criminal organization.[103] Despite lack of a formal definition, judges in the IMT established that the prosecution must prove the "existence of a group entity, such that its members would have understood that they were participating in a collective purpose," with common criminal objectives accepted and shared by its members.[104] In defining a criminal organization, the IMT referenced how "[a] criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for a criminal purpose. There must be a group bound together and organized by a common purpose."[105]

Subsequently, the ICTY Appeals Chamber characterized this form of liability as encompassing three forms of collective criminality: (1) liability for a common intentional purpose; (2) liability for participation in a common criminal plan within an institutional framework; and (3) incidental criminal liability based on foresight and voluntary assumption of risk.[106]

The first category relates to crimes in which there is a plan to commit a crime, that the individual defendant voluntarily participated in at least one aspect of the common plan, and that the defendant intended to contribute in the commission of the underlying crime.[107] The defendant falls into this category even if the individual did not personally partake in the actual commission of the ultimate crime.[108] The second category relates to crimes committed systemically on a mass scale.[109] This category emerged primarily motivated by the atrocities committed in concentration camps during the Second World War.[110] In this category no previous agreement or former plan is required for liability.[111] The third category of liability is broader than the previous two categories and provides the foundation for the discussion of the prosecution of crimes such as conspiracy.[112]

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102. VAN SLIEDREGT, *supra* note 92, at 133.

103. Allison Danner & Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 109 (2005).

104. *Id.* at 113. Notably of the seven organizations that were indicted the IMT only found four of the organizations criminal organizations, *id.* at 114.

105. Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg 14 Nov. 1945–Oct. 1946, Volume. 1, at 256 [hereinafter "Nuremberg Transcript"].

106. CASSESE, *supra* note 89, at 191–95, 199.

107. *Id.* at 191.

108. *Tadíc*, at ¶ 196.

109. Giulia Bigi, *Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The Krajiinik Case*, 14 MAX PLANCK Y.B. U.N. L. 51, 56 (2010).

110. CASSESE, *supra* note 89, at 195.

111. *Id.*

112. *Id.* at 209.

This third category of JCE involves criminal behavior that falls outside the common design.[113] This is in contrast to the other two categories, which relate to criminal acts that fall within the common design.[114] In *Tadíc*, the ICTY Appeals Chamber established that a defendant may be found guilty of acts that are a "natural and foreseeable consequence" of realizing the common purpose.[115] This category of liability also encompasses the predicable consequences of carrying out the common purpose and allows the individual to be found liable for "reckless or indifferent" actions taken in furtherance of the common design or purpose.[116] JCE does not require actual presence in the physical perpetration, but rather requires some form of active involvement when necessary.[117] For example, Dusko Tadíc was found to have participated in the common criminal purpose to commit mass murder and that the killing of others, who were not his intended victims, was a foreseeable risk that he was aware of, and he continued to participate in the common design nevertheless.[118]

The third category of JCE is the most extensive, and thus more controversial among actors in the international community.[119] Controversy emerges because this category effectively lowers the "*mens rea,*" or mental state, required for commission of the underlying substantive crime without affording different sentences among those who did not engage in the crime's execution.[120] Not only has JCE continued to have importance in the ICTY, but it has also expanded in the international community and has been applied to a variety of criminal offenses.[121] The JCE doctrine has been applied to individuals who act "in concert" to commit substantive offenses, and has been used when prosecuting criminal organizations. The doctrine has also been applied when there are charges of conspiracy in the case.[122]

1. JCE and the Rome Statute

It is debated whether JCE is included in the Rome Statute of the International Criminal Court ("Rome Statute").[123] JCE is applied predominantly at the ICTY, but there is an argument for possible inclusion of JCE liability under Article 25(3) of the Rome Statute.[124] Under the Rome Statute, individual criminal responsibility is included in the general principles of criminal law in Article 25.[125] Subsection three of Article 25 provides that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the

113. Bigi, *supra* note 109, at 57.

114. Danner & Martinez, *supra* note 103, at 106.

115. Bigi, *supra* note 109, at 57.

116. Danner & Martinez, *supra* note 103, at 106

117. VAN SLIEDREGT, *supra* note 92, at 139.

118. Danner & Martinez, *supra* note 103, at 106–07.

119. Bigi, *supra* note 109, at 69–70, 78.

120. Danner & Martinez, *supra* note 103, at 109, 125.

121. *Id.* at 107.

122. *Id.* at 108–09.

123. *Id.*at 99, 154.

124. *See* VAN SLIEDREGT, *supra* note 92, at 131; Rome Statute of the International Criminal Court art. 25, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"].

125. VAN SLIEDREGT, *supra* note 92, at 131; Rome Statute, *supra* note 124.

Court if that person . . . " engages in any of the actions listed therein.[126] JCE has been argued to be included in Article 25(3)(d) which provides that a person is liable for a crime if that person, "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose."[127] Of particular interest is the inclusion of the phrase "common purpose," which implies reference to the ICTY language used to define JCE liability.[128] However, the inclusion of JCE in the Rome Statute has been rejected for differences in the *mens rea* requirement.[129] This is mainly because JCE has a lower requirement that can be satisfied by recklessness, whereas the Rome Statute requires "knowledge of the intention of the group to commit the crime."[130]

C. Application of JCE in U.S. Domestic Law

The U.S. Supreme Court paralleled the language used in *Tadíc* by the ICTY Appeals Chamber to endorse the concept of imputed liability for co-conspirators.[131] In *Pinkerton* v. *United States,* the U.S. Supreme Court held that each member of a conspiracy can be liable for the substantive offenses carried out by their co-conspirators in furtherance of the conspiracy, even when there is no evidence of the individual's direct participation in, or knowledge of such offenses.[132] In essence, the Court deemed that liability extends to the offenses that are reasonably foreseen as a necessary or natural consequence of the unlawful agreement.[133]

The Court reviewed the conviction of brothers Walter and Daniel Pinkerton for "unlawful possession, transportation, and dealing in whiskey" and other charges for tax fraud.[134] Ultimately, the Court "imported the civil concept of vicarious liability into the American law of criminal conspiracy."[135] The act of one being attributable to all, essentially finding guilt by association.[136] In *Pinkerton* the Court recognized that the commission of the substantive offense and conspiracy to commit the offense are separate and distinct offenses.[137] However, *Pinkerton* did not separate conspiracy as a substantive crime from conspiracy as a theory of lia-

126. Rome Statute, *supra* note 124.

127. *Id.* at art. 25(3)(d).

128. Bigi, *supra* note 109, at 82–83.

129. *Id.*

130. Kevin Jon Heller, *JCE III, the Rome Statute, and Bashir*, OPINIO JURIS (Feb. 11, 2009, 7:55 PM), http://opiniojuris.org/2009/02/11/jce-iii-and-the-rome-statute/.

131. VAN SLIEDREGT, *supra* note 92, at 132.

132. *Id.*; Danner & Martinez, *supra* note 103, at 115.

133. The Court applied the same concept of joint criminality, to members of an organized crime enterprise:

> Each member of the conspiracy can be liable for substantive offenses carried out by co-conspirators in furtherance of the conspiracy, even when there is no evidence of their direct participation in, or knowledge of such offenses. Liability extends to offenses that are reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

VAN SLIEDREGT, *supra* note 92, at 132.

134. Pinkerton v. U.S. 328 U.S. 640, 648 (1946).

135. James Shellow, William Their, & Susan Brenner, Pinkerton v. United States *and Vicarious Criminal Liability,* 36 MERCER L. REV. 1079, 1080 (1985).

136. *Pinkerton*, 328 U.S. at 646–47.

137. *Id.* at 644.

bility, but rather intertwined the two as was done in the International Military Tribunal at Nuremberg.[138]

D. JCE and Terrorism Prosecutions

The crime of terrorism has been the subject of debate throughout the international community.[139] As a result, many antiterrorism declarations have been disseminated that consistently deemed terrorism a crime, compelling states to either prosecute or extradite terrorists to fulfill their obligations under international law.[140]

Although there is no agreed upon definition of terrorism pronounced in any treaty, there is a consensus on a generally acceptable definition of terrorism in the time of peace.[141] This support cultivates an argument for international terrorism as customary international law as evidenced by state practice through domestic laws and judgments by national courts, the passing of General Assembly resolutions, and the ratification of international conventions.[142]

Despite lack of an agreed upon definition, UN General Assembly resolutions and various conventions provide a general consensus on the main elements that comprise a definition of terrorism: (1) acts normally criminalized under any national penal system; (2) acts intended to provoke a state of terror in the population or to coerce a state to take some sort of action; and (3) acts that are politically motivated.[143] Rather than formulate a concise definition to include in a treaty or convention, the international community has focused on acts that would generally be considered terrorist and prohibiting specific acts of terrorism.[144] Consequently, prosecution of terrorism is not uniform and can be difficult to prove.

JCE offers a solution for the complicated causation problems, which inevitably arise when prosecuting enemy combatants for terrorism offenses.[145] These types of issues result when determining the acts of the perpetrator and distinguishing the level of culpability of others who participate in the execution of the crime. However, under the premise of co-perpetration, the "distinction between principle and accessory becomes immaterial."[146]

International war crimes, such as terrorism, are often an "expression of collective criminality."[147] Acts of terrorism are normally carried out by a group of individuals who may not contribute to the commission of the terrorist activity in the same way, but nonetheless participate in the planning, organizing, and carrying out of the substantive crime. When perpetrators of

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138. Danner & Martinez, *supra* note 103, at 109.

139. Michael Lawless, *Terrorism: An International Crime*, 63 INT'L J. 139, 145 (2008).

140. *Id.*

141. CASSESE, *supra* note 89, at 163.

142. *Id.*

143. *Id.* at 165.

144. *Id.* at 163.

145. *See* VAN SLIEDREGT, *supra* note 92, at 131.

146. *Id.*

147. CASSESE, *supra* note 89, at 189.

terrorist acts are caught, it is difficult to isolate the specific contribution made by each individual who participated in the overall crime since it was committed collectively.[148] Consequently, it is also difficult to identify the specific degrees of culpability of the various people working within and for the organization.[149] As a result of these challenges in collecting individualized evidence and identifying culpability, the international system has recognized joint liability and equal responsibility for those who participate in a common criminal action if they participate in the action, regardless of their position or the extent of their personal contribution, and intent to engage in the underlying criminal action.[150]

V. Problems with Prosecuting Conspiracy Offenses

A. Military Jurisdiction to Prosecute Conspiracy Offenses

U.S. military commissions are limited in scope and traditionally have only had authority to try crimes recognized by international law.[151] The Uniform Code of Military Justice provides that military tribunals have "jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[152] Additionally, Supreme Court precedent concludes that the purpose of military commissions is to prosecute violations of international law.[153] Therefore, military commissions must follow rules and principles established in international treaties the United States is a signatory to, as well as corresponding customary international law developing from the continued practices of nation-states. Whether conspiracy is a law of war offense as defined by the MCA and recognized under international law continues to challenge federal judges.[154]

B. Conspiracy as a Substantive Crime

An inchoate crime is a crime that is not fully formed. In other words, the underlying crime does not need to occur for the offense to be committed.[155] The rationale for criminalizing an inchoate crime is to protect society by deterring the commission of the offense.[156] Con-

148. *See id.*

149. *See id.* at 189–90.

150. *Id.* at 190.

151. *See Ex Parte Quirin*, 317 U.S. 1, 28 (1942).

> Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

Id.

152. The Uniform Code of Military Justice, 10 U.S.C. § 818 art. 18 (2013).

153. Bahlul v. U.S., 840 F.3d 757, 761 (D.C. Cir. 2016).

154. Link, *supra* note 12, at 440, 442.

155. CASSESE, *supra* note 89, at 219.

156. *Id.*

spiracy is a group offense that involves the agreement of two or more people to commit a crime.[157] Participants are guilty even if the crime is never fully committed.[158] If the underlying crime is committed, the perpetrators are held liable for both conspiracy and for the substantive crime, making conspiracy the "darling of the modern prosecutor's nursery."[159] To be found guilty of conspiracy it must be proven that that the individual has had the requisite *mens rea* to commit the crime.[160] This means the defendant had the knowledge of the facts or circumstances consisting of the crime and the intent to carry out the conspiracy to commit that crime.[161] Therefore, unlike an attempt crime, it can be punished even before a substantial step toward the offense is taken.[162]

1. Conspiracy as a Theory of Enterprise Liability

The London Agreement of 1945 is the source of treaty rules on conspiracy.[163] The International Military Tribunal, criminalized conspiracy to commit crimes against peace, war crimes, and crimes against humanity.[164] Article 6 of the Charter provides, "Leaders, organizers, instigators, and accomplices participating in the formation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[165] The Charter made clear to reject the formation of a separate crime of conspiracy "except the one to commit acts of aggressive war."[166] Therefore, distinguishing conspiring to commit crimes against peace as a criminal act in and of itself, from the simple participation in conspiring to commit war crimes or crimes against humanity.[167]

However, conspiracy was controversial at Nuremberg.[168] The IMT judgment dedicated an entire section to "Law as to the Common Plan or Conspiracy;"[169] but the court narrowly found conspiracy convictions to be only where the evidence established "the common planning to prepare and wage war by . . . defendants."[170] Notably, the court considered charges for common plan or conspiracy and planning and waging wars together "as they are in substance the same."[171]

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157. *Id.* at 227.

158. *Id.*

159. Bahlul v. United States, 840 F.3d 757, 800 (D.C. Cir. 2016) (quoting Harrison v. U.S. 7 F.2d 259, 263 (2d Cir. 1925)).

160. CASSESE, *supra* note 89, at 227.

161. *Id.*

162. *Bahlul*, 840 F.3d at 801.

163. CASSESE, *supra* note 89, at 227.

164. Nuremberg Transcript, *supra* note 105, at 11.

165. *Id.*

166. *Id.* at 226; *see also* Kevin Jon Heller, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 275 (2011).

167. HELLER, *supra* note 166, at 275–76.

168. VAN SLIEDREGT, *supra* note 92, at 23.

169. Nuremberg Transcript, *supra* note 105, at 224–26.

170. *Id.* at 225.

171. *Id.* at 224.

The military tribunals failed to clearly identify conspiracy as an independent crime, instead emphasizing the acts "connected with plans or enterprises" accepted as a mode of participation.[172] According to the tribunals, enterprise liability consists of four parts: (1) the existence of a criminal enterprise; (2) the commission of a war crime or crimes against humanity arising from the criminal enterprise; (3) the defendant's knowledge of the criminal enterprise; and (4) the defendant's participation in the criminal enterprise.[173] Ultimately, JCE expanded potential liability of defendants beyond the actual perpetration of the crime.[174]

Although JCE and inchoate conspiracy share common attributes, they are not one in the same. Where conspiracy can function as a substantive crime and as a theory of liability, JCE never constitutes a substantive crime.[175] Nonetheless, both JCE and conspiracy require an agreement among individuals to commit a crime.[176] However, conspiracy does not require any overt act to be taken in furtherance of the agreement, whereas JCE requires parties to the agreement to take action in furtherance of the agreement.[177] Although debated within the ICTY whether conspiracy is synonymous to JCE, the U.S. made it clear in *Pinkerton* that "conspiracy . . . does play an important role as a liability theory and also functions in ways virtually identical to JCE."[178] JCE is criticized for its failure to consider the degree of culpability among individual participants, but the rationale for criminalizing conspiracy seeks to prevent offenses from occurring in the first place, "especially when they involve several persons and are thus more dangerous to the community."[179]

VI. Upholding al Bahlul's Conviction Through Joint Criminal Enterprise Liability

JCE can offer a solution to complicated causation problems that often arise when prosecuting crimes of terrorism.[180] Judge Wilkins correctly determined that the offense al Bahlul was charged with did not amount to conspiracy as an inchoate crime, but rather conspiracy as a form of vicarious liability.[181] Judge Wilkins referenced the *Pinkerton* doctrine to support this conclusion that al Bahlul was convicted pursuant to a joint criminal enterprise theory of liability for the contributions he made as a member of al-Qaeda.[182] In *Pinkerton*, the Supreme Court established liability for conspiracy when the substantive offense committed by one of the conspirators was done in furtherance of the conspiracy, and fell within the scope of the unlaw-

172. Héctor Olásolo, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 209–10 (2009).

173. *Id.*

174. *Id.*

175. Danner & Martinez, *supra* note 103, at 119.

176. *Id.*

177. Prosecutor v. Milutinović, Case No. ICTY-99-37-AR72, (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise), ¶ 23 (May 21, 2003).

178. Danner & Martinez, *supra* note 103, at 119.

179. CASSESE, *supra* note 89, at 227; VAN SLIEDREGT, *supra* note 92, at 141.

180. VAN SLIEDREGT, *supra* note 92, at 131.

181. Bahlul v. U.S., 840 F.3d 757, 803–04 (D.C. Cir. 2016) (Wilkins, J., concurring).

182. *Id.*

ful project, or was merely a consequence of the plan that was reasonably foreseen as a necessary or natural consequence of the unlawful agreement.[183]

Applying the test outlined in *Pinkerton* to the actions of al Bahlul shows he participated in a conspiracy as a form of vicarious liability. First, the substantive offense was conspiring to commit war crimes, like murdering civilians. Second, al Bahlul's actions fell within the scope of the unlawful scheme to commit terrorism, which resulted in the deaths of hundreds of thousands of innocent civilians. Third, even if al Bahlul could successfully provide a defense that he did not intended to cause those deaths, the act of creating propaganda videos exploiting the killing of US soldiers from the bombing of the *USS Cole* proves that it was reasonably foreseeable that the necessary or natural consequence of that promotion, together with creating terrorist martyr wills, would produce further terrorist activity and therefore result in the deaths of American citizens. Ultimately, Bahlul was properly convicted of the actions he performed as part of the overall al-Qaeda plots to kill civilians.

To find in the alternative would mean to prosecute a terrorist, like al Bahlul, in federal courts. Prosecuting terrorists in Article III courts rather than by military commission can lead to the distribution of confidential information and undermine national security.[184] Terrorism defendants represent a class of defendants that threaten national security, therefore, trained personnel may be more suited to handle their prosecution.[185] Additionally, trying terrorism defendants in federal courts may induce a significant amount of outside pressure for judges and jury members to convict terrorists, making a trial by a jury of peers is nearly impossible.[186] Consequently, refusing to uphold al Bahlul's conviction may undermine congressional authority to establish military tribunals and limit the government's ability to effectively try enemy combatants for war crimes.

VII. Conclusion

Although the D.C. Circuit correctly upheld al Bahlul's conviction, the majority unnecessarily and incorrectly found that the military commission had jurisdiction to try inchoate conspiracy offenses. The military commission found al Bahlul committed overt acts directly related to the attacks that occurred on September 11, 2001 that killed thousands of civilians. Therefore, the fact that the underlying war crime was completed separates al Bahlul's acts from inchoate conspiracy. Thus, the conspiracy that was committed falls into the realm of a theory of responsibility for murdering civilians, which has been recognized in international law through the joint criminal enterprise theory of liability.[187]

The complex procedural history of *Bahlul v. United States* and the separate opinions manifest the D.C. Circuit's difficulty in retrofitting traditional constitutional law and international law-of-war to the challenges of terrorism and the new realities of modern warfare. The decision

183. Pinkerton v. U.S., 328 U.S. 640, 647–48 (1946).

184. Kittel, *supra* note 19, at 796.

185. *Id.* at 796.

186. *Id.* at 797.

187. Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. Davis L. Rev. 305, 371 (2015).

places pressure on the Supreme Court to address the relationship between the protection of individual rights and national security.[188]

On November 28, 2016, the D.C. Circuit denied a petition for a rehearing and on March 28, 2017, counsel for al Bahlul filed a petition for a writ of certiorari to the Supreme Court. The D.C. Circuit decision did not resolve the uncertainty in military commission practice. Due to this continued uncertainty and the potential wide-ranging effects of any decision on Article I and Article III issues, Supreme Court review is likely.

If military commissions are able to try inchoate conspiracy offenses, prosecutors would essentially be able to weave around Ex Post Facto barriers, since the reach of the military commissions is now nearly unbound and held with barely any constraint. As a result, the D.C. Circuit's holding effectively permits the government to try any person who had a "general affiliation with al Qaeda."[189] Yet, to find otherwise relieves al Bahlul and non-state actors alike from accountability and defeats any counter deterrence mechanisms.[190] Perhaps judges are hesitant to limit or expand the parameters of military tribunal jurisdiction because of the political underpinnings involved in preserving or eliminating the use of these alternative forums. Military commissions provide the government with an alternative forum to prosecute international crimes in the context of wartime actions.[191] This type of alternative forum provides a practical solution to issues that may arise within the exigencies of war. Most importantly, military commissions protect the integrity of Article II courts by limiting the creation of troubling precedent that may arise from the outcomes of difficult cases marked by the circumstances of war.[192]

The debate concerning military commission jurisdiction highlights the severity of the D.C. Circuit holding's practical implications. A decision from the Supreme Court would provide a unified voice and clearer way for military commissions to prosecute Guantanamo Bay detainees, while simultaneously providing a more efficient and just process for al Bahlul and other similarly situated defendants with cases pending before the commission.

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188. Sunstein, *supra* note 30, at 1.

189. Steve Vladeck, *The Government's Overstated Rehearing Petition in al Bahlul*, JUST SECURITY (July 30, 2015, 11:05 AM), https://www.justsecurity.org/24985/governments-overstated-rehearing-petition-al-bahlul/.

190. Margulies, *supra* note 187, at 379–80.

191. U.S. v. Hamdan, 801 F. Supp. 2d 1247, 1314–15 (U.S.C.M.C.R. 2011).

192. Kittel, *supra* note 19, at 796, 816.

Waldman v. Palestine Liberation Organization

835 F.3d 317 (2d Cir. 2016)

The United States Court of Appeals for the Second Circuit vacated and remanded Plaintiffs' allegations and held that (1) Palestinian Authority and Palestine Liberation Organization did not waive their objection to personal jurisdiction; (2) Palestinian Authority and Palestine Liberation Organization possessed due process rights; (3) Palestinian Authority and Palestine Liberation Organization were not subject to general personal jurisdiction in the United States; and (4) terrorist attacks in Israel were not sufficiently connected to the United States to subject Palestinian Authority and Palestine Liberation Organization to specific personal jurisdiction in the United States.

I. Holding

The United States Court of Appeals, Second Circuit, concluded that the United States did not have personal jurisdiction over Defendants with respect to the claims at issue in this action.[1] Although American plaintiffs suffered devastating deaths and injuries, as a result of the atrocious terror attacks in Israel, the attacks were "random" and not expressly aimed at the United States.[2] Here, despite the horrific underlying attacks or Plaintiffs' morally compelling claims, the Court could not exercise jurisdiction beyond the limits that due process proffers.[3]

II. Facts and Procedure

Eleven American families (Plaintiffs) sued the Palestine Liberation Organization (PLO) and the Palestine Authority (PA) (collectively, "Defendants") pursuant to the Anti-Terrorism Act (ATA) as a result of seven terror attacks in Israel that killed or injured the Plaintiffs, or their family members.[4]

The PA was established by the 1993 Oslo Accords as the non-sovereign government of portions of the West Bank and the Gaza Strip (collectively, "Palestine").[5] The PA is headquartered in Ramallah, West Bank.[6] As the governing authority in Palestine, the PA funds conventional government services, including developing infrastructure; public safety; the judicial system; health care; education; foreign affairs; economic development movements in agricul-

1. Waldman v. Palestine Liberation Org., 835 F.3d 317, 322 (2d Cir. 2016).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 323.

ture, energy, public works, and public housing; payment of government employee salaries and pension funds; transportation; and communication and information technology services.[7]

The PLO was established in 1964, with headquarters in Ramallah, the Gaza Strip, and Amman in Jordan.[8] The PLO conducts Palestine's foreign affairs because of the limited power granted to the PA by the Oslo Accords.[9] Globally maintaining over 75 embassies, missions, and delegations, the PLO is registered with the United States Government as a foreign agent. The PLO houses two offices in the United States: a mission to the United States in Washington, D.C., and a mission to the United Nations in New York City.[10]

Despite any connections to the United States, courts have held that neither the PA nor the PLO is a "state" entitled to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), because neither entity has a defined territory with a permanent population controlled by a government that has the capacity to enter into foreign relations.[11]

In 2004, after a wave of violent terror attack, Plaintiffs sued Defendants alleging violations of the ATA for the following attacks:[12]

A. Jaffa Road Shooting: January 22, 2002

A PA police officer opened fire outside a pedestrian mall in Jerusalem, shooting at the people on the street, a nearby bus stop, on the bus, and at people in nearby stores.[13] The shooter aimed to "cause[e] the death of as many people as possible."[14] The PA shooter killed two, and injured forty-five others before he was killed by the Israeli police. Two of the plaintiffs were injured.[15]

B. Jaffa Road Bombing: January 27, 2002

A PA intelligence informant detonated a suicide bomb in Jerusalem, killing herself, one other man, and seriously wounding four of the plaintiffs.[16] Of the four plaintiffs seriously wounded, two were children.[17] Evidence at trial showed that the bombing was planned by the PA, who encouraged the informant to conduct the suicide bombing.[18]

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 324.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

C. King George Street Bombing: March 21, 2002

A former PA police officer, with the aid of co-conspirators, detonated another suicide bomb on a busy street in Jerusalem.[19] The officer chose the particular street because its busy afternoon crowds would conveniently allow him to "caus[e] the deaths of as many civilians as possible."[20] Two plaintiffs were severely incapacitated.[21]

D. French Hill Bombing: June 19, 2002

At a bus stop in a Jerusalem neighborhood, a seventeen-year-old member of a militant faction of the PLO's Fatah party detonated a suicide bomb.[22] The United States Department of State had designated the Fatah party (also known as the Al Aqsa Martyr Brigades, or "AAMB") as a foreign terrorist organization (FTO).[23] The bombing killed several, and wounded dozens, including an eighteen-year-old plaintiff. [24]

E. Hebrew University Bombing: July 31, 2002

At a campus café, military operatives of Hamas (also designated as a FTO) detonated a bomb, causing the death of nine, including four United States citizens.[25] The estate of the four deceased citizens bring suit here.[26]

F. Bus No. 19 Bombing: January 29, 2004

In another AAMB attack, a PA police officer detonated a suicide vest on a crowded bus in Jerusalem.[27] The bomber's aim was to "caus[e] the deaths of a large number of individuals."[28] The bombing killed eleven people, including one of the plaintiffs.[29]

III. Procedure

Plaintiffs first filed suit in the Southern District of New York in 2004. In July 2007, Defendants moved to dismiss claims for lack of personal jurisdiction. The district court denied the motion, and held that it had general personal jurisdiction over Defendants. In reaching its conclusion, the court considered Defendants' substantial commercial presence in the United States, fully and continuously functional office in Washington, D.C., bank accounts and com-

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 325.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

mercial contracts, and a substantial promotional presence in the United States. As an initial matter, the district court held that, pursuant to Federal Rule of Civil Procedure 4(h)(1)(B) the service of process was properly effected by serving the Chief Representative of the PLO and the PA at his home in Virginia. Further, the district court concluded that exercising personal jurisdiction over Defendants comported with traditional notions of fair play and substantial justice.

In January 2014, after the Supreme Court significantly narrowed the test for general personal jurisdiction, Defendants moved for reconsideration of the denial of their motion to dismiss. The district court denied Defendants' motion for reconsideration and motion to certify the jurisdictional issue for an interlocutory appeal.

The case proceeded to trial in January 2015, and Defendants again argued that the district court lacked personal jurisdiction. Defendants also moved, in the alternative, for judgment as a matter of law or for a new trial. The district court did not rule explicitly on whether it had specific personal jurisdiction over Defendants. The jury found Defendants liable for all six terrorist attacks and awarded Plaintiffs $655.5 million in damages. On appeal, the United States Court of Appeals for the Second Circuit reviews the district court's assertion of personal jurisdiction *de novo*.

IV. Discussion

A. Questions presented

This case presented three threshold issues for determination before the court: (1) whether Defendants waived objections to personal jurisdiction; (2) whether Defendants have due process rights at all; and (3) whether the Due Process clause of the Fifth Amendment controls the personal jurisdiction analysis.[30]

1. Defendants' Waiver of Objections to Personal Jurisdiction

Plaintiffs argue that Defendants waived their argument that the district court lacked personal jurisdiction over them.[31] Plaintiffs contend that Defendants could have taken the stance that they were not subject to general jurisdiction under *Daimler*'s "at home" test,[32] because the "at home" general jurisdiction test existed after *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[33]

The Second Circuit found this argument unconvincing.[34] The Defendants did not waive their objection to personal jurisdiction because they repeatedly and consistently objected to personal jurisdiction and invoked *Daimler*.[35]

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30. *Id*. at 328.
31. *Id.*
32. *Id.; see also* Daimler AG v. Bauman, 134 S. Ct. 746 (2014).
33. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).
34. *Waldman*, 835 F.3d 317 at 328.
35. *Id.*

2. Defendants' Due Process Rights

Plaintiffs' second argument states that Defendants have no due process rights because they are foreign governments and share attributes usually affiliated with a sovereign government.[36] Foreign sovereign states receive protection under the FSIA, but do not have due process rights.[37] Plaintiffs contend that because Defendants do not view themselves as part of a sovereign, and are treated as a foreign government in other contexts, Defendants lack due process rights. Plaintiffs fail to cite any cases to support this contention.[38]

Sovereign states are not entitled to due process protection.[39] However, neither the PLO nor the PA is recognized by the United States as a sovereign state, and therefore, the PLO and PA possess due process rights.[40]

3. Due Process Clause of the Fifth Amendment

Plaintiffs' third contention is that the due process clause of the Fifth Amendment, and not the Fourteenth Amendment, applies to the ATA in controlling this analysis.[41] Plaintiffs seek to prevent application of the Fourteenth Amendment due process clause here because it restricts state power and imposes stricter limits on personal jurisdiction.[42] In contrast, the Fifth Amendment allows for more leniency by contemplating disputes with foreign nations which are not subject to our constitutional system, unlike States.[43] Plaintiffs allege that conflating the due process requirements of the Fifth and Fourteenth Amendments would impose a unilateral constraint on United States courts, even when the political branches conclude that personal jurisdiction over a defendant for extraterritorial conduct is in the national interest.[44]

The Second Circuit has previously established the congruence of the due process analysis under both the Fifth and Fourteenth Amendments.[45] The fundamental difference between the two analyses is that under the Fifth Amendment, the court can consider the defendant's contacts throughout the United States, whereas under the Fourteenth Amendment, the court can only consider the contacts with the forum state.[46] The minimum contacts and fairness analysis remains unchanged under both the Fifth Amendment and Fourteenth Amendment.[47]

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36. *Id*. at 329.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 330.
44. *Id.*
45. *Id.*
46. Chew v. Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1998).
47. *Waldman*, 835 F.3d 317 at 331.

B. Jurisdiction

1. Personal Jurisdiction

a. Two-part Due Process Test for Personal Jurisdiction

International Shoe established a two prong due process test for personal jurisdiction, pursuant to the Fifth and Fourteenth Amendments: the "minimum contacts" inquiry, and the "reasonableness" inquiry.[48] As part of the minimum contacts inquiry, the court must determine whether a defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction over the defendant.[49] The reasonableness inquiry requires that the court determine whether the assertion of personal jurisdiction over the defendant comports with traditional notions of fair play and substantial justice under the circumstances of a particular case.[50]

b. General jurisdiction

A court may assert general personal jurisdiction over a foreign defendant to hear any and all claims against that defendant, only when the defendant's affiliations with the State in which suit is brought are so constant and pervasive that it is rendered at home in the forum State.[51]

Here, the Second Circuit overturned the lower court's decision holding that it had general jurisdiction over the defendants.[52] The lower court's decision was based on an erroneous interpretation of *Daimler*.[53] In Daimler, the Supreme Court held that a German corporate parent, which was not incorporated in California and did not have its principal place of business in California, could not be considered to be "at home" in California, and be subject to general jurisdiction there.[54] *Daimler* held that for a corporation, the place of its incorporation and principal place of business are a bases for general jurisdiction.[55]

Unlike *Daimler*, neither the PA nor the PLO are corporations, but this Court did not find reason to invent a different test for general personal jurisdiction for an unincorporated entity.[56] This court assessed where the PA and PLO were fairly regarded as "at home," and found overwhelming evidence that they were "at home" in Palestine, where they govern.[57] The PA has no

48. International Shoe Co. v. Wash., 326 U.S. 310 (1945).

49. *Waldman*, 835 F.3d 317 at 331; *See Daimler,* 1345 S. Ct. at 754; Calder v. Jones, 465 U.S. 783 (1984); *Int'l Shoe*, 326 U.S. at 316.

50. *Waldman*, 835 F.3d 317 at 331; *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 923); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–78 (1985).

51. *Waldman*, 835 F.3d 317 at 331; *Daimler*, 134 S. Ct. at 751 (quoting *Goodyear*, 564 U.S. at 919).

52. *Waldman*, 835 F.3d 317 at 332.

53. *Id.*

54. *Id.*; *Daimler*, 134 S. Ct. at 762.

55. *Daimler*, 134 S. Ct. at 760.

56. *Waldman*, 835 F.3d 317 at 332.

57. *Id.*

independently operated offices anywhere outside of the West Bank and Gaza.[58] Also, all PA governmental ministries, the Palestinian president, the Parliament, and the Palestinian security services reside in Palestine.[59] With regards to the PLO, at the time of the incident, it maintained its headquarters in Palestine and Jordan.[60] In addition, the defendants' mission in Washington, D.C. engaged in activities that were limited to promoting the Palestinian cause in speeches and media appearances, and retaining a lobbying firm.[61]

These contacts with the United States did not render the defendants essentially "at home" in the United States.[62] In fact, Daimler's contacts with California were substantially greater than the defendant's contacts with the United States here, but the Supreme Court rejected subjecting Daimler to general personal jurisdiction in California.[63]

2. Specific Jurisdiction

Specific jurisdiction depends on the affiliation between the forum and the underlying controversy that takes place in the forum State, and is therefore subject to the state's regulation.[64] Asserting specific jurisdiction depends on in-state activity that gave rise to the episode in suit.[65]

Here, the Second Circuit evaluated whether the defendants' role in the six terror attacks creates a substantial connection with the forum State pursuant to the ATA.[66] The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship between the defendant, the forum, and the litigation.[67] A substantial connection is required between the defendant and the forum, and the relationship must arise out of contacts that the defendant himself creates with the forum.[68] The ATA provides:

> 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, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.
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> 18. U.S.C. § 2333(a).

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58. *Id.*
59. *Id.*
60. *Id.* at 333.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 331; *Goodyear*, 564 U.S. at 919.
65. *Id.*; *Goodyear*, 564 U.S. at 923 (quoting *Int'l Shoe*, 326 U.S. at 317).
66. *Waldman*, 835 F.3d. 317 at 335.
67. *Id.* at 340; *Walden v. Fiore*, 134 S. Ct. 1115 (2014).
68. *Id.* at 335; *Walden*, 134 S. Ct. at 1122 (citing *Burger King*, 471 U.S. at 475).

To succeed under the ATA, a plaintiff must prove (i) unlawful action; (ii) the requisite mental state; and (iii) causation.[69]

a. Unlawful Action

To assert unlawful action, plaintiffs must show that their injuries resulted from an act of "international terrorism," defined by the ATA as activities that, among other things, "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State."[70] The acts must also appear to be intended to intimidate or coerce a civilian population; influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.[71]

Here, Plaintiffs asserted that Defendants were vicariously liable for several acts, including murder and attempted murder, use of a destructive device on a mass transportation vehicle, detonation of an explosive device on a public transportation system, and conspiracy to commit those acts.[72] Plaintiffs further alleged that Defendants violated federal and state antiterrorism laws by providing material support to FTO-designated groups (the AAMB and Hamas), and by harboring persons whom the defendants had reasonable grounds to believe were about to commit a terrorism-related offense.[73]

The ATA further limits international terrorism to activities that "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."[74]

Here, the bombings and shootings took place entirely outside the territorial jurisdiction of the United States.[75] The Court assessed whether there were other sufficient connections between the torts committed by the defendants and the jurisdiction of the United States.[76] As atrocious as the torts were, the Court found that these acts were not sufficiently connected to the United States in order to provide specific personal jurisdiction in the United States.[77] Defendants were liable for tortious conduct that occurred outside the United States and

69. Sokolow v. Palestine Liberation Org., 60 F. Supp. 3d 509 (2014).

70. 18 U.S.C. § 2331(1)(A).

71. 18 U.S.C. § 2331(1)(B)(i)–(iii).

72. *Waldman*, 835 F.3d 317 at 336.

73. *Id.*

74. 18 U.S.C. § 2331(1)(C).

75. *Waldman*, 835 F.3d 317 at 336.

76. *Id.*

77. *Id.* at 337.

affected American citizens because they were made victims of the foreign violence.[78] As such, there is no personal jurisdiction over the Defendants in this case.[79]

3. Plaintiffs Appeal for Specific Jurisdiction

On appeal, Plaintiffs argue that the Court has specific jurisdiction for three reasons: the effects test, purposeful availment, and accepting process.[80] First, Plaintiffs argue that pursuant to the effects test, a defendant acting entirely outside the United States is subject to jurisdiction "if the defendant expressly aimed its conduct at the United States."[81] Second, Plaintiffs contend that the defendants purposefully availed themselves of the forum by establishing a continuous presence in the United States, and pressuring United States government policy by conducting terror attacks in Israel, and threatening imminent terrorism.[82] Third, Plaintiffs allege the defendants consented to personal jurisdiction under the ATA by appointing an agent to accept process.[83] The Second Circuit turned to *Walden* to assess Plaintiffs' arguments.[84]

a. The Effects Test

Under *Walden*, it is "insufficient to rely on a defendant's 'ransom, fortuitous, or attenuated contacts' or on the 'unilateral activity' of a plaintiff" with the forum to show specific jurisdiction.[85] *Walden* further established that a forum State's exercise of jurisdiction over an intentional tortfeasor that is a foreign State, must be based on intentional conduct by the defendant.[86] Here, the acts of terrorism were unconnected to the forum, and were not expressly aimed at the United States.[87]

Although during trial, Plaintiffs alleged that "Defendants *intended* to hit American citizens by continuing a terror campaign,"[88] the Constitution demands a higher standard of purposefully directed conduct with the forum.[89] Exercising specific jurisdiction because the victims of a foreign attack were American by happenstance runs contrary to due process.[90] In order to apply a federal criminal statute to an extraterritorial defendant consistent with due process, there must be a sufficient nexus between the defendant and the United States so that such application would not be arbitrary or fundamentally unfair. [91]

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78. *Id.*
79. *Id.*
80. *Id.* at 337.
81. Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 173 (2d Cir. 2013).
82. Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120 (2d Cir. 2002).
83. *Waldman*, 835 F.3d 317 at 337.
84. *Id.*
85. *Walden*, 134 S. Ct. at 1123 (quoting *Burger King*, 471 U.S. at 475).
86. *Id.*
87. *Waldman*, 835 F.3d. 317 at 337.
88. *Id.* at 338.
89. *Id.*
90. *Id.*
91. *Id.*

Further, the Supreme Court has also noted that the fact that harm is foreseeable in a specific forum is insufficient for the purpose of establishing specific personal jurisdiction over a defendant.[92] Plaintiffs fail to point out any evidence that these indiscriminate terrorist attacks were targeted against American citizens in particular.[93] Additionally, it would be impermissible to speculate what the terrorists intended to do.[94]

b. Purposeful Availment

Walden negates Plaintiffs' argument that the defendants met the purposeful availment test by establishing a continuous presence in the United States and pressuring United States government policy.[95] *Walden* requires that the terror attacks in Israel have a "substantial connection" with the forum.[96] Moreover, courts usually require that the plaintiff show a causal connection between a defendant's U.S. contacts and the episode in suit.[97]

Plaintiffs offered pamphlets published by the PA as evidence that Defendants intended their terror campaign to influence the United States.[98] The pamphlets were submitted in an attempt to show that the defendants were trying to influence United States policy toward the Israel-Palestinian conflict.[99] These exhibits contained broad language of how the United States and Europe should exert pressure on Israel to alter its practice towards the Palestinians.[100] For due process purposes, it is insufficient to rely on this evidence without some other connection among the activities underlying the litigation, the defendants, and the forum.[101] In this case, Plaintiffs' claims do not arise from Defendants' purposeful contacts or activity in the forum.[102] Defendants' missions in Washington, D.C., and New York revolve around lobbying activities that are not proscribed by the ATA and are not connected to the wrongs for which Plaintiffs seek redress.[103]

c. Accepting Process

Plaintiffs' third contention is that the defendants consented to personal jurisdiction under the ATA by appointing an agent to accept process.[104] Although the ATA permitted service of process on the PLO and PA representatives in Washington, it is unclear whether the statute sat-

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 341.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 342.
102. *Id.*
103. *Id.*
104. *Id.* at 343.

isfies due process.[105] Due process analysis, including considerations of minimum contacts and reasonableness, applies even when federal service-of-process statutes are satisfied.[106] Here, Defendants were not afforded due process, and courts have neither general nor specific jurisdiction over Defendants.[107]

V. Conclusion

This Court concludes that it lacks specific jurisdiction over the defendants because the subject terror attacks in Israel were not expressly aimed at the United States, and because the deaths and injuries suffered by the American plaintiffs were "random" and "fortuitous," and because lobbying activities regarding American policy toward Israel are insufficient conduct to support specific jurisdiction. The Court cannot exercise jurisdiction beyond the limits that due process proffers, notwithstanding the horror of the underlying attacks by the defendants and moral validity of the plaintiff's claims. Therefore, the Second Circuit properly dismissed this case.

Divya Acharya

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105. *Id.*

106. *Id.*

107. *Id.*

Bolivarian Republic of Venezuela et al. v. Helmerich & Payne International Drilling Co., et. al.

137 S. Ct. 1312 (2017)

The Supreme Court of the United States held that a party's incorrect argument that property was taken in violation of international law, even if non-frivolous, is insufficient to confer jurisdiction under the expropriation exception of the Foreign Sovereignty Immunities Act.

I. Holding

In the recent case, *Republic of Venezuela et al. v. Helmerich & Payne International Drilling Co., et al.*, the Supreme Court of the United States vacated and remanded the decision of the Court of Appeals for the District of Columbia Circuit. The Court analyzed the expropriation exception of the Foreign Sovereign Immunities Act and concluded that a court may exercise jurisdiction under the Foreign Sovereign Immunities Act's expropriation exception only when a party's relevant factual allegations show that property was taken in violation of international law. The Court held that an incorrect argument that property was taken in violation of international law is insufficient.

II. Facts and Procedure

In the mid-1970's, a wholly owned Venezuela-incorporated subsidiary ("Subsidiary") of an American company ("Parent") supplied oil-rigs to entities that were owned by the Venezuelan Government (hereinafter "Government").[1]

By 2010, the Government owed more than $10 million to the Subsidiary.[2] The Government began to send troops to the yard where the rigs were being held, and prevented the Subsidiary from removing them.[3] The Government subsequently issued a "Decree of Expropriation" which nationalized the rigs.[4] As a result, in 2011, the Parent and Subsidiary brought suit in a United States federal court against the Government entities.[5] The Parent and

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1. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1317 (2017). Helmerich & Payne International Drilling Co. ("H & PIDC") is an Oklahoma based company. They operated an oil-drilling business in Venezuela through its subsidiaries; *see In Alleged Expropriation of U.S. Assets by Venezuela, D.C. Circuit Holds That Venezuela Can Be Sued in the U.S. If the Expropriation Was Motivated by Discriminatory Animus; Discriminatory Takings Violate International Law*, 21 Int'l L. Update 62, 62 (2015) [hereinafter "Discriminatory Takings"].

2. *Bolivarian Republic,* 137 S. Ct. at 1317. Venezuela controls the exploration, production and exportation of oil through two state-owned corporations, Petroleos de Venezuela, S.A. ("PDVSA") and PDVSA Petroleo.

3. *Id*. In June 2010, PDVSA employees, assisted by solders of the Venezuelan National Guard, blockaded the premises of the subsidiaries, preventing them from removing their rigs and other assets.

4. *Id*. President Hugo Chavez issued the "Decree of Expropriation" which stated that the availability of drilling equipment was very low in the country and the world, and a lack of the equipment would affect Venezuela's national drilling plan. The president directed PDVSA to take forcible possession of the drilling rigs. *See* Discriminatory Takings.

5. *Bolivarian Republic*, 137 S. Ct. at 1317.

Subsidiary alleged that the Government had unlawfully expropriated the Subsidiary's oil rigs and sought compensation.[6]

The Government argued that the court should dismiss the case based on a lack of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA").[7] The Parent and the Subsidiary argued that the case falls under the expropriation exception.[8] The Venezuelan government argued to the contrary, reasoning that the matter did not fall under the exception because international law does not cover expropriations of property belonging to a country's own nationals, thus the taking of property was not in violation of international law.[9] The Government argued that the nationality of the Parent was a nonfactor, because they did not own the subsidiary's assets.[10]

The District Court found that the exception did not apply since the Subsidiary was a national of Venezuela.[11] Thus, the Government did have foreign sovereignty in regards to the suit by the Subsidiary. However, the court did not dismiss the Parent's claim, rejecting the argument that the Parent had no rights in the property. The court ultimately concluded that the actions of the Venezuelan government "deprived the parent, individually, of its essential and unique rights as sole shareholder by dismantling its voting power, destroying its ownership and frustrating its control over the company."[12] Subsequently, the Subsidiary appealed the dismissal of its expropriation claim, while the Venezuelan government appealed the court's refusal to dismiss the Parent's claim.[13] The Court of Appeals for the District of Columbia reversed in part and affirmed in part, deciding that both the Subsidiary and Parent's claims fell under the exception.[14]

The Court of Appeals contended that a sovereign's taking of its own nationals' property would not generally violate international law, but carved out an exception to this rule: if an expropriation unreasonably discriminates on the basis of a company's shareholders' nationality, then it would violate international law.[15] The Court did not find that the Subsidiary's property was taken in violation of international law, but simply, that it might have been. Since the claim was non-frivolous, they found that it fell within the exception.[16] With regard to the Parent's claim, the Court of Appeals found that the expropriation exception applied because the Parent had put its rights in property in issue in a non-frivolous way.[17]

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6. Id.
7. Id.
8. Id.
9. Id.
10. *Bolivarian Republic*, 137 S. Ct. at 1317.
11. *Id.*
12. *Id*. at 1317–18 (*citing* Helmerich & Payne Intern. Drilling Co. v. Bolivarian Republic of Venezuela, 971 F. Supp. 2d 49, 57–61 (2013)).
13. *Id*. at 1318.
14. *Id.*
15. *Bolivarian Republic*, 137 S. Ct. at 1318.
16. *Id.*
17. *Id*.

The Venezuelan government ultimately filed a petition for certiorari asking the Supreme Court to decide whether the correct standard had been applied.[18]

III. Discussion

A. The Foreign Sovereign Immunities Act (FSIA)

The Foreign Sovereign Immunities Act of 1976 provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States."[19] This act defines the jurisdiction of the courts of the United States in actions involving foreign sovereigns, their agencies and instrumentalities.[20] Before this act came into being, decisions regarding a foreign sovereign's immunity were decided on an *ad hoc* basis by the U.S. Department of State.[21] The enactment of this legislation was a response to the increase in contact between American citizens and companies, and foreign states and entities owned by foreign states.[22] The implementation of the act allowed for consistency in the litigation process.[23] The statute accomplished four objectives: (1) it codified the "restrictive" principle of sovereign immunity which restricts immunity to claims involving a foreign state's public acts and does not extend to suits based on commercial or private conduct; (2) it transferred the determination of immunity from the Executive Branch to the Judicial Branch which in turn reduced foreign policy implications; (3) it created a formal procedure to follow for service of process, notice and the obtaining of in personam jurisdiction over a foreign state or instrumentality in an action in a United States court; and (4) it remedied the predicament of a plaintiff who obtained a judgment against a foreign state.[24]

1. Expropriation Exception

One of the jurisdictional exceptions to the FSIA, known as the "expropriation exception" provides that "a foreign state shall not be immune from the jurisdiction of courts of the United States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property . . . is owned or operated by an agency or instrumentality of the foreign state . . . engaged in a commercial activity in the United States."[25] In other words, this exception grants jurisdiction only where there is a valid claim that property has been taken in violation of international law.

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18. *Id.*

19. 28 U.S.C. § 1604.

20. Hugh R. Koss, Brooke C. Galardi, Eric C. Strain, *The Foreign Sovereign Immunities Act Assessing the Immunity of Foreign States in U.S. Litigation*, 34 THE BRIEF 52, 59 (2004).

21. *Id.*

22. ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS § 3662 (4th ed. 2017).

23. *Id.*

24. *Id.*

25. 28 U.S.C. § 1605(a)(3).

The phrase "taken in violation of international law," means the nationalization or expropriation of property without payment of the prompt, adequate, and effective compensation required by international law, as well as the taking of property, which is arbitrary or discriminatory.[26] Therefore, to be a valid taking under international law: (1) the expropriation must serve a public purpose; (2) aliens must not be discriminated against; and (3) there must be payment of just compensation.[27]

The Court found that this was not a situation that violates international law. A sovereigns taking or regulating of its own nationals' property within its own territory is referred to as a "jure imperii."[28] This taking is not ordinarily in violation of international law and is generally immune from suit.[29] Here, the Venezuelan Government was taking from the Venezuelan subsidiary.[30] Therefore, the Court found that this was not in violation of international law and that the exception did not apply. Although the Court reached this decision, it still engaged in a statutory interpretation of the language to determine what "in issue" means.

a. The Non-frivolous-Argument Standard

A claim is frivolous when it is "clearly insufficient on its face, and does not controvert the material points of the opposite pleading and is presumably interposed for mere purposes of delay or to embarrass the plaintiff."[31] Although the expropriation in this case was not in violation of international law, the Court had to analyze whether Plaintiff's non-frivolous claim was sufficient to bring the claim "in issue."[32] The problem with the language of the expropriation exception is that it can easily be misinterpreted.[33] The Court analyzed the meaning of the term "in issue," and in doing so, it had to analyze the non-frivolous argument standard.[34] If something is "in issue" does it merely mean that the exception will apply even if the argument is not a sound one? The Court says no.[35] Although the District of Columbia held that a motion to dismiss will be granted in a FSIA case on the grounds that the plaintiff has failed to plead a taking in violation of international law or has no rights in property in issue *only if* the claims are wholly insubstantial or frivolous,[36] the Supreme Court disagrees.[37] A failed argument, even if non-frivolous, is still not sufficient to confer jurisdiction.[38]

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26. ALEXA ASHWORTH ET AL., FEDERAL PROCEDURE, LAWYER'S EDITION § 36:505 (2017).
27. *Id.*
28. *See* RESTATEMENT (THIRD) OF FOREIGN REL. L. OF THE U.S. § 712 (Am. Law Inst. 1987); RESTATEMENT (FOURTH) OF FOREIGN REL. L. OF THE UNITED STATES § 455 (Am. Law Inst. 2015).
29. *Bolivarian Republic*, 137 S. Ct. at 1321.
30. *Id.*
31. *Frivolous,* BLACK'S LAW DICTIONARY (2d ed. 2009).
32. *Bolivarian Republic*, 137 S. Ct. at 1321.
33. *Id.*
34. *Id.*
35. *Id.*
36. Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934, 943 (D.C. Cir. 2008).
37. *Bolivarian Republic*, 137 S. Ct. at 1321.
38. *Id.*

2. Plaintiff's Arguments and Policy Considerations

The Plaintiffs in this case argue that 28 U.S.C. § 1331, the federal question jurisdiction statute, provides that the federal court has jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States."[39] In a previous case, the Supreme Court held that the "arising under" language confers jurisdiction if a plaintiff can make a non-frivolous argument even if the argument is ultimately incorrect.[40] Additionally, the Plaintiff here argues that the non-frivolous argument approach would not disadvantage the Defendant as they can move for judgment on the merits under FRCP (12)(b)(6), or move for summary judgment under FRCP 56.[41] The Court disagreed however, because this finding would impose greater burdens of time or expense on the foreign nation.[42]

The Court heavily focused on the statute's language, history, and structure.[43] Justice Breyer emphasized that the non-frivolous argument interpretation of the expropriation exception would undermine the basic objective of the FSIA.[44] The whole purpose of the statute itself is to give a foreign sovereign immunity from a suit in the United States.[45] The use of the non-frivolous argument standard would create a difficulty in assessing jurisdictional questions.[46] The Court underscored the importance of clarity required when a foreign nation and foreign lawyers litigate in the American court system, because they must be able to understand American laws.[47]

Moreover, the Court feared that the utilization of this standard would create frictions with other nations in the world, and in turn, would allow foreign courts to entrap the United States in "expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated."[48]

3. *Verlinden B.V. v. Central Bank of Nigeria*

Since the main objective of FSIA is to free a foreign sovereign from the burden of defending themselves, the court is advised to resolve any factual disputes and reach a decision regarding immunity as soon as possible.[49]

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39. *Id.* at 1322.
40. Bell v. Hood, 327 U.S. 678, 685 (1946).
41. *Bolivarian Republic*, 137 S. Ct. at 1322.
42. *Id.*
43. *Id*.
44. *Id*. at 1321.
45. *Id*.
46. *Bolivarian Republic*, 137 S. Ct. at 1321.
47. *Id*.
48. *Id*. at 1322.
49. *Id.* at 1316.

The Court cites the *Verlinden* case to illustrate that a court should decide the foreign sovereign's immunity defense at the threshold of the action.[50] In that case, a Dutch corporation brought suit against an instrumentality of the Federal Republic of Nigeria, alleging anticipatory breach of a letter of credit.[51] The Supreme Court held that even where the grant of jurisdiction in the FSIA is consistent with the Constitution, it does not necessarily resolve the case.[52] An action must also be supported by a statutory grant of subject matter jurisdiction.[53] Justice Burger rationalized that at the threshold of every action against a foreign state, the court must satisfy itself that one of the exceptions applies.[54] The reasoning for this is that actions against foreign sovereigns in our courts raise "sensitive issues concerning the foreign relations of the United States."[55]

IV. Conclusion

Writing for a unanimous Court, Justice Breyer stated that the District of Columbia's non-frivolous argument standard is not sufficient to bring a claim under the expropriation exception. A case will only fall within the exception if the facts definitively show a taking of property in violation of international law. A party's mere argument that the taking is in violation is not enough.

Evident under the holding of this opinion are notions of diplomacy and the need to maintain international relationships. It is crucial that the courts of the United States respect foreign sovereigns and keep them out of our courts when they are reasonably able to do so. Although there are numerous exceptions carved out of the FSIA, courts must be extremely careful in applying those exceptions. In order to uphold the integrity of the FSIA, the Supreme Court had to balance the interests of the two opposing parties. In this situation, the Plaintiff was a foreign entity and thus the Court properly held that the expropriation exception did not apply.

Jenna Bontempi

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50. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Verlinden,* 461 U.S. at 493.

D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro

29 N.Y.3d 292, 56 N.Y.S.3d 488 (2017)

The New York Court of Appeals denied Defendant's motion for summary judgment, holding that the Supreme Court, New York County, has personal jurisdiction over Defendant, pursuant to New York's long-arm jurisdiction statute, thus establishing subject matter jurisdiction.

I. Holding

In the recent case *D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, the New York Court of Appeals considered whether the Supreme Court, New York County, had personal jurisdiction over a foreign Defendant under New York's long-arm jurisdiction statute.[1] The Court held that the lower court has personal jurisdiction over the Defendant under New York CPLR § 302(a)(1) because: (1) Defendant purposefully availed itself of the privilege of conducting activities within New York by transacting business in the state; (2) Plaintiff's claim arose from Defendant's business transactions in New York; and (3) the exercise of long-arm jurisdiction comports with federal due process.[2]

The Court of Appeals also considered whether the lower court had subject matter jurisdiction over the dispute under New York Business Corporation Law § 1314(b)(4).[3] Chief Judge DiFiore reasoned that because the lower court had personal jurisdiction over the Defendant, it also had subject matter jurisdiction over the dispute.[4] As such, the Court of Appeals reversed the order of the Appellate Division and denied Defendant's motion for summary judgment.[5]

II. Facts & Procedural History

Plaintiff, D & R Global Selections, S.L., is a Spanish limited liability company.[6] Defendant, Bodega Olegario Falcon Pineiro, is a Spanish winery.[7] In March 2005, the two parties entered into an oral agreement, in which Plaintiff agreed to find a distributor to import Defendant's wine into the United States. In exchange, Defendant agreed to pay a commission to Plaintiff on all wine sales made to that distributor.[8]

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1. *See* D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 56 N.Y.S.3d 488, 490 (2017).
2. *Id*. at 297.
3. *Id*. at 295.
4. *Id*. at 297.
5. *Id*. at 300.
6. *D & R Global Selections*, 29 N.Y.3d at 295. The company is based in Pontevedra, Spain, and it does not have offices or a permanent presence in New York.
7. *Id.* The winery is located in Pontevedra, Spain, and it does not have offices or a permanent presence in New York.
8. *Id.*

In November 2005, Plaintiff introduced Defendant to Kobrand Corp., a wine importer and distributor located in New York.[9] Then, in January 2006, Defendant entered into an exclusive distribution agreement with Kobrand Corp.[10] For the next year, Defendant paid a commission to Plaintiff on all wine sold to Kobrand Corp., but ceased all payments in January 2007.[11] As a result, on November 9, 2007, Plaintiff brought suit against Defendant for breach of contract, quantum meruit, and unjust enrichment.[12] Plaintiff claimed Defendant was required to pay commissions to Plaintiff as long as Defendant continued to sell wine to Kobrand Corp.[13]

In June 2008, Plaintiff obtained a default judgment against Defendant.[14] On November 12, 2009, a judgment for $133,570.12 was entered against Defendant.[15] Then, on February 1, 2010, Defendant moved to vacate the default judgment and dismiss the action for lack of personal and subject matter jurisdiction.[16] Defendant also claimed that its obligation to pay commissions to Plaintiff expired after one year.[17] Thereafter, on June 2, 2010, the Supreme Court entered an order, denied Defendant's motion to vacate, and did not consider Defendant's motion to dismiss.[18] Defendant appealed, and on December 1, 2011, the Appellate Division reversed and vacated the default judgment, holding there was an issue of fact as to whether the lower court had personal jurisdiction over Defendant under New York's long-arm jurisdiction statute.[19]

On remand, Defendant moved for summary judgment based on lack of personal and subject matter jurisdiction.[20] The Supreme Court denied Defendant's motion for summary judgment, whereby Defendant appealed, and on May 14, 2015, the Appellate Division reversed again, holding that the lower court did not have personal jurisdiction over Defendant under New York's long-arm statute.[21] The Appellate Division reasoned that although Defendant transacted business in New York, Plaintiff's claim did not arise from Defendant's business

9. *Id.*

10. *Id.*

11. *Id.*; *see also* D & R Global Selections, S.L. v. Pineiro, 90 A.D.3d 403, 404, 934 N.Y.S.2d 19, 20 (1st Dep't 2011) ("[A]ll payments were made in Spain in the Euro currency.").

12. *D & R Global Selections*, 90 A.D.3 at 404; *see also D & R Global Selections*, 29 N.Y.3d at 295.

13. *D & R Global Selections*, 29 N.Y.3d at 296.

14. *Id.*; *D & R Global Selections*, 90 A.D.3d at 404 (A Spanish attorney instructed Defendant not to take action on the complaint, advising that personal jurisdiction did not exist and service of process was insufficient under both Spanish and New York law).

15. *D & R Global Selections*, 90 A.D.3d at 404.

16. *D & R Global Selections*, 29 N.Y.3d at 296.

17. *Id.*

18. *Id.*; *D & R Global Selections*, 90 A.D.3d at 404.

19. *D & R Global Selections*, 90 A.D.3d at 406 ("Plaintiff failed to demonstrate that vacating the default would unjustly prejudice it, and the motion to vacate the default judgment was not untimely. Especially in view of New York's preference for resolving disputes on their merits, it is appropriate to vacate the default judgment and permit the matter to be addressed on its merits.").

20. *D & R Global Selections*, 29 N.Y.3d at 296.

21. *Id.*; D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 128 A.D.3d 486, 487, 9 N.Y.S.3d 234, 234 (1st Dep't 2015) (finding that because Defendant was "neither incorporated in New York State nor ha[d] its principal place of business [t]here, New York courts may not exercise jurisdiction over it").

transactions in New York because the oral agreement was made and performed wholly in Spain.[22] Thereafter, the Court of Appeals granted Plaintiff leave to appeal.[23]

III. Analysis

A. Specific Personal Jurisdiction

1. Federal Law

Under federal law, when a defendant's activities within a forum state are not substantial and continuous enough to be subject to general personal jurisdiction, they may nonetheless be subject to specific personal jurisdiction when the dispute arises out of the defendant's contacts with the forum state.[24] Before exercising jurisdiction, the court must determine: (1) whether the defendant purposefully established minimum contacts in the forum state; and (2) whether exercising jurisdiction would offend traditional notions of fair play and substantial justice[25].

Under the first inquiry, due process requires that the defendant purposefully avail itself of the privilege of conducting activities within the forum state, invoking the benefits and protections of the forum state's laws.[26] Under the second inquiry, the court must analyze the following factors: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the states in furthering fundamental substantive policies.[27]

2. New York Law

Under New York law, specific personal jurisdiction is provided for in CPLR § 302, New York's long-arm jurisdiction statute.[28] But before exercising jurisdiction, the court must determine: (1) whether jurisdiction is authorized under CPLR § 302; and if so, (2) whether exercising jurisdiction is consistent with federal due process.[29]

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22. *D & R Global Selections*, 128 A.D.3d at 487 ("[T]here is no substantial nexus between [P]laintiff's claim for unpaid commissions in connection with the sales of that wine, pursuant to an agreement made and preformed wholly in Spain, and those promotional activities."); *D & R Global Selections*, 29 N.Y.3d at 296–97.

23. *D & R Global Selections*, 29 N.Y.3d at 297.

24. *See* Oscar G. Chase & Lori B. Day, *Re-Examining New York's Law of Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown and J. Mcintyre Machinery, Ltd. v. Nicastro*, 76 ALB. L. REV. 1009, 1024 (2013).

25. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987).

26. *See* Chase & Day, *supra* note 24, at 1024; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474–75 (1985).

27. *Burger King,* 471 U.S. at 476; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Chase & Day, *supra* note 24, at 1024.

28. *See* Chase & Day, *supra* note 24, at 1033.

29. *Id*.

When a foreign defendant challenges specific personal jurisdiction, courts look to CPLR § 302(a)(1), which provides, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state."[30] Here, because Chief Judge DiFiore concluded Defendant transacted business within New York.[31]

a. Whether Jurisdiction is Authorized

Under CPLR § 302(a)(1), the defendant's physical presence in New York is not required, and only one transaction in New York is needed to establish jurisdiction over the defendant.[32] Jurisdiction is authorized under CPLR § 302(a)(1) when: (1) the defendant purposefully avails itself of the privilege of conducting activities within New York by transacting business in New York; and (2) the plaintiff's claim arises from the defendant's transaction of business in New York.[33]

A foreign defendant purposefully avails itself of the privilege of conducting activities within New York by transacting business in the state when it seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship with individuals or businesses located in New York.[34] Moreover, a foreign defendant transacts business in New York when on its own initiative, it projects itself into New York to engage in a sustained and substantial transaction of business.[35] In *Deutsche Bank Securities v. Montana Board of Investments*, the New York Court of Appeals held that the Defendant purposefully availed itself of the privilege of conducting activities within New York by intentionally entering into bond transactions with a New York employee of a corporation headquartered in New York.[36]

Here, the Court of Appeals held that the Appellate Division properly determined that Defendant purposefully availed itself of the privilege of conducting activities within New York by transacting business in the state, thereby invoking the benefits and protections of New York laws.[37] Chief Judge DiFiore reasoned that Defendant purposefully availed itself because Defendant was physically present in New York on various occasions.[38] For example, Defendant accompanied Plaintiff to New York several times to attend wine industry events in hopes of meeting potential distributors. Similarly, on at least two occasions, Defendant returned to New York to promote its wine alongside Plaintiff and Kobrand Corp.[39] Chief Judge DiFiore also reasoned that Defendant purposefully availed itself because Defendant's activities in New York

30. N.Y. CPLR § 302(a)(1).

31. D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 301, 56 N.Y.S.3d 488, 494 (2017).

32. D & R Global Selections, S.L. v. Pineiro, 90 A.D.3d 403, 404, 934 N.Y.S.2d 19, 20 (1st Dep't 2011).

33. *D & R Global Selections*, 29 N.Y.3d at 297.

34. *Id.* at 298; Paterno v. Laser Spine Inst., 24 N.Y.3d 370, 377, 998 N.Y.S.2d 720, 725 (2014).

35. *D & R Global Selections*, 29 N.Y.3d at 298.

36. *See* Chase & Day, *supra* note 26, at 1036; *see also* Deutsche Bank Secs., Inc. v. Mont. Bd. of Investments, 7 N.Y.3d 65, 72, 818 N.Y.S.2d 164, 167 (2006).

37. *D & R Global Selections*, 29 N.Y.3d at 298.

38. *Id.*

39. *Id.*

resulted in the purposeful creation of a continuing relationship with a New York corporation.[40] After promoting its wine in New York, Defendant, as planned, entered into an exclusive distribution agreement with Kobrand Corp. for the importation of its wine into the United States.[41]

A plaintiff's claim arises from a foreign defendant's transaction of business in New York when the cause of action has an articulable nexus or substantial relationship with the defendant's transaction of business in New York.[42] There must be a relatedness between the transaction and the legal claim.[43] In other words, the relationship between the claim and the defendant's transaction of business in New York cannot be too attenuated or merely coincidental.[44] An articulable nexus or substantial relationship "exists where at least one element arises from" the defendant's transaction of business in New York.[45]

Here, Plaintiff asserted that Defendant breached the oral agreement when it ceased paying Plaintiff commissions on wine sales to Kobrand Corp.[46] Plaintiff prevailed on this claim because it successfully showed that Defendant failed to pay commissions on wine sales to a distributor, which Plaintiff identified and solicited for Defendant.[47] The Court of Appeals held that Plaintiff's claim arose from Defendant's business transactions in New York.[48] According to Chief Judge DiFiore, Defendant's business transactions in New York were, in fact, "at the heart of [P]laintiff's claim."[49] She disagreed with the Appellate Division's conclusion that the oral agreement was performed wholly in Spain, and instead concluded that both parties engaged in activities in New York in furtherance of the oral agreement.[50] Ultimately, the Court held that an articulable nexus or substantial relationship had been established between Defendant's business activities conducted in New York and the contract, Defendant's breach of the contract, and potential damages for unpaid commissions.[51]

b. Whether Jurisdiction is Consistent with Due Process

The exercise of long-arm jurisdiction under CPLR § 302(a)(1) must comport with federal due process in order to establish jurisdiction over the defendant.[52] Federal due process requires: (1) that the defendant have minimum contacts with New York such that the defendant should reasonably anticipate being haled into court in New York; and (2) the prospect of having to defend a suit in New York comports with traditional notions of fair play and substantial jus-

40. *Id.*
41. *Id.*
42. *Id.* at 298–99; *see also* Licci v. Lebanese Can. Bank, 20 N.Y.3d 327, 339, 960 N.Y.S.2d 695, 702 (2012).
43. *D & R Global Selections*, 29 N.Y.3d at 299.
44. Johnson v. Ward, 4 N.Y.3d 516, 520, 797 N.Y.S.2d 33, 35 (2005).
45. *Licci*, 20 N.Y.3d at 341, 960 N.Y.S.2d at 703; *D & R Global Selections*, 29 N.Y.3d at 299.
46. *D & R Global Selections*, 29 N.Y.3d at 299.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *D & R Global Selections* 29 N.Y.3d at 299.
52. *Id.*

tice.[53] Very rarely is personal jurisdiction under CPLR § 302(a)(1) prohibited under the due process analysis.[54]

When a foreign defendant establishes minimum contacts within New York, it simultaneously creates a reasonable expectation that it may have to defend a lawsuit in New York.[55] This reasonable expectation must comport with traditional notions of fair play and substantial justice,[56] meaning that the court's exercise of jurisdiction must be reasonable under the particular circumstances of the case.[57] The defendant has the burden of presenting a compelling reason why the exercise of jurisdiction is unreasonable under the circumstances.[58]

Here, the Court of Appeals held that Defendant established minimum contacts with New York.[59] Defendant visited New York on various occasions to promote its wine and find a distributor for its wine, and it entered into an exclusive distribution agreement with a New York-based distributor.[60] Further, Defendant purposefully availed itself of the privilege of doing business in New York when it took purposeful action, motivated by its desire to sell its product in the United States.[61] As such, the Court held that Defendant could have reasonably foreseen having to defend a lawsuit in New York.[62]

The Court also held that Defendant's prospect of having to defend a suit in New York comported with traditional notions of fair play and substantial justice.[63] Defendant presented no compelling reason as to why the exercise of jurisdiction might be considered unreasonable.[64] Thus, ultimately, the exercise of long-arm jurisdiction over Defendant comported with federal due process.[65]

B. Subject Matter Jurisdiction

1. Federal Law

Federal courts have limited subject matter jurisdiction, meaning they can only hear certain cases as prescribed by the Constitution and federal statutes. For example, 28 USC §1331 pro-

53. *Id*. at 300.
54. *Id*. at 299–300.
55. *Id*. at 300; *see also* LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 216, 713 N.Y.S.2d 304, 308 (2000).
56. *LaMarca*, 95 N.Y.2d at 216; *see also D & R Global Selections*, 29 N.Y.3d at 300.
57. Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 129 (2d Cir. 2002).
58. *LaMarca*, 95 N.Y.2d at 217–18; *see also D & R Global Selections*, 29 N.Y.3d at 300.
59. *D & R Global Selections*, 29 N.Y.3d. at 300.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *D & R Global Selections*, 29 N.Y.3d. at 300.
65. *Id*.

vides for federal question jurisdiction[66] and 28 USC §1332 provides for diversity of citizenship jurisdiction.[67] Federal courts also have discretion in deciding whether to address personal jurisdiction before subject matter jurisdiction, or vise versa.[68] In most cases, subject matter jurisdiction does not involve a difficult inquiry, so it is usually addressed first.[69] However, if a personal jurisdiction issue presents no complex questions, and if an alleged defect in subject matter jurisdiction raises a difficult and novel question, it is appropriate for the court to consider personal jurisdiction first.[70]

2. New York Law

Typically, state courts have general subject matter jurisdiction, meaning they can hear any case. Under New York law, when a foreign defendant challenges subject matter jurisdiction, courts look to New York Business Corporation Law § 1314(b)(4), which provides "an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind or by a non-resident…[w]here…a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the civil practice law and rules."[71] In other words, under New York Business Corporation Law § 1314(b)(4), when a court finds it has personal jurisdiction over a defendant under CPLR § 302, it also finds it has subject matter jurisdiction over the dispute.[72] Thus, subject matter jurisdiction under New York Business Corporation Law § 1314(b)(4) depends on personal jurisdiction under CPLR § 302.[73] Here, because the lower court had personal jurisdiction over Defendant, the Court of Appeals held that it also had subject matter jurisdiction over Defendant, pursuant to Business Corporation Law § 1314(b)(4).[74]

IV. Conclusion

The New York Court of Appeals held that under CPLR § 302(a)(1), the lower court had specific personal jurisdiction over Defendant Bodega Olegario Falcon Pineiro.[75] As a result, the Court found that under New York Business Corporation Law § 1314(b)(4), the lower court

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66. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

67. 28 U.S.C. § 1332 ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between . . . citizens of different states . . . citizens of a State and citizens or subjects of a foreign state . . . citizens of different States and in which citizens or subjects of a foreign state are additional parties . . . [and] foreign state[s].").

68. See DANIEL R. COQUILLETTE ET AL., MOORE'S FEDERAL PRACTICE § 12:30 (3d ed. 2017).

69. *Id.*

70. *Id.*

71. N.Y. Bus. Corp. Law § 1314 (b)(4).

72. D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 297, 56 N.Y.S.3d 488, 492 (2017).

73. D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 128 A.D.3d 486, 487, 9 N.Y.S.3d 234, 234 (1st Dep't 2015).

74. *D & R Global Selections*, 29 N.Y.3d at 297.

75. *Id.*

had subject matter jurisdiction over the Defendant corporation.[76] An important takeaway from this decision is that the laws governing the jurisdiction of New York courts are similar to the federal laws governing the jurisdiction of federal courts, especially with regard to the analysis for specific personal jurisdiction. It is important to note this because, as in most areas of law, it is imperative to evaluate whether New York law and federal law are converging or diverging as time progresses.

Originally, federal law was much more liberal in conferring jurisdiction on federal courts, until New York law followed suit.[77] Federal law was first to replace the restrictive long-standing requirement that a person or corporation be physically present in the forum state to be subject to specific personal jurisdiction.[78] This old requirement was replaced with two new, more liberal requirements that the defendant purposefully establish minimum contacts in the forum state and that the court exercise jurisdiction only if doing so would not offend traditional notions of fair play and substantial justice.[79] New York law was also considered more liberal after abandoning the "physically present" requirement; however, because New York law introduced an additional requirement, it is still slightly more restrictive than federal law. In New York, the old requirement was replaced with three new requirements that the defendant purposefully avail itself of the privilege of conducting activities within New York by transacting business in New York, that the plaintiff's claim arises from the defendant's transaction of business in New York, and that the court exercise jurisdiction only if doing so is consistent with federal due process.[80]

It is crucial to keep abreast of any new developments in New York and federal law pertaining to the courts' conferring of jurisdiction on defendants. Time will tell if the liberal trend, which results in more foreign corporation defendants being held subject to jurisdiction in the United States, will continue, or if a more restrictive trend will supersede. Unfortunately, for the foreign corporations doing business in the United States, it appears that both federal and New York law will be construed even more liberally in the future, and more foreign plaintiffs will be able to take advantage of the opportunity to litigate against foreign defendants in the United States rather than abroad.

Laina Boris

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76. *Id.*

77. Chase & Day, *supra* note 24, at 1011–12.

78. *Id.*

79. *Id.*

80. *D & R Global Selections*, 29 N.Y.3d at 297–301.