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International Law Practicum

A publication of the International Section of the New York State Bar Association

Comparative Perspectives on Mediation in New York and Singapore: Lessons for Court-Administered ADR Services

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A Guide for Non-New York Attorneys

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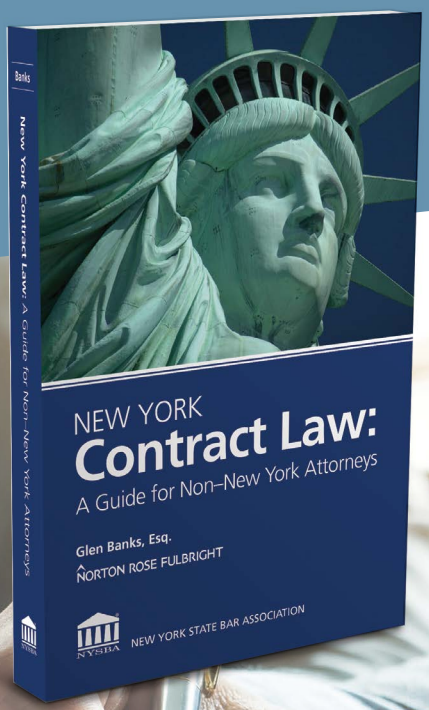

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International Section

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Message From the Section Chair

By Azish E. Filabi

Welcome to the *International Law Practicum* and Chapter News! We encourage all our Section's committees to provide articles of interest, and our chapters to provide news of the latest legal developments in your home jurisdictions. Cases, new legislation, programs, or practice tips—all can provide content for substantive articles or news developments.

The International Section of the New York State Bar Association is a global community of lawyers committed to advancing professionalism, education and the rule of law. Our global community has faced a number of challenges over the past few years, as the toll of the global pandemic reverberated through the world, and the economy came to a near halt in some areas with lockdowns. More recently, the unlawful invasion of Ukraine by Russia called uniquely upon lawyers to respond with a call to action in defense of the rule of law and in support of human rights.

The next year brings new opportunities for collaboration and action through our Section's substantive law committees, and over 70 chapters in jurisdictions around the world. Now that we can reconvene in-person, our next global meeting will be in London on Nov. 30, 2022, comprising multiple days of education and networking. The Section is also exploring possibilities to convene regional meetings in multiple locations in 2023, to expand opportunities for members to meet and connect.

I'd like to commend and congratulate the Section's immediate past chair, Ed Lenci, for his leadership through these trying times. Among his many accomplishments, Ed led the creation of a Ukraine Task Force whose members include a number of our International Section lawyers as well as experts from collaborating organizations, including the Ukrainian Bar Association. I'd also like to extend special thanks to the NYSBA administration for supporting our various activities, and in particular Carra Forgea, the international relations manager, for her dedication and hard work.

There are multiple ways to get involved in the International Section. You can reach out to one of our committee or chapter chairs about substantive law involvement, write for this *Practicum*, propose a panel topic for an upcoming meeting, or join an event to network and learn. Thank you for your continued membership and support of the International Section, I hope to see you soon!

Azish Filabi

Message From the Editor

By Torsten M. Kracht

Dear Friends and Readers:

It is an honor and privilege to welcome you to Vol. 34, No. 1, of the *International Law Practicum.* Our world has, of course, dramatically changed over the last two years as we all adjusted to new ways of working and communicating. Unfortunately, this edition comes to publication later than hoped because of the new challenges that COVID-19 has imposed on bringing publications to print and distribution. With this edition, we hope to resume our regular semi-annual publication schedule.

Many hours of hard work have gone into producing this new issue. In addition to our contributing authors, I would like to thank Pam Chrysler and Lori Herzing at NYSBA for their tireless efforts to bring this edition to print. I would also like to thank our executive editor, Andria Adigwe, for assembling and leading our team of talented student editors. Unfortunately, due to a change in jobs and geographic location, Andria has resigned as executive editor. We wish her all the best in her new position and welcome her back if her schedule permits!

I hope this issue provokes further thought and discussion. Feedback and suggestions about this edition or the *Practicum* in general are highly encouraged and I hope that together, as a community, we can continue to develop our publication as a practical forum for the exchange of useful information for our members.

Best,
Torsten M. Kracht
tkracht@hunton.com

Book Review

Commercial Litigation in New York State Courts

(New York County Lawyers Association, West's New York Practice Series, 5th ed. 2020)
Edited by Robert L. Haig (Thomson Reuters, 2020)

Reviewed by John F. Zulack and Bianca Lin

When the New York State Commercial Division was created in 1995, Robert Haig was chosen by former Chief Judge Judith Kaye (1938-2016) to co-chair the Commercial Courts Task Force and create the court that would make New York state the preferred forum for adjudication of commercial disputes. Mr. Haig's seminal treatise, *Commercial Litigation in New York State Courts*, was published the same year. His treatise helped make the Commercial Division the success that it is today and has been an indispensable resource for New York practitioners as well as those outside the United States who adjudicate complex commercial disputes. The fifth edition of Mr. Haig's treatise, released in October 2020, continues to guide readers through the development of commercial litigation in New York, as well as emerging areas of law that commercial litigators have confronted more frequently since the publication of the fourth edition in 2015.

Lawyers practicing outside the United States who want to understand litigation in New York, or who are collaborating with New York counsel on a cross-border commercial matter, should look no further than Mr. Haig's treatise to guide them. The fifth edition maintains the treatise's easy-to-follow style, which includes outlines, checklists and forms. These features also make it an ideal resource for international practitioners who want to gain familiarity with New York procedure. It is the only treatise devoted to commercial litigation in New York State courts, and the only treatise focusing on the interplay between the rules of procedure in New York courts and the substantive law that commercial litigators frequently encounter.

The fifth edition has a total of 256 authors, who represent some of the most highly esteemed practitioners and jurists in New York. There are 29 judges on the roster of authors, including Chief Judge of the State of New York Janet DiFiore, who succeeded former Chief Judge Judith Kaye and former Chief Judge Jonathan Lippman as the author of Chapter 1. Court of Appeals Judge Eugene M. Fahey, former Court of Appeals Judges Victoria A. Graffeo and Robert S. Smith, and many Appellate Division justices and Commercial Division justices have contributed chapters. U.S. District Judges Brian M. Cogan, Katherine B. Forrest, Barbara S. Jones and William F. Kuntz, II are also among the authors included in the fifth edition.

Without exception, the authors either practice commercial litigation or preside over commercial disputes as jurists. The insights in the Haig treatise can only be gained from years of litigation experience. It addresses the practical and strategic considerations that practitioners confront on a daily basis and was designed to be a step-by-step guide covering

all aspects of commercial litigation, from the initial assessment of a case through to enforcement of judgments. In addition to in-depth analysis of law and procedural matters, the treatise also provides checklists of allegations and defenses, hundreds of essential litigation forms and jury charges, and strategies for representing both plaintiffs and defendants. It is an essential guide for international practitioners who are just beginning to navigate the ins-and-outs of New York procedure and researching substantive points of New York law for the first time.

The fifth edition includes 28 new chapters, comprising two new volumes and more than 2,800 additional pages addressing developing areas of the law that have grown in prominence in the five years since the fourth edition was published. The treatise now spans 156 chapters, 10 volumes and 13,076 pages of text, a tremendous undertaking that represents more than $60 million in billable hours, according to Mr. Haig's "conservative[] estimate" of the time authors have devoted to the treatise since its first publication in 1995. The 28 new chapters include Artificial Intelligence (Chapter 79), Attorney Discipline (Chapter 87), Business Courts (Chapter 14), Career and Practice Development (Chapter 82), Civil Justice Reform (Chapter 88); Commercial Cases in New York County for Less Than $500,000 (Chapter 40), Comparison with Commercial Litigation in Delaware Courts (Chapter 12), Comparison with Commercial Litigation in Foreign Courts (Chapter 13, discussed in more detail below), Cross-Border Litigation (Chapter 23, discussed in more detail below), Deceptive and Misleading Business Practices (Chapter 127), Declaratory Judgments (Chapter 36), Diversity and Inclusion (Chapter 83), Fashion and Retail (Chapter 135), Fiduciary Duty Litigation (Chapter 117), Fraud (Chapter 128), Fraudulent Transfer (Chapter 129), Gaming (Chapter 152), Joint Ventures (Chapter 105), Limited Liability Companies (Chapter 104), Litigation Management by Judges (Chapter 74), Marketing to Potential Business Clients (Chapter 80), Negligence (Chapter 130), Personal Injury (Chapter 108), Private Equity (Chapter 109), Teaching Litigation Skills (Chapter 81), Third-Party Litigation Funding (Chapter 77), Valuation of a Business (Chapter 111), and Valuation of Real Property (Chapter 146). Another useful feature is a separate appendix with an index and tables of all laws, rules and cases discussed throughout the treatise. References to other treatises are included in many chapters, which makes it simple for readers to expand their research to additional sources. The existing chapters have also undergone extensive updates to reflect the many changes over the past five years in New York procedural and substantive law relating to commercial litigation.

Chapter 23 on cross-border litigation, one of the new chapters included in the fifth edition, is particularly useful for international practitioners. The chapter provides a framework for approaching cross-border disputes in New York litigation, and addresses important civil procedure and jurisdictional issues, including service of process, discovery, forum selection clauses (also addressed in Chapter 15, Enforcement of Forum Selection Clauses, discussed in more detail below), *forum non conveniens* arguments, choice of law, and chain of commerce analyses. It also discusses privilege and data privacy issues in the cross-border context and introduces forms of injunctive relief that can be useful in cross-border litigation. The chapter concludes with guidance for managing parallel proceedings, as cross-border litigation, by its nature, often results in multiple actions in different jurisdictions and different fora.

Chapter 13, Comparison with Commercial Litigation in Foreign Courts, is also a new chapter of particular interest to international lawyers. The chapter delves into various aspects of the commercial litigation systems in two other common law countries (England and Australia) and three civil law countries (France, Germany, and Russia). It focuses on similarities to and differences from New York litigation that may be strategically relevant in choosing between forums, including, for example, the availability of jury trials, confidentiality of filings and proceedings, breadth of discovery, and available remedies. Practitioners also can use those comparisons to identify questions to be asked when considering litigation in any other common or civil law country not discussed in Chapter 13.

The fifth edition also updates and expands upon existing chapters of interest to cross-border lawyers, including: Comparison with Commercial Litigation in Federal Courts (Chapter 11); Coordination of Litigation Within New York and Between Federal and State Courts (Chapter 18); Suing or Representing Foreign Corporations in New York State Courts (Chapter 22); Litigation Avoidance and Prevention (Chapter 71); Litigation Management by Law Firms (Chapter 76); Litigation Technology (Chapter 78); White Collar Crime (Chapter 125); The Interplay Between Commercial Litigation and Criminal Proceedings (Chapter 126); E-Commerce (Chapter 139); and Information Technology Litigation (Chapter 141). The treatise also covers commonly encountered topics such as contracts, insurance, sale of goods, banking, securities, antitrust and intellectual property.

Also of particular importance to the international law community is Chapter 15, Enforcement of Forum Selection Clauses, specifically § 15:7, which discusses New York's General Obligations Law § 5-1402 (Choice of Forum), and CPLR 327(b). CPLR 327(b) works in conjunction with New York General Obligations Law § 5-1402 and provides that a court may not stay or dismiss any action on the basis of *forum non conveniens* where the action arises out of a contract, agreement, or undertaking to which § 5-1402 applies, and

where the parties to the contract have agreed that New York law is to govern the rights and duties, in whole or in part, under the contract. In such situations, the court is required to keep the action in the New York courts.

The treatise devotes substantial attention to the discovery process in New York actions, a process that can be accused of frightening potential litigants, who may opt instead to litigate outside of New York, or even outside of the U.S. Chapter 27 does an effective job of putting potential practitioners' minds at ease, and helps to focus potential litigants on the benefits of New York's comprehensive disclosure process, such as how the thoroughness of the discovery process better facilitates truth-finding.

As the Commercial Division has become the preferred court for adjudicating commercial disputes, it is more important than ever for international practitioners to expand their knowledge of New York procedure. Unlike federal courts in New York, the Commercial Division has statutory authority to hear disputes between parties to a contract who have no contact with New York or with the United States other than having included a New York choice of law and a New York choice of forum provision in their contract,[1] as long as the contract relates to a transaction having a value of at least one million dollars.[2] As explained above, a New York state court cannot dismiss such a lawsuit on the ground of forum non conveniens.[3]

The Commercial Division consists of 31 parts with judges who have been selected for their expertise in commercial matters.[4] In addition to New York commercial matters, the Commercial Division handles many international and cross-border disputes. Largely due to the creation of the Commercial Division, "New York is widely recognized as having an established, well-developed contractual commercial law equipped to deal with complex transactions."[5] As New York's role as the epicenter of commercial law continues to grow, practitioners can rely on Haig's treatise as a guide in this constantly changing world.

Mr. Haig and the contributing authors should be commended for their work on the fifth edition. The treatise continues its focus on the practical needs of commercial litigation practitioners located in New York and internationally, leaving no stone unturned in creating a comprehensive, substantive work that remains easy to navigate. Haig's work will continue to encourage international practitioners to litigate commercial cases in New York, ensuring that the Commercial Division will continue to see the growth and success that it has experienced for more than two decades.

John F. Zulack and **Bianca Lin** are partners at Allegaert Berger & Vogel LLP.

Endnotes

1. N.Y. Gen. Oblig. Law § 5-1401(Choice of Law) and § 5-1402 (Choice of Forum).
2. The newly added Chapter 40 discusses commercial cases not meeting the $500,000 monetary threshold for the Commercial Division. According to Chapter 40, commercial cases commenced in New York County that are below the monetary threshold may be able to pursue a procedural course that utilizes certain Commercial Division Rules upon application to the justice assigned.
3. CPLR 327(b).
4. *See* § 1:7, The Commercial Division today and in the future.
5. Final Report of the New York State Bar Association's Task Force on New York Law in International Matters (June 25, 2011), at 6.

Comparative Perspectives on Mediation in New York and Singapore: Lessons for Court-Administered ADR Services

By Nadia Moynihan and Eoin Moynihan

New York and Singapore are both highly regarded centers of mediation practice and scholarship, at the very forefront of the development of the industry globally. Both cities offer its lawyers world-class mediation training opportunities that are broadly similar in terms of the substance and philosophy of the facilitative mediation model. However, in the field of court-administered ADR services, significant divergences in practice may be observed, particularly in terms of how these services are provided and the mediation models being employed in doing so.

This article will attempt to briefly summarize the court ADR landscape in each jurisdiction, highlight some differences between them, and make some tentative recommendations for how Singapore's courts might draw on the experience of New York's courts to enhance the efficacy and sustainable resourcing of its own mediation services for the benefit of court users.

I. Overview of New York Courts' ADR Services

New York is home to some of the world's pre-eminent ADR institutions and is at the forefront of mediation practice and scholarship globally. Mediation has gained considerable popularity among New York's jurists over the last decade. Most of the state courts in New York maintain a mediation program, the details of which vary between courts, judicial districts, and specialized court divisions. Typically, each division (commercial, family, small claims, etc.) maintains its own panel of mediators.

The conditions regarding practical mediation and legal practice experience (where applicable) for admission to the panels vary, as do the terms for payment of services rendered by mediators. By and large, the people providing mediation services on behalf of the courts are predominantly lawyers in private practice who typically have specialized expertise in the practice area of the division in which they are mediating and a certain amount of prior experience mediating cases of that kind.

What these mediators have in common is a substantively similar education in mediation. New York's courts accredit third-party course providers and impose certain requirements on the content and length of courses. All mediators are required to complete at least 40 hours of court-certified mediation courses to become eligible for consideration for a

court mediation panel. These courses train mediators in the facilitative model of mediation.

Federal courts in New York maintain similar mediator panels whose members have typically received their mediation training at New York State court-certified courses.

The fees chargeable by the mediators on these panels are regulated to varying degrees by the various courts. Some of them require mediators to provide the first few hours of mediation pro bono and cap fees thereafter at U.S.$400 or U.S.$500 per hour. Some of them are entirely pro bono.

New York's state courts recently took the somewhat controversial step of introducing presumptive mediation for all civil and commercial cases, meaning that all such cases will automatically be sent for mediation, regardless of the litigants' wishes. While this undermines the inherently consensual basis for mediation, what tends to happen in practice is that litigants who have no interest whatsoever in mediation can satisfy the requirement to mediate by simply showing up to the mediation. More often than not, they end up engaging in the process but if they simply want to leave without making a good faith attempt to settle, the mediator will simply certify their attendance and refer them back to court where the litigation can continue. Typically, about 60-75% of cases settle at the mediation stage and high user satisfaction among disputants is reported.[1]

II. Overview of Singapore Courts' ADR Services

Singapore is highly regarded internationally as a center of mediation excellence. Those credentials were bolstered in 2018 by the launching of the Singapore Convention on Mediation, which has now been signed by 53 countries and ratified by six. In the context of court mediation in Singapore, typically, mediation of civil cases in Singapore's district court[2] is carried out by judges. Each party pays S$250 for such a mediation. According to Singapore's state courts, its judges receive training in mediation.[3]

Mediation of civil cases in Singapore's magistrate's court, which hears civil disputes with a value of no more than S$60,000, is typically carried out by lawyers on a pro bono basis over the course of half a day.[4] To qualify for admission to the court's pro bono mediation panel, mediators must be Singaporeans, admitted to practice at the Singapore bar, with at least three years of practice experience in Singapore, and must already be a member of Singapore Mediation Centre's (SMC) Panel of Associate Mediators with at least three years of mediation experience or Singapore International Mediation Institute (SIMI) Accredited Mediator Level 3. To be able to satisfy these requirements, mediators must typically have completed SMC's mediation course and passed its assessment.

Singapore's state courts also offer a separate neutral evaluation service. This is provided by a judge other than the trial judge, who reviews the parties' key evidence and provides a non-binding evaluation on the merits of the dispute to any disputants who jointly request it. This is a more recent innovation in Singapore's state courts and it has not been adopted by court users as frequently as mediation.

Mediation of most disputes commenced in Singapore's state courts is voluntary but any parties who do not wish to mediate are required to complete a form certifying that they refuse to mediate. If they ultimately lose at trial, their refusal to mediate can be used to penalize them in terms of costs. This provides a strong incentive to mediate but not a requirement to do so, meaning that generally mediation technically remains a voluntary process in Singapore's courts, except for cases from the Small Claims Tribunal and Employment Claims Tribunal, which require mandatory mediation.

According to Singapore's State Courts Centre for Dispute Resolution, of cases that were mediated in Singapore's state courts between 2012 and 2017, over 85% of them reportedly resulted in settlements. High user satisfaction with Singapore's court ADR services of 98% is reported, based on a user survey conducted in 2015, the most recent survey for which data was publicly available.[5]

III. Challenges Facing Singapore's Court ADR Landscape

Although the existence of a handful of court user surveys has been mentioned by members of the judiciary over the last three decades, it would appear that Singapore's courts do not routinely collect and collate feedback from all court users regarding their satisfaction with the mediation process or with the service provided by their mediator. Accordingly, it is difficult to gauge the extent to which court-administered mediation actually meets the needs of court users. However, anecdotal evidence suggests that there is a broad spectrum of satisfaction with the process and with the services of the court's mediators and that users, by and large, tend to have more positive experiences with professional volunteer mediators than with "judge-mediators."

Users report feeling pressured by judge-mediators to settle cases and remove them from the court's docket. This pressure can manifest itself in judge-mediators offering unsolicited advice to disputants, who are represented by counsel, on the weaknesses of their case. Judge-mediators do not consistently adopt the facilitative mediation model, often preferring to rely on evaluative mediation to "reality test" parties' expectations, regardless of whether they have been invited to do so.

Judge-mediators do, from time to time, go so far as to propose possible settlement permutations to parties rather than soliciting them from the parties themselves, thereby depriving the parties of ownership of their settlement. The unintended consequence of this is that parties, particularly if they were unrepresented in mediation, may ultimately return to court seeking to either vacate a mediation settlement agreement or to involve the court in enforcing it against a recalcitrant party whose buy-in was never wholeheartedly secured in mediation. Therefore, litigation that is terminated by a mediation settlement of this nature may often prove to be a false economy in terms of savings to court resources.

That judges would be inclined to judge rather than mediate should not be surprising. Mediation is a popular occupation for retired jurists around the world. Ask any mediation trainer who has trained a retired judge in mediation techniques, and they will candidly share the challenges judges routinely face in unlearning everything they know about resolving disputes. Judging is what judges do all day. To ask them to suddenly change gears and merely facilitate the parties in reaching their own solutions is a challenging demand and requires judges to exceed the boundaries of their core competencies.

By contrast, professional private sector mediators in Singapore have been trained, usually at SMC, in the facilitative mediation model and would not pass SMC's assessment if they adopted any of the above behaviors observed in judge-mediators.

At the same time, newly minted mediators being accredited by SMC find themselves struggling to find avenues to apply their new skills. They do not qualify to even volunteer on a pro bono basis for the Singapore state courts' volunteer mediators' panel as they do not have three years of mediation experience and getting that experience can be a challenge.

Furthermore, the sole practitioners and members of small law firms, who make up the bulk of litigators in Singapore's state courts, have reported their business model coming under increasing pressure from rising costs and an increasingly sophisticated and cost-conscious market.

IV. Drawing on Possible Solutions From New York: Recommendations for Reform

It should be obvious that the possible solutions to these problems are interlinked. We respectfully make the following recommendations.

1. Routinely Collect User Satisfaction Data

First, Singapore should follow New York's lead and begin collecting feedback from court users about their satisfaction with specific aspects of the mediation process and collating that data. This should include feedback on the performance of their particular mediator so that desirable methodologies can be identified and promoted and undesirable methodologies can be identified and eliminated.

Gathering this data means more than sending out a survey to a small sample set of court users every few years. Rather the feedback gathering mechanism should be embedded in the ADR process and sent out to every single disputant that

experiences a mediation immediately upon the conclusion of that mediation. Questions should be framed neutrally but refer to specific aspects of the mediation experience.

It is understandable that Singapore's court ADR program would be driven primarily by a desire to reduce the use of finite public resources in resolving private disputes. Court ADR programs all over the world, including New York, are motivated by similar resource constraints. However, the success of an ADR program should be measured primarily by the satisfaction of the people it is intended to serve and not solely by the number of trials it averted. If the cost of avoiding trials is the loss of the public's confidence in the administration of justice, then that is too high a cost.

2. Reduce Evaluative Mediation—Enshrine the Facilitative Model

The use of evaluative mediation by mediators should be discouraged. In New York, if the mediator is a lawyer, she might offer the disputants the option of having her provide her candid views on the merits of the claim, if they want it. Other mediators wait for a disputant to ask for the mediator's opinion on the merits and seek the other disputant's consent before doing so. Other mediators will simply refuse to provide their opinion on the merits and instead insist on refocusing the disputants' attention on their interests and the solutions that might best address them.

When a mediator provides her unsolicited opinion on the weaknesses of a disputant's claim, the disputant's loss of confidence in that mediator's neutrality, impartiality and overall credibility can immediately be observed on the disputant's face. Disputants, particularly those with legal representation, are in the best position to determine whether they require any further input on the merits of their case. If they want it, they will ask for it. Indeed, some of them do want it. However, since the court's neutral evaluation program was introduced recently, parties who are interested in hearing a judge's non-binding opinion on their case are now more likely to opt for that neutral evaluation route rather than mediation. Accordingly, the assumption should be that unless the parties state otherwise, facilitation, rather than evaluation, is what is required of a mediator.

A mediator who nevertheless insists on offering her unsolicited opinion on the merits of the case, as so many of Singapore's court mediators often do, makes her own job more difficult and is doing little to help the parties. Instead, she undermines the mediator's sacred position of neutrality and creates the damaging perception that she is an advocate for the adverse party. So-called "reality testing" certainly has its place, but that place is within the context of the parties' consent.

Singapore's courts should ensure that all its mediators are trained and instructed to apply the facilitative mediation model, and its mediators must understand that they should never give their personal opinions on the merits of the case except with the consent of the parties.

3. Phase Out Judge-Mediators

If the data collected supports the conclusion that private sector professional mediators can indeed create a more positive facilitative mediation environment than judge-mediators, the use of judge-mediators should be phased out. Anecdotal evidence from the feedback of disputants in Singapore suggests that court users in Singapore would benefit from a court mediation program that follows New York's example in relying entirely on private sector professional mediators rather than foisting this additional role on a fully occupied judiciary that lacks the time and sufficient public resources to dedicate fully to professionalizing its members' mediation methodologies.

The motivations of courts in promoting mediation as an alternative to trials to reduce the burden on public resources are legitimate and laudable. However, in effect, judges stand to benefit directly from a reduction in the numbers of trials on their dockets if parties reach a settlement in mediation. This creates an incentive for judge-mediators to pressure parties, perhaps unconsciously, into accepting a settlement over which they lack a sense of ownership and which may not ultimately serve their interests. Every statistic and key performance indicator (KPI) Singapore's State Courts collects about court mediation settlement rates reinforces the message to its judge-mediators that their role in a mediation is to stop the case from getting to trial. Removing judges from the mediation equation removes that pressure on parties and refocuses the purpose of the mediation back to meeting the parties' needs for effective dispute resolution in a truly neutral forum.

In 1997, Yong CJ claimed that the Singapore court mediation model was an adaptation of the "western" style of mediation to the Asian and Singaporean context, where he claims there is more of a tendency to have high regard for persons in positions of authority.[6] With respect, there is nothing uniquely Singaporean or Asian about respect for members of the judiciary. It also misses the point of facilitative mediation, which is to place the power to settle a dispute in the hands of the parties themselves. Every reputable facilitative mediation course there is emphasizes the importance of the mediator not dominating the process and even arranging the furniture in the room in a way that reinforces her neutrality and approachability, not her authority.

In 2008, Chan CJ acknowledged that Singapore's practice of using judge-mediators was "considerably different in

nature from other facilitative alternative dispute resolution processes where the mediator facilitates settlement by helping the parties appreciate how their interests will be advanced by settling the matter."[7] He described this system as "*sui generis,*" and again made the claim, without evidence, that such a system was "particularly suited to a jurisdiction where litigants respect the impartiality of judges in giving objective views on the merits . . . "

First, this ignores the position of potential conflict in which judges are placed when asked to advance the courts' agenda of reducing trials whilst also purporting to act as impartial facilitators of a mediation. If any examples of the difficulties this can create are required, one need only think of the number of times a judge-mediator has pointed out to a party in a mediation that their case has weaknesses and compare this to the number of times a judge-mediator has advised a party in a mediation that their case is very strong and that they should insist on fully vindicating their rights. The latter simply doesn't happen. Nor would this be desirable with a view to resolving a dispute amicably, but this is the position in which a mediator necessarily places herself when purporting to provide impartial and objective views on the merits of a dispute.

Second, if Singapore's system of judge-mediator evaluative mediation is really *sui generis,* this alone should give cause for concern that Singapore has chosen to depart from the mainstream of mediation scholarship which the rest of the world has seen fit to adopt.

In commending this judge-mediator evaluative mediation model, Chan CJ claims that "[f]eedback from litigants shows an overwhelming preference for district judges to act as mediators because of the public confidence and respect that they command . . . as well as the convenience to the parties of being able to directly enforce a court-mediated settlement by means of a court order."[8]

The direct enforceability of court-mediated settlements under this model is merely a product of the rules of court that create this effect, and there is no reason why, with any necessary amendment, they could not similarly be applied to court-mediated settlement conducted by professional mediators rather than judges. The feedback referred to by Chan CJ here appears to be a survey conducted in 1997.[9] SMC was only established in 1997. Accordingly, a substantial supply of trained private sector professional mediators effectively didn't exist in the Singapore market at that time. Therefore, survey respondents simply didn't have any high-profile credible alternative to compare to judge-mediators at that time.

People know what judges are. Public understanding of what a mediator is and what they do is low even now and would have been even lower in 1997 when the profession was in its infancy in Singapore. Better the devil you know than the devil you don't know. In any case, there are parties to court-mediations now who were not even born in 1997 (as shocking a realization as that is!). Basing current policy on the views of society as it existed almost a quarter of a century ago is unwise and unnecessary. Furthermore, the views of current court ADR users who have experienced a mediation with a judge-mediator and those of users who have experienced a mediation with a professional private sector mediator are the views that must be collected and compared.

The particularly damaging consequence of thrusting judges into a mediation is that their mere presence taints the entire process with a whiff of litigiousness that is just unavoidable. The lawyers can't help but slip up and address the mediator, who they know to be a judge, as "Your Honor." The disputants refrain from speaking up and allow the lawyers to do all the talking for them. The lawyers sometimes even deliver their clients' opening statement instead of allowing them to hear each other and be heard by each other. The lawyers, particularly those who may not be as intimately familiar with the theoretical foundations of the mediation process as they are with courtroom advocacy, start submitting oral arguments to the judge and pontificate on the merits of their respective cases instead of allowing their clients to explore each other's true interests and propose creative solutions. In short, the mediation is all too often reduced to little more than "litigation lite."

Unlike judge-mediators, professional private sector mediators have nothing to gain or lose by the parties' decisions in a mediation and no concern for the workload of judges. This takes the pressure off the parties to focus on their interests. When the mediator is a fellow member of the legal profession rather than an authority figure, the lawyers might even relax a little and let their clients speak. When a mediator reminds parties that they do not have to settle and can always go back to court if they cannot find a mutually acceptable solution, this sometimes operates like a kind of reverse psychology. Parties sometimes respond by behaving more calmly and rationally and start calculating the time and cost required for litigation. Then, whether or not they do settle, they are more likely to leave the mediation feeling empowered and positive about the mediation process, the courts and the administration of justice and if they do settle, they are less likely to return to court to try to relitigate what they agreed.

4. Create a Private Sector Market for Court Mediation

The above recommendation dovetails nicely with a potential solution to the escalating economic pressures operating on sole practitioners and small firms in Singapore in that it

could create a new source of revenue for lawyers who are trained and qualified as facilitative mediators.

Currently, parties to district court suits pay S$250 per party for a court mediation while parties to a magistrate's court suit pay nothing. The district court hears civil disputes for amounts between S$60,000 and S$250,000 and the magistrate's court typically hears disputes between S$20,000 and S$60,000. Given the quanta of those disputes, it is suggested that mediation would remain an economically attractive ADR option for district court parties if they were charged S$500 per party and for magistrate's court parties if they were charged S$250 per party. Then, rather than those funds subsidizing a judge's precious and publicly funded time, they could be redirected to a revitalization of the backbone of Singapore's legal profession, sole practitioners and small firms, by being paid out as mediation fees to professional private sector mediators. Effectively privatizing the mediation burden of the courts, currently being borne by public servants, would grow the size of the legal industry, for the benefit of the sector of that industry that needs it the most.

This solution also dovetails nicely with the need to find more avenues for new mediators to gain experience at mediating. This is a challenge that also faces mediators in New York. Currently, several structured mediation mentorship programs are being considered in New York to address this need. The parameters of these programs vary but the essential elements typically featured involve new mediators shadowing a dedicated mentor mediator and observing her mediate a certain number of disputes, then co-mediating a certain number of disputes together, before being assigned several low-quantum disputes to mediate alone under observation from mediation trainers before becoming eligible for admission to a court mediation panel, subject to positive feedback from the mentor and observer.

If Singapore court mediation was privatized, this would provide another very significant high-volume avenue for new mediators to gain supervised experience via a mentorship or co-mediation training program. The mentee mediator would, at all times, act on a pro bono basis until she had observed, co-mediated and mediated a sufficient number of mediations (some of which could be small claims tribunal cases) to be admitted to the court mediation panel.

However, for all other cases excluding small claims mediations, pro bono mediations by private sector mediators should be largely phased out. Disputants potentially stand to reap significant value from mediations and those that can afford to do so should not baulk at the prospect of paying a modest fee for access to such potential. Lawyers who contribute to the public good by making the significant investment of time and money involved in becoming a qualified mediator need to be presented with a clear path upon qualification to securing a return on that investment.

Singapore's courts may be concerned that the volume of court mediations is too high to leave entirely to a panel of private sector mediators. That has not been the experience of the New York courts. Indeed, quite the opposite, in that there are more qualified mediators on the panels in New York than there are mediations to keep them all fully engaged—at least many panel members in New York report being under-utilized. It would seem, then, that the solution to this concern is simply to ensure that the supply of private sector mediators on the court panel is large enough to match the demand for court mediations.

Another potential solution, depending on the volume of mediations, is simply for Singapore's courts to hire one

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or more full-time experienced professional mediators from the private sector to add some predictability to the supply of mediators for mediations. Such hires could essentially be self-funded as the fees from the parties whose disputes they would mediate could cover the costs of their employment. However, any KPIs they would be required to meet should be based on the satisfaction of disputants in their feedback rather than on the volume of cases that result in a mediation settlement agreement. This is essential to ensure that they, like judge-mediators, are not incentivized to step outside of their facilitative role and descend into the arena of advocacy to pressure parties into settling when doing so may not be in their best interests.

V. Conclusion

Court ADR services in New York are certainly not perfect. Court ADR services in Singapore also have much to commend them. The authors merely suggest that Singapore's courts could benefit from studying the model being used by New York's courts. The recommendations made above are all made without the benefit of comprehensive current data about the user experience of Singapore's court ADR services. Collecting this data is essential to be able to reform court ADR in an informed way.

However, these recommendations are made with the benefit of considerable experience of representing parties in court mediations in Singapore. What has been observed from parties in court mediations suggests that our court users in Singapore feel there is room for improvement in how these services are administered. It also tentatively suggests that judge-mediators are a particular source of unhappiness amongst court-users and reallocating our judicial resources back to their primary purpose of judging, in the more appropriate forum of courtrooms, would be in the interests of the effective administration of justice.

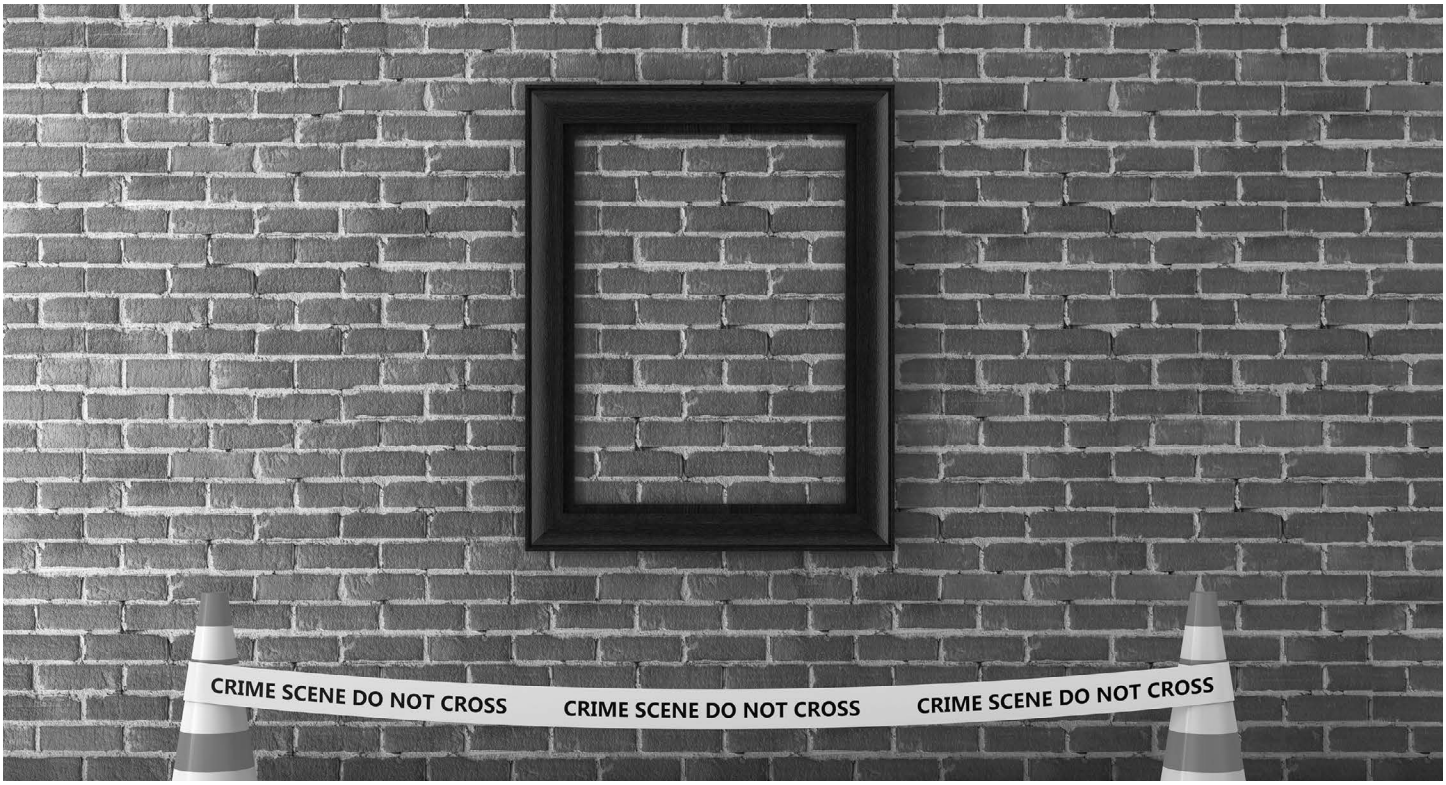
If nothing else, we should at least hear what our court-users have to say about their experiences in court-administered mediations. Let's start asking them and let's start listening to their answers.

Endnotes

1. Interim Report and Recommendations of the Statewide ADR Advisory Committee, New York State Unified Court System (February 2019) <https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf> (accessed 25 Jan. 2021).
2. This discussion is limited to the state courts, an umbrella term that includes the magistrate's court, district court, Small Claims tribunal and Employment Claims Tribunal. The state courts hear 90% of the cases in Singapore. The Supreme Court, which includes the High Court, Court of Appeal and Singapore International Commercial Court, does not provide court mediation directly but refers cases for mediation out to the private sector. Mediation in Singapore's Family Justice Courts is not within the scope of this article.
3. "We plan . . . to provide court annexed ADR training for our judicial officers . . . . We will begin by intensifying internal training efforts for State Courts judges, court administrators and volunteer mediators and, among other offerings, a 2-day course for judges with an interest in court annexed judge-led ADR will be held in the fourth quarter of this year. Where appropriate, we will seek to partner the Singapore Judicial College, the Civil Service College, the Singapore Mediation Centre and other strong training institutions to conduct a variety of Court ADR programmes . . ." Menon CJ, Keynote Address at State Courts Workplan 2017 Advancing Justice: Expanding The Possibilities (17 March, 2017) <https://www.statecourts.gov.sg/cws/Resources/Documents/State%20Courts%20Workplan%202017%20Keynote%20Address%20by%20Chief%20Justice(FINAL).pdf> (accessed 25 January 2021).
4. Lawyers are offered a nominal S$50 honorarium which they are invited to waive.
5. Ang J. "Opening Remarks in SMU Forum: Expanding the Scope of Dispute Resolution and Access to Justice: The Use of Mediation Within the Courts," (12 March 2018), <https://www.supremecourt.gov.sg/Data/Editor/Documents/Use%20of%20Mediation-Within%20the%20Courts.pdf> (accessed 25 Jan. 2021).
6. Singapore Law Watch "About Singapore Law, Chapter 3: Mediation," <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-03-mediation> (accessed 25 Jan. 2021).
7. *Jonathan Lock v. Jesseline Goh* [2008] 2 SLR 455.
8. *Id.*
9. *See* note 7, p 3.

Recovery of Works of Art Under International Law

By Delphine Eskenazi and Thibault Mechler



Due to their historic, cultural, symbolic, scientific, and also financial value, works of art have always been a subject of intense desire.

Purchasers of works of art may therefore find themselves in possession of a work that then becomes the subject of an action to establish ownership brought by someone who believes that he or she is the true owner, for example, the victim of a theft or misappropriation. Whether the owner is a private individual or a public entity, there may be multiple foreign elements. For example, the work may have been acquired abroad or even moved through several countries. It also often happens that the deprived owner and the purchaser are foreign nationals and reside in different countries.

Therefore, this study aims to analyze the situation of a work of art that has been stolen or lost and then becomes the subject of an action to establish ownership in a case that involves a foreign element.

This study will explore how rules of private international law, too often neglected when resolving such disputes, apply in practice. This erasure may be due to the "spectral" character of the rules of private international law that apply to works of art.[1] In fact, "the general principles that apply to the international circulation of cultural property can be defined: they are essentially those of French private international law on contracts or real rights."[2] In short, despite their specific nature, "cultural property is not subject [. . .] [to] particular conflict rules."[3] This observation applies, *mutatis mutandis*, to all works of art, even if they do not constitute cultural property.

Works of art therefore fall within the most general definition of tangible movable property, i.e., "a tangible object [. . .] that is useful to a person and able to be appropriated."[4]

Consequently, "ordinary" private international law applies to actions to establish ownership of works of art, even if art cannot be considered equivalent to fungible tangible movable property.

Determining the competent jurisdiction and applicable law is not without risk when resolving disputes because national solutions that govern such disputes sometimes favor the original owner and other times the good-faith purchaser. As will be shown below, some countries "prioritize the interests of commerce over those of the owner. They therefore protect the good-faith purchaser."[5] The question of how these rules apply is particularly important since works of art are movable property, which can lead to mobile disputes, requiring a "choice between several successive laws" to be made and creating a risk of promoting evasion of the law.[6]

Although the resulting "uncertain outcomes in transnational litigation"[7] may be regrettable, it is interesting to analyze the impact of rules regarding conflicts of jurisdictions and laws on these different interests.

When it comes to establishing ownership of works of art, which rules support the jurisdiction of French courts (I)? Once jurisdiction is established, will French courts necessarily apply French law (II)?

I. Classic Application of the Principle *Actor Sequitur Forum Rei* in Actions to Establish Ownership of Works of Art

If the good-faith purchaser and the work are located in France, should a foreign original owner file suit in French courts? It should be noted that the failure of sectoral international agreements applicable to the restoration of cultural property (A) leads to the application of ordinary law grounds for jurisdiction in actions to establish ownership of works of art (B).

A. Failure of Solutions Based on Sectoral International Agreements Regarding Cultural Property

With regard to cultural property, the original owner might consider basing a suit on the international agreements that apply to such matters. Firstly, one might obviously refer to the UNESCO Convention of 1970 concerning measures to be taken to prohibit and prevent the illicit import, export and transfer of ownership of cultural property. Although the principles upheld by this convention are praiseworthy, their practical application remains theoretical, since the Convention is not directly applicable: "the States merely agreed to take certain measures."[8] In order to remedy this considerable limitation, the UNIDROIT Convention on the return of stolen or illegally exported cultural objects was adopted in 1995. This convention, presented as the "implementing decree" of the Convention of 1970, "enacts direct application rules which [. . .] are presented as substantive rules and appear in a sense to be the realization of the commitments made in 1970."[9] Thus, the convention enacts "ad hoc international grounds for jurisdiction" in the courts of the State in which the claimed property is found.[10]

However, since France has not yet ratified the UNIDROIT Convention, it cannot be used as a basis to establish the jurisdiction of French courts.

In light of the failure of substantial international rules applicable to the issue of restitution of cultural property and, more generally, works of art in an international context, general instruments of private international law will, therefore, be used as grounds for the jurisdiction of French courts.

B. Application of Ordinary Law Grounds for Jurisdiction in Actions To Establish Ownership of Works of Art

The regulation referred to as "Brussels I bis"[11] is the ordinary law governing jurisdiction within the European Union for any legal action concerning a civil or commercial matter. This regulation applies "whenever the dispute does not fall within a domain that is covered by a specific regulation and unless the matter is expressly excluded."[12] An action to establish ownership of works of art is indeed a civil matter. The other condition for applying the Brussels I bis Regulation is that the defendant must be domiciled on the territory of a Member State. Conversely, "if the defendant is not domiciled on the territory of a Member State, the jurisdictional rules contained in the regulation are not applicable, except for particular exceptions. Jurisdiction is therefore governed in each Member State by its national laws."[13]

When the Brussels I bis Regulation is implemented, in accordance with Article 4,[14] persons domiciled on the territory of a Member State are brought before the courts of that Member State regardless of their nationality.

In addition to this "ordinary" jurisdictional rule, Article 7 provides for several special grounds for jurisdiction. Thus, Article 7(4) provides for a specific ground for jurisdiction for the matter discussed here: "as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised." This solution resonates with the fundamental principle that applies to conflicts of laws for tangible movable property, that of *lex rei sitae*. Nevertheless, the scope of application of this ground for jurisdiction is limited by Directive 93/7/EEC, which defines a cultural object as "an object which is classified, before or after its unlawful removal from the territory of a Member State, among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 of the Treaty."[15] Objects of international trafficking that fall within the scope of this restrictive definition are rare indeed.

One might also consider applying the grounds for jurisdiction contained in Article 7(3) of the regulation: "as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings." However, the original owner must prove that the "transfer of ownership" arose from a criminal offense, and criminal proceedings related to this violation must also be pending.

Therefore, with the exception of these options, which are rather restrictive in practice, no specific or exclusive ground for jurisdiction appears to apply to an action to establish ownership of a work of art that is brought against a defendant domiciled in a Member State.[16]

If the defendant is not domiciled in a Member State,[17] French rules of ordinary private international law will then be applicable by reference to Article 6(1) of the Brussels I bis Regulation.[18] The solution in the further alternative of jurisdictional privileges under Articles 14 and 15 of the French Civil Code could also support French jurisdiction in certain specific situations, provided that it is not invoked against a person residing in a Member State of the European Union.[19]

Therefore, in practice, the purchaser must very often be summoned before the courts of the place of his or her domicile.[20] In sum, works of art are assimilated into basic tangible movable property and "international jurisdiction [. . .] does not offer any specificity related to movable property."[21]

The solution is not necessarily a bad one in that, in the context discussed here, it often allows jurisdiction to coincide with applicable law, since the property, in practice, is often located on the same territory as the domicile of the purchaser.

Although the assimilation of works of art into tangible movable property may therefore be justified when deciding issues of jurisdiction, that is not necessarily the case when it comes to the issue of applicable law.

II. A Questionable Application of the Principle of *Lex Rei Sitae* in Actions To Establish Ownership of Works of Art

Once the original owner has served the good-faith purchaser in a suit before the competent court, the issue arises of which law applies when there is a foreign element. Firstly, we will examine how the general principle of *lex rei sitae* is implemented based on the conflicts method (A), a principle that, in matters of establishing ownership of works of art, is likely to cause negative effects (B).

A. Application of the General Principle of *Lex Rei Sitae* Based on the Conflicts Method

In the absence of international agreements that apply to the matter, national solutions that are traditionally applied to movable property should be transposed to the international level. Thus, "the law of the place in which the movable or immovable property is located [i.e., the *lex rei sitae*] determines the entire regime, understood as establishing a relationship between the persons and the thing."[22]

For an original owner who initiates an action to establish ownership, determining the law that applies to the acquisition of real rights is particularly thorny, "since the *lex rei sitae* determines the methods for acquiring real rights." Thus, for example, Article 2276 of the French Civil Code provides, "[w]here movable property is concerned, possession equals title," which is advantageous to the good-faith purchaser. Consequently, "taking possession of an item of movable property in France leads to the application of this regime [. . .]; in the case in which an item of movable property that was misappropriated, lost or stolen abroad was brought into France and transferred to a good-faith purchaser, the latter is protected under French law."[23]

While it may have been suggested that only the purchaser who took possession of the property on French territory should benefit from this regime, allowing "the foreign [. . .] property title [. . .] to remain in effect [. . .] as long as a new possession has not taken place" in France, French jurisprudence considers that "the introduction of an item of movable property into France constitutes a new possession" allowing the purchaser to benefit from this regime.[24] This solution is disadvantageous for the original owner, since the action to establish ownership under French law is limited to a fixed period of three years (French Civil Code Article 2276).

Thus, according to the French conflict of laws rule, it is the place where the property is located that determines which regime is applied to the acquisition of real rights.

Some property nonetheless deserves enhanced protection, which can affect the issue of applicable law. In France, that is the case, for example, with property spoliated during World War II. The framework for the restitution of such property is provided by Order No. 45-770 of 21 April 1945. When a spoliation can be established according to the definition of the order cited above, it appears that it is applicable regardless of the *lex rei sitae.* Thus, very recently, in a decision dated July 1, 2020, No. 18-25.695, the Court of Cassation applied this regime, which assumes bad faith on the part of the subpurchasers,[25] to an American couple who had acquired a spoliated property at Christie's in New York in 1995.[26]

Except for certain items that are subject to enhanced protection, actions to establish ownership of works of art are thus subject to the conflicts method. However, it is not necessarily suited to the special features of property with an "extra-commercial" value.[27]

B. Negative Effects Applying the Conflicts Method in Actions To Establish Ownership of Works of Art

The hypothesis explored in this study is, on one hand, that of "individuals who base their title of ownership or similar title on national protective rules granting them a property

right, and on the other hand, that of good-faith purchasers who base their property right on conflict rules connecting real rights over movable property to the relevant legal system."[28]

However, a generalized application of the *lex rei sitae* by applying the conflicts method is a source of uncertainty for the original owner, since "the protective legislation" of the original owner's country of origin cannot be implemented if the disputed property is located abroad.[29] Paradoxically, although the *lex rei sitae* could provide a way to harmonize decisions and legal certainty, on the contrary, it creates a lot of uncertainty due to the "international disharmony" of national laws.[30] Thus, for example, some countries like Italy "prioritize commercial interests over those of the owner" while others, such as the British system, "protect the owner by allowing the owner to claim property that was stolen and acquired by a third party."[31]

In addition to the various national solutions, there is an added degree of uncertainty linked to the question of when to apply the principle of *lex rei sitae*. It is possible to apply it on the day (i) of the claim, (ii) of the acquisition, or (iii) of the theft. Therefore, although application of the *lex rei sitae* at the moment of acquisition may generally be favorable to the purchaser, the purchaser must have acquired the property in dispute in good faith and must have a title that is "protected by the law of the place of purchase." Moreover, this system promotes laundering the fruits of theft, since the wrongdoer can go "trade the stolen property in a country that protects commerce rather than the owner."[32] Application of the principle on the day of the theft is not necessarily more favorable to the original owner either, since the solution once again depends on the variable content of national laws. The same limitation is seen in cases where the *lex originis* is applied, understood as the law of the original situation of the property.

This risk of fluctuating solutions is particularly acute for works of art, which can easily be the subject of mobile disputes, thus leading to the work of art being "successively subject to two laws that do not necessarily bring it under the same legal system."[33]

One may therefore wonder whether the conflicts method that applies to "ordinary" movable property is suitable for works of art. Indeed, "regardless of the proposed connection, the conflict of laws method appears unsuitable for ensuring, under all circumstances, the restoration of cultural property" and, more generally, of works of art.[34] The weakness inherent in the conflicts method appears to be its failure to recognize the specific nature of works of art, which should be "governed by laws that recognize their distinct nature."[35] This is what the international agreements presented above attempted to do by establishing a regime for the restoration of property with directly applicable substantive rules, but nevertheless with the weaknesses mentioned.

Although the solutions applicable to issues of jurisdiction are more "traditional," with the primary application of the classic rule *actor sequitur forum rei*, the resolution of conflicts of laws is highly variable and precarious for original owners who want to recover property following a disappearance, misappropriation or theft.

This weakness is due to a conflicts method that disregards the special features of works of art by giving too much weight to national laws, the interests of which greatly diverge. That is why some authors call for a rejection of the conflicts method, believing that "ordinary private international law reveals itself to be [. . .] unsuitable."[36] The solutions proposed by some authors to postpone the moment at which the *lex rei sitae* is applied do not make it possible to escape the vagaries of differing national interests. The same is true for the proposal to base a specific connecting factor on the prohibition on exporting the *lex originis*. Everything depends on the country and its internal policy for protecting works of art.[37] In such cases where there are multiple foreign elements, the national scale does not seem sufficient, which is why "the 1970 UNESCO and 1995 UNIDROIT international conventions [should] pick up where ordinary law leaves off."[38] Faced with the inherent weaknesses of these instruments, some authors suggest going even further and push for the creation of a "uniform standard favoring the owner applied in all cases involving stolen art work [in which] the conflict of laws question would be moot since the application of either countries' law would result in identical outcomes."[39]

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Until such a change to the laws takes place, warned of the inherent weaknesses of the rules of private international law as they apply to such matters, an original owner who initiates an action to establish ownership must, in light of these principles, reflect before filing suit on how to best protect his or her interests from the negative effects of the *lex rei sitae*.

Endnotes

1. J.S. Berge, *Actualité du conflit de lois sur le droit d'auteur: bataille au pays des fantômes*, Gazette du Palais, No. 177, p. 8, 26 June 2003.
2. B. Audit, *Le statut des biens culturels en droit international privé français*, R.I.D.C. 2- 1994.
3. V. Bonnet, Biens, Fasc. 550, JurisClasseur Droit international, 1 Nov. 2019, No. 145.
4. *Id.*, no. 1.
5. P. Lagarde, *La restitution internationale des biens culturels en dehors de la Convention de l'UNESCO de 1970 et de la Convention d'UNIDROIT de 1995*, Rev. Dr. Unif. 2006.
6. V. Bonnet, Biens, Fasc. 550, JurisClasseur Droit international, 1 November 2019, No. 127.
7. K. Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers,* 13 Loy. L.A. Int'l & Comp. L. Rev. 427 (1990).
8. V. Bonnet, Biens, Fasc. 550, JurisClasseur Droit international, 1 Nov. 2019, No. 152.
9. *Id.*, no. 153.
10. *Id.*, no. 158.
11. Regulation No. 1215/2012 of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
12. C. Gentili, *Compétences des juridictions civiles, Compétence internationale dans l'Union Européenne*, Fasc. 50, JurisClasseur Procédures Formulaires, Vol. Compétence des juridictions civiles, LexisNexis, 9 Oct. 2017, No. 13.
13. *Id.*, no. 30.
14. Article 4: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."
15. This directive has since been replaced by Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, but the definition of "cultural objects" remains very limited and restricted.
16. It should also be noted that the provisions of the Brussels I bis Regulation on consumer protection do not apply to the hypothesis envisaged by this study, since they assume the existence of a contract, which would not be the case for an action to establish ownership initiated by a dispossessed owner against a purchaser.
17. The rules of the Lugano Convention will, however, be applicable between Member States of the European Union, Switzerland, Norway and Iceland, but they lead to the same result as the jurisdictional rules of the Brussels I bis Regulation.
18. Article 6(1): "If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall [. . .] be determined by the law of that Member State."
19. Article 5(2) of the Brussels I bis Regulation specifically excludes the option of invoking these articles against a person who resides in a Member State.
20. *See,* for example: Cour de cassation [Cass.] [supreme court for judicial matters], civ. 1, 6 Dec. 2005, No. 01-02.515:

    > Whereas in so ruling, without automatically declaring that it had no jurisdiction due to the defendant's domicile in Belgium, when it was seized of an action to establish ownership of movable property and when the plaintiff could not take advantage of any of the jurisdictional options under Article 5 of the above-mentioned Convention [Brussels Convention], the court of appeals violated the above-mentioned text.

21. B. Audit, L. D'Avout, Droit international privé, LGDJ, 8th edition, 2018, No. 955.
22. B. Audit, L. D'Avout, Droit international privé, LGDJ, 8th edition, 2018, No. 958.
23. *Id.*, No. 958, No. 962, No. 963.
24. B. Audit, *Le statut des biens culturels en droit international privé français*, R.I.D.C. 2-1994, No. 31.
25. P. Noual, *Spoliation et restitution: échec et mat pour les sous-acquéreurs de bonne foi*, La Semaine du Droit Civil et Procédure Civil, No. 42, 12 Oct. 2020.
26. Of course, the work in question was located in France at the time of the summons, but the location does not appear to have been a determining factor in the choice of applicable law.
27. V. Bonnet, Biens, Fasc. 550, JurisClasseur Droit international, 1 Nov. 2019, No. 145.
28. C. Armbrüster, *La revendication de biens culturels du point de vue du droit international privé*, Revue critique de droit international privé, 2004, p. 723.
29. *Id.*
30. K. Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers*, 13 Loy. L.A. Int'l & Comp. L. Rev. 427 (1990).
31. P. Lagarde, *Id.*
32. *Id.*
33. B. Audit, L. D'Avout, *Droit international privé*, LGDJ, 8th edition, 2018, No. 957.
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The Impact of COVID-19 on Migration to the United States and Visa Services

By Rikkilee Barrow

When it comes to travel, there is no denying that the tourism and airline industries were dealt a heavy blow by the COVID-19 pandemic. However, cancelled flights and postponed vacations were not the only travel impacted by the virus. The ability to migrate to the United States, whether permanently or temporarily, was also significantly curtailed starting in early 2020 with some of the impacts still being felt today. In some cases, this was the result of intentional government action intending to minimize importation and spread of the virus. Yet in other cases, the global reaction to the virus caused a ripple effect on migration and related services that were likely not foreseen, or at the very least, not intended.

In a "normal" year the United States welcomes over 9 million migrants.[1] Yet, in 2020 that number halved and continued to further decline in 2021.[2] This not only impacted families trying to reunite during a global crisis, but also multinational businesses trying to send executives and key personnel to the U.S. to keep operations afloat. It not only impacted international students trying to complete their education, but also foreign citizens trying to visit dying family members in the United States.

Throughout it all, these effects were, and continue to be, the result of four main factors: regional entry bans, North American land entry bans, visa specific entry bans, and the closure of consulates and embassies world-wide. The COVID-19 pandemic has also impacted numerous other areas in the realm of immigration and U.S. citizen services, but the focus of this article is on international travel to the United States and U.S. visa services abroad.

I. Regional Entry Bans

Presidential Proclamations

As cases skyrocketed in the early days of the global outbreak, many countries made the difficult decision to close their borders. On Jan. 31, 2020, exactly one month after a cluster of pneumonia cases were reported in Wuhan, China,[3] President Trump issued Presidential Proclamation 9984, "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk."[4] This proclamation went into effect on Feb. 2, 2020, and banned entry to the United States for those who were present in China

(excluding Hong Kong and Macau) within 14 days preceding the attempted entry.[5]

It wasn't long before reports of COVID-19 cases began cropping up in other parts of the world as well. As the virus continued to spread, the United States responded with additional restrictions on entry for those with physical presence in each designated region within 14 days of their attempted entry. On March 2, 2020, Presidential Proclamation 9992 went into effect, which banned entry to those with presence in Iran.[6] On March 12, 2020, only hours after the World Health Organization (WHO) declared COVID-19 a global pandemic,[7] Presidential Proclamation 9993 was announced, which went into effect on March 13, 2020, and banned entry for those with presence in the Schengen Area.[8] The president's initial announcement from the White House briefing room did not clarify that American citizens would be exempt from the restrictions, which resulted in a deluge of chaos at airports across Europe with many citizens attempting to secure a last minute flight home.[9] Then, following criticism that the United Kingdom had a significantly higher case count than many of the nations included in the blanket Schengen Area ban, on March 14, 2020, an additional ban for those with presence in the United Kingdom or Ireland was introduced via Presidential Proclamation 9996.[10] After a two month lull, on May 24, 2020, Presidential Proclamation 10041 expanded the restrictions to include those with presence in Brazil.[11]

Before his departure from office in January 2021, President Trump issued a proclamation rescinding the entry bans directed at the Schengen Area, United Kingdom/Ireland, and Brazil,[12] while leaving the restrictions for China and Iran untouched. The rescission was set to go into effect on Jan. 26, 2021, yet on the eve prior, President Biden (who took office on Jan. 20, 2021) issued Presidential Proclamation 10143 which reinstated all three bans and, due to the newly identified Omicron strain, added South Africa to the list as well.[13]

In place for well over a year, these bans had a significant impact on inbound travel to the U.S. However, each proclamation contained a handful of exceptions identifying specific circumstances in which a person would *not* be subject to the entry ban. First, the proclamations did not apply to U.S. citizens (U.S.Cs) or lawful permanent residents (LPRs).[14] In addition, certain family members of citizens and permanent residents were also exempted, including: spouses; children, wards, or prospective adoptees; parents, as long as the U.S.C or LPR was unmarried and under 21; and siblings, as long as both the U.S.C or LPR *and* the sibling were unmarried and under 21.[15]

Additional exceptions were outlined for anyone traveling to the United States according to a government invitation or for COVID-19 containment or mitigation efforts; crew members of air or sea vessels; anyone traveling as a diplomat, foreign government/military official, or designated international organization official; anyone whose entry would advance U.S. law enforcement objectives; and anyone whose entry would be in the national interest.[16] In addition, all but the proclamation directed at China also contained exceptions for U.S. military members and their spouses and children, along with exceptions for E-1 visa holder employees of TECRO or TECO (Taiwan's de facto embassy in the United States).[17]

For several of the enumerated exceptions, traveling to the United States was as simple as showing the airline and Customs and Border Protection (CBP) officer a relationship document (e.g., marriage or birth certificate) and evidence of the qualifying family member's U.S. citizenship or LPR status (e.g., U.S. passport or green card). Yet for several others, namely those seeking entry pursuant to a national interest exception (NIE), clearance to travel must have been obtained ahead of time by either the Department of State (DOS) or CBP.

One notable exception not itemized in any of the proclamations was for fiancé(e)s of U.S. citizens.[18] Although other immediate family members were exempt from the restrictions so that they could be with their relatives in the United States, those looking to enter the U.S. to marry their partner and adjust status to that of a permanent resident were nonetheless subject to the bans. Even when many embassies and consulates began to offer more services after their initial shut-down, K-1 fiancé(e) visas were not seen as high priority. However, on Nov. 19, 2020, the U.S. District Court for the District of Columbia enjoined the DOS from suspending K-1 visa issuance, limited to the named plaintiffs in the case and not across the board for all applicants.[19] Yet as consulates around the world began to increase capacity, the DOS adopted a tiered approach to prioritizing immigrant visa applications and acknowledged that immediate relatives—including fiancé(e)s—ought to be prioritized.[20]

Finally, 20 months after the first regional travel ban was introduced, President Biden announced, on Oct. 25, 2021, the recission of all regional travel bans to be effective Nov. 8, 2021.[21] In its place, a new requirement was introduced that all non-immigrant entrants must have received a full dose of the COVID-19 vaccine.[22] Limited exceptions were accounted for including for those travelling on diplomatic and government visas; for those that it was deemed medically inappropriate to receive the vaccine, either based on age or medical contraindication; for those participating in a COVID-19 clinical trial; for citizens of a country with limited availability of the vaccine and seeking entry in a non-immigrant status other than a visitor; those with a humanitarian emergency; members of the U.S. armed forces and their immediate family; air crew complying with industry COVID-19 protocols; and those whose entry would be in the national interest.[23] At the time this article was written the

vaccine requirements are still in place and can only be lifted by discretion of the president.[24]

National Interest Exceptions

In order for someone who was subject to a regional entry ban to obtain an NIE and travel to the U.S. they needed to obtain approved prior to travel.[25] In the early months of the pandemic, foreign nationals who were able to travel to the United States under the Visa Waiver Program, or those who already had a valid visa to their name, were able to request an NIE from CBP if such requests were accepted at that port of entry.[26] However, not every airport accepted such requests so many travelers were forced to enter the U.S. at a handful of select airports and then catch a connecting domestic flight to their final destination. What promulgated the chaos and confusion was that each port had their own requirements as to what documents had to be submitted and how long they would take to review a request.[27] As CBP became more and more inundated with requests the policy shifted where most ports began to require that a request first be made with the DOS through the individual's local U.S. embassy or consulate.[28] However, this simply transferred the burden from CBP to DOS and delays in response times continued to ensue—making it difficult for travelers facing an emergency and needing to travel last minute to obtain the necessary permission to do so.

Although there was no formal definition of what was considered the "national interest" for a regional entry ban exemption, several U.S. embassies and consulates offered their own guidelines. For example, the U.S. Embassy in Vienna qualified that the national interest included travel for public health, students and academics, as well as certain business related travel for investors in U.S. businesses or when the travel would result in a "substantial economic benefit."[29] Likewise, the U.S. Embassy in Bratislava added that the national interest could also include journalists and humanitarian situations such as travel to receive lifesaving medical treatment or to provide humanitarian care for close family members in the U.S..[30] Both Embassies also specifically made allowances for professional athletes.[31]

Designated Airports

In conjunction with President Trump's early proclamations restricting entry from certain countries, the Department of Homeland Security, which controls CBP, also began to funnel anyone who had recently been to a country affected by any of the proclamations through only 13 U.S. airports for enhanced screening.[32] Accordingly, anyone exempt from the entry bans, even U.S. citizens, were required to enter the United States through Boston Logan, Chicago O'Hare, Dallas/Fort Worth, Detroit Metropolitan, Daniel K Inouye (Honolulu), Hartsfield Jackson Atlanta, John F Kennedy (New York), Los Angeles, Miami, Newark Liberty, San Francisco, Seattle-Tacoma, and Washington-Dulles.[33] In the first few days when many Americans abroad were trying to return home they were met with significant delays while waiting to be screened and let into the country.[34] This lasted for several months, and two additional airports were added to the list during that time, but eventually the Center for Disease Control (CDC) decided to "refocus" their mitigation efforts and stopped performing health screening upon entry.[35] As a result, travelers were once again able to enter at any port they could find a flight into.[36]

II. North American Land Entry Bans

In addition to President Trump's regional proclamations restricting international arrivals, the Department of Homeland Security also implemented their own restrictions to limit entry to the United States from land ports of entry at the Canadian and Mexican borders.[37] Effective on March 20, 2020, these agency restrictions limited travel across land borders into the United States except for essential travel.[38]

These restrictions did not apply to U.S. citizens, lawful permanent residents, or U.S. military members and their spouses and children returning to the United States.[39] Additionally, "essential" travel specifically included:

- Receiving medical treatment;
- Attending an educational institution;
- Facilitating cross-border trade and movement of goods;
- Providing emergency response or public health services, particularly related to the COVID-19 pandemic, but also to any other designated emergency;
- Working in the United States;
- Traveling in an official government or diplomatic capacity; and
- Traveling on military orders.[40]

These regulations caused initial confusion as they only applied to travel through a land border or ferry. They did *not* apply to air or sea travel. Thus, an individual would not have been able to make a non-essential trip by car, but *could* make a trip for the same non-essential purpose by air. Both regulations had an initial expiration of April 20, 2020, but continued to be extended every 30 days until they were finally lifted on Nov. 8, 2021.[41]

III. Visa-Specific Entry Bans

In addition to geographical restrictions, President Trump also introduced two highly controversial visa-specific bans. The purported purpose was to protect the American economy and minimize risk to American jobs,[42] yet many argued that was a

front for the Trump administration's ongoing anti-immigration rhetoric.[43] Regardless, on April 23, 2020, Presidential Proclamation 10014 went into effect regarding "Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak."[44]

This proclamation suspended the entry of immigrants to the United States with several exceptions.[45] First and foremost, the suspension did not apply to intending immigrants who already had a valid visa or travel document in their possession and had not yet traveled to the U.S.[46] Nor did it apply to the following:

- A U.S.C's spouse or child under the age of 21, including prospective adoptees;
- Anyone seeking to enter the U.S. to provide professional health care services, medical research related to COVID-19, or any "work essential to combating, recovering from, or otherwise alleviating the effects of the COVID-19 outbreak."[47] Spouses and unmarried children under the age of 21 accompanying these workers were also exempt;
- Anyone seeking to enter under to the EB-5 Immigrant Investor visa category;
- Anyone whose entry would advance U.S. law enforcement objectives;
- Any member of the U.S. Armed Forces and their spouse or children;
- Anyone seeking to enter pursuant to a Special Immigrant visa category for Iraqis or Afghans previously employed by the U.S. government in designated capacities. Accompanying spouses and children were also exempt; or
- Anyone whose entry would be in the national interest.[48]

Notable exceptions that were *not* provided for were the spouses and children of LPRs, as well as parents of U.S. citizens.[49] This resulted in prolonged family separation during a global pandemic when family support is arguably most important. Although on its face the proclamation was implemented to protect American jobs in a declining economy, the restrictions seemed broad reaching. For example, it applied to all parents of U.S.Cs, regardless of the parent's age or whether they would enter the workforce once in the U.S.[50]

Another issue was that there was no exception for Diversity Visa (DV) lottery winners. The DV category allows nationals of underrepresented countries to enter a lottery for an immigrant visa.[51] However, if a DV lottery winner does not obtain their immigrant visa in the same fiscal year, they lose the ability to immigrate based on that drawing.[52] Accordingly, with the president's immigrant visa ban in place, thousands of DV lottery winners faced losing their chance to immigrate. Lawsuits were filed, and the district court for the District of Columbia issued a preliminary injunction ordering the DOS to begin processing DV applications.[53]

Furthermore, after much speculation, on June 22, 2020, President Trump extended the reach of his visa-specific entry bans with Presidential Proclamation 10052, which suspended entry for those seeking to enter pursuant to an H-1B, H-2B, or L visa as well as certain J visas.[54] Again, the proclamation itself touted protection of American jobs, yet many tech executives, including those from Google and Facebook, were quick to point out that the economy's success is in large part due to immigrants and the diverse work force.[55]

Similar to the immigrant visa ban, the non-immigrant visa (NIV) ban did not apply to individuals who already had a valid visa to their name at the time the proclamation was announced.[56] It also contained exceptions for spouses and children of U.S. citizens, workers providing services essential to the food supply chain, and anyone whose entry would be in the national interest.[57]

Unlike for the regional entry bans, the Department of State provided an explanation as to what might constitute "national interest" for each visa category.[58] For H-1Bs and Ls it included, but was not limited to, health care professionals or researchers, technical specialists and senior level managers, as well as those traveling at the request of the U.S. government.[59] The DOS also clarified that those seeking to continue ongoing employment in the same position with the same employer could also qualify in the national interest since forcing businesses to replace employees "may cause financial hardship."[60] Examples for H-2Bs included travel at the request of the U.S. government as well as travel necessary to facilitate economic recovery;[61] while examples for Js included au pairs providing specialized care to minor children or care for the children of parents involved in COVID-19 relief, as well as interns and trainees on U.S. government-sponsored programs.[62]

While the immigrant visa restrictions were initially only valid for 60 days,[63] when the NIV ban was introduced, the validity was extended and both sets of restrictions were scheduled to expire on Dec. 31, 2020.[64] Yet, as was expected, President Trump issued a continuation of both Proclamation 10014 and Proclamation 10052 until March 31, 2021.[65] However, after President Biden took office, he revoked the immigrant visa ban, effective Feb. 24, 2020.[66] He did so saying that the ban did "not advance the interests of the United States" and that "it also harm[ed] industries in the United States that utilize talent from around the world."[67] Although President Biden did not affirmatively revoke the NIV ban, he declined to extend it any further and it naturally expired on March 31, 2021.

IV. Consulate and Embassy Closures

Perhaps one of the largest impacts of COVID-19 on U.S. immigration has been the closure of most consulates and embassies worldwide. Beginning in mid-March 2020, many locations began to close completely, or at the very least, reduce operations to emergency services only.[68] On March 16, 2020, a swathe of locations across Europe, along with Colombia, India, the Philippines, and other global hubs, all cancelled pending visa appointments.[69] Despite an announcement from the DOS in July 2020 that U.S. embassies and consulates worldwide would begin a phased resumption of routine visa services,[70] few locations were able to accomplish anything of the sort.

Before the pandemic hit, during the 2019 fiscal year (which runs from October-September) over 8.7 million non-immigrant visas were issued, whereas in the 2020 fiscal year that number more than halved to just over four million.[71] In fiscal year 2021 it dropped even further to 2.79 million.[72] On the immigrant side, 462,422 immigrant visas were issued in fiscal year 2019, while only 240,526 were issued in fiscal year 2020 and 285,069 in fiscal year 2021.[73]

This was felt particularly hard by some of the traditionally busiest U.S. embassies and consulates around the world which experienced massive decreases in visa issuance. For example, in the 2020 fiscal year non-immigrant visa issuance in Lagos declined by 72%; Beijing declined by 75%; London declined by 59%; Tel-Aviv declined by 58%; Mumbai declined by 47%; Mexico City declined by 47%; and Sao Paulo declined by 60%.[74]

Even at the time of writing, many consulates are short-staffed, trying to comply with any lingering local social distancing requirements, and deluged with applications that have been backlogged for the past two years. Unfortunately, that means that U.S. visa services around the world are still unable to accommodate the standard "pre-pandemic" flow of applications.[75] As of June 2022, the Department of State continues to report lengthy wait times for non-immigrant visa appointments around the world. In Kingston and Lagos, the wait time for a visitor visa is over two years; in Mexico City it's 19 months; in Paris it's 18 months; across the Indian consulates it ranges from 11 to 15 months; in Sydney it's 13 months; in Dubai, Manila, Tel-Aviv, Madrid, and Sao Paulo it's roughly a year; and in London and Berlin it's about six months.[76] Although consulates are doing the best they can to work through the backlog, continued delays are inevitable.

This means significant wait times to obtain a visa, and for those individuals needing to travel urgently who cannot wait for regular consular services to resume and backlogs to thin, they must jump through additional hoops to get an expedited visa appointment. The process is different depending on each location's specific requirements but typically involves contacting the local embassy or consulate to request an expedited appointment and provide documentation evidencing the urgency. Yet due to reduced consular resources, the availability of expedited appointments remains incredibly limited.

Moreover, for those who cannot document a qualifying emergency, there is a growing queue of applicants waiting for their application to be processed.[77] The National Visa Center (NVC), which is the arm of the DOS that processes immigrant visa applications before an applicant is scheduled for an interview at their local embassy or consulate, has addressed the backlog saying:

> Since March 2020, the COVID-19 pandemic has dramatically affected the Department of State's ability to process immigrant visa applications. U.S. embassies and consulates are working to resume routine visa services on a location-by-location basis as expeditiously as possible in a safe manner. However, the pandemic continues to severely impact the number of visas our embassies and consulates abroad are able to process. The particular constraints vary based on local conditions and restrictions, but include local and national lockdowns; travel restrictions; host country quarantine regulations; and measures taken by our embassies and consulates to contain the spread of COVID-19.[78]

As of June 2022, the NVC was reporting 455,031 eligible cases ready to be scheduled for an interview at a U.S. embassy or consulate but only 28,545 were actually scheduled, leaving a backlog of 426,486 cases ready and waiting.[79] Compared to the 2019 calendar year, on average, there were 60,866 cases ready and waiting each month.[80] It is estimated that this growing backlog could take *years* to work through.[81]

V. Conclusion

The COVID-19 pandemic has been hard-hitting for many industries, and immigration is not immune. The challenges introduced by regional entry bans, North American land entry bans, visa-specific entry bans, and the closure of consulates and embassies worldwide are not likely to go away overnight despite most restrictions no longer being implemented. As the nation continues to heal and re-open its borders, there are significant backlogs to contend with that mean consulates abroad will likely be overwhelmed for many months, if not years, to come. However, the patience and dedication of foreign nationals with a dream of starting a new life in the United States, of remaining together or reuniting with family members, or of

participating in the American marketplace cannot be counted out. Throughout the pandemic they have remained hopeful that their dreams will eventually become reality, and one day, hopefully soon, they will find themselves on American soil.

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Key Developments of the Life Sciences Framework in Brazil During the First Year of the Pandemic

By Ana Cândida Sammarco, Maira Materagia, Caroline Aguiar Malatesta and Marina Dalmaso Battistella

Introduction: The Race for a Vaccine

On Jan. 17, 2021—almost two months before the anniversary of the pandemic declaration by the World Health Organization (WHO) in March 2020—the Brazilian Health Regulatory Agency (ANVISA) issued groundbreaking Emergency Use Authorizations (EUA) for two COVID-19 vaccines[1]: CoronaVac and Covishield.[2]

In a meeting with an audience the size of the World Cup finals watching, Brazilians were following this innovative decision by ANVISA and this milestone for the health sector. Since then, ANVISA has also received applications for Marketing Authorizations (MA) regarding vaccines against COVID-19. As a matter of context, the use of EUA is a fast-tracking exceptional regulatory permission. On the other hand, the MA, which takes a deeper and longer analysis by the agency, is regularly granted by ANVISA for medicines (including vaccines) and health products.

Almost one month later, on Feb. 9, 2021, ANVISA issued Resolution No. 465/2021,[3] which establishes a specific set of rules for the importation and monitoring of the availability of COVID-19 vaccines that are purchased by the Ministry of Health under the COVAX Facility initiative. In a nutshell, based on the provisions of Law No. 9,782/1999[4] and assuming the criteria established by Resolution No. 465/2021 is met, the regulatory requirement of MA or EUA for imported vaccines in this context can be waived.

Although the vaccine against COVID-19 is the trendiest innovation as of now and 2021 is being called by the press as the year of the vaccine,[5] this is not the only development

worth mentioning. The provision of health care services via telemedicine, for example, was a big achievement.

By means of this article, we aim to summarize the regulatory highlights in Brazil relating to digital health driven by the pandemic, which were a remark to the life sciences framework during 2020.

Telemedicine: Spreading Medical care

Before the COVID-19 outbreak, the provision of medical services through telemedicine was regulated by the Federal Council of Medicine (CFM)[6] and its use was restricted to medical assistance in circumstances of urgency or emergency.

The need to reduce the circulation of people that could be exposed to COVID-19 and to decrease the number of face-to-face consultations in health care facilities led the legalization of telemedicine in a temporary manner. Telemedicine is now being used in a wider range of situations by the Ministry of Health through MS 467/2020 Ordinance,[7] which regulates telemedicine as a measure to confront COVID-19. Particularly, in a country as vast as Brazil, facilitating access to health care in a situation as critical as a pandemic is of utmost importance.

The repercussion also reached the legislative branch, which approved a bill in this regard. Law No. 13,989/2020[8] was approved by the Brazilian president, which provides for the use of telemedicine during the crisis caused by COVID-19. It is important to highlight that the term *"during the crisis caused by COVID-19"* is not precisely defined in this law. Therefore, there is some uncertainty of when and whether the telemedicine will return to be restricted to urgency and emergency situations.

A physician is required to inform the patient of all limitations on the use of telehealth, including the impossibility of performing a physical examination during the consultation. Also, Law No. 13,989/2020 determines that the health care service provided via telehealth shall follow the usual normative and ethical standards of in-person care, including in relation to financial compensation for the provision of the service.

The Brazilian National Supplemental Health Agency (ANS), the agency responsible to oversee Healthcare Maintenance Organizations in Brazil, also supported the use of telemedicine in the provision of health care services.[9] More than that, ANS defined the mandatory coverage of a health care service provided through remote communication, since it does not correspond to a new procedure, but rather to a remote medical consultation (i.e., a modality of a preexisting procedure). Lastly, it is important to mention that ANS even adapted the Supplemental Health Information Exchange Standard, with the inclusion of telehealth as a new modality of care.

Lastly, ANVISA has also approved the use of telemedicine in connection with clinical trial procedures, mainly with regard to health monitoring activity.[10] This is an important achievement, because the pharmaceutical industry has been putting a lot of effort into the research and development of drugs and vaccines against COVID-19 and clinical trials are a key point in this process.

Digital Form for Medical Certificates and Medical Prescriptions: A Faster Solution

Medical prescriptions and medical certificates can also be given remotely by physicians using a digital signature accepted by the Brazilian national digital certification system (ICP).[11] The digital medical prescription necessarily has a virtual signature certified by ICP and can be sent to the patient or his legal representative via SMS, email, or QR code.

A digital framework called the Electronic Prescription Platform has been developed by the CFM, the Federal Council of Pharmacy (CFF) and the National Institute of Information Technology to ensure information security and interoperability between physicians, patients and pharmacists.

The possibility to dispense medicines subject to special control by pharmacies via electronic medical prescriptions with ICP was also authorized by ANVISA, given that such medicines are classified as antimicrobial medications and, prior to dispensing the medication, the pharmacist performs an authenticity and validity assessment of the electronic medical prescription.[12]

Informatization of Health Facilities: Dissemination of Information

In May 2020, through Ordinance No. 1,434/2020, the Ministry of Health established the SUS Connection Program and the National Health Data Network aimed at computerization and the promotion of interoperability standards in health.

The Connect SUS program seeks, in a broad way, to establish the computerization of public and private health establishments and health management bodies. More specifically, it provides for the computerization of the establishments that make up the levels of health care, starting with primary care. In addition, it seeks to promote the access of citizens, establishments, professionals, and health managers to relevant information through a mobile platform and digital services.

The National Health Data Network consists of a national platform aimed at the integration and interoperability be-

tween public and private health establishments, as well as health management bodies. It is a data repository that will be responsible for storing all citizens' health information, ensuring the privacy, integrity, accessibility, and auditability of this content. The platform is intended to enable communication and sharing of various digital health applications, Electronic Patient Records, Hospital and Laboratory Management Systems, portals and mobile applications.

Final Considerations: What Is Yet To Come?

Before the COVID-19 outbreak, the use of technology as a tool to provide health care services was more restricted, given the fact that authorities and professionals were concerned over put at risk the physician–patient relationship.

However, in the past year people's daily lives have suddenly changed. Quick and effective health solutions that make it possible to maintain social isolation have become crucial. The ideal became to find fast and effective ways to provide medical services while not compromising the health and security of the population. In this context, digital health plays a significant role, since in the past year it has been used as an important tool to accomplish these goals.

Even though some of the regulations mentioned in this article were established on a temporary basis, their impact in the life sciences framework is significant and might be permanent. They provided the opportunity for governmental authorities, players from the industry and society to study what can be incorporated on a permanent basis, as well as mapping advantages and points of improvement.

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Endnotes

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Albert S. Pergam International Law Writing Competition Submissions

The Albert S. Pergam International Law Writing Competition began in 1988 as a way to foster legal scholarship among law students in the field of international law. It is intended to encourage students of law to write on areas of public or private international law.

NYSBA's International Law Section believes that by providing a forum for students to disseminate their ideas and articles, the professional and academic communities are enriched. Furthermore, the competition presents an opportunity for students to submit law review quality articles to the Section for possible publication in the *New York International Law Review*.

Each fall, law students are invited to submit their original articles to the Section for consideration in the competition. All submissions are reviewed by a committee of attorneys practicing international law, and a winner is chosen based on a variety of factors, including significance and timeliness of the subject matter, thoroughness of research and analysis, clarity of writing style, as well as the importance and originality of the topic to the understanding of private/public international law or comparative law.

The competition winner is awarded $2000 and publication in the *New York International Law Review*.

On the following pages we have included submissions from this year's writing competition from Nia A. Knighton, Alyaa Chace and Lena Raxter. We hope that you enjoy this content from the up-and-coming talent in the study of International Law.

The United Nations Security Council Permanent Member States' Abuse of Power Impedes on Syrians' Right to Peace and Justice

By Nia A. Knighton

The sad truth is that most evil is done by people who never make up their minds to be either good or evil.

– Hannah Arendt

I. Introduction

The year 2021 marks a decade of war in Syria. While adequate access to humanitarian aid, cessation of violence on civilians, and a Syrian-led pluralistic political process is paramount to the preservation of the Syrian Arab Republic, these actions have largely failed to commence, in part, due to cynical unimpeded abuse of power by the Permanent Member States on the United Nations Security Council. Human rights violations have occurred by almost every armed group in Syria—including the Syrian government—and continue to destabilize peace within Syrian borders. Throughout the conflict, various human rights organizations and outlets have documented countless breaches of international treaties. The Syrian war has claimed the lives of more than 250,000 victims, 7.6 million internally displaced persons, and 4.2 million refugees, forming one of today's largest humanitarian issues in the world. It is my submission that while some efforts by the United Nations to mitigate the ongoing violence and instability, have been made, Permanent Member State status allows countries to prioritize political interest over the functional duties of the Security Council, through the abusive use of veto power and impunity for foreign military intervention, further politicizing the protection of human rights in Syria and undermining the United Nations' position as a global mechanism to maintain international peace and security. This article will explore the responses of several U.N. Security Council Member States (UNSCMS) in particular, Russia, China, and the United States to the war, by providing a brief overview of the conflict in Syria in Section II, followed by a discussion of the legal obligations of the Syrian government through treaty ratification, and corresponding human rights violations that breach such obligations in Section II. In Section III, this article will analyze Russia, China, and the United States' conflicting interests as parties to the conflict, while maintaining an authoritative position as Security Council Permanent Member States; and subsequent responses to the dilemma in Sections IV and V. In brief, the existence of the Permanent Member Security Council delegitimizes the United Nations as a fair and impartial intergovernmental body dedicated to mitigating disputes and reestablishing peace and security across the globe.

II. Brief Overview of the Syrian Conflict

The modern struggle for freedom from authoritarian rule in Syria has its origins in the *Arab Spring*. The unrest in the region commenced when a young street vendor from Tunisia named Mohamed Bouazizi set himself on fire in front of the Tunisian Parliament in frustration with the Tunisian government. The incident initiated a crescendo of anti-government protests across the Middle East, resulting in the toppling of authoritarian leaders in Tunisia and Egypt.[1]

In March 2011, just one month after the commencement of protests in Tunisia during the *Arab Spring*, 15 Syrian schoolboys were detained by Syrian security forces after being accused of painting anti-Bashar al-Assad graffiti on school property in the city of Dara'a.[2] The young boys were detained for months and severely tortured.[3]

In response to growing demonstrations protesting arbitrary detainment and torture of the schoolboys, military forces, under current Head of State, President Bashar al-Assad, dispensed live rounds on protesters to quell demonstrations.[4] Widespread arrests during ground operations and checkpoints ensued. Government forces and its militias expended lethal force resulting in unlawful and extrajudicial killings, mass torture, arbitrary detention, and enforced disappearance against Syrian civilians participating in largely peaceful demonstrations. The government's use of lethal force on civilians resulted in the emergence of the Free Syrian Army (FSA), an opposition group composed of armed demonstrators and defectors from the Syrian army.[5] What started as peaceful demonstrations

against the Assad regime has since spurred into a complicated and ever-evolving war between government forces, splinter groups, and various international allies and opposition forces, contributing to exuberant human rights violations. Numerous armed actors have been involved in deliberate and indiscriminate, violent attacks on civilian populations including women and children, medical facilities, and residential areas; use of chemical weapons and barrel bombs; acts of torture, summary executions, arbitrary arrests, and enforced disappearances, as well as widespread displacement, rape, and sexual violence.

III. Human Rights Violations in Syria

A. Key Authorities That Obligate the United Nations' Involvement

Key authorities obligate intervention by the United Nations in response to the conflict in Syria. As a member-state of the United Nations, the Syrian government has a duty to uphold the conventions which Syria has ratified, including the International Covenant on Civil and Political Rights (CCPR), the Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Universal Declaration of Human Rights (UDHR). These treaties create inalienable rights for Syrians under which, the Syrian government has a duty to uphold and protect, including, specific rights concerning the civil and political freedoms of human beings, "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."[6] The Syrian government has breached its duty to protect both the rights and freedoms of civilians through its actions, as well as its duty to provide an effective remedy for violations that have occurred.

B. Use of Heavy Weaponry by Syrian Army on Civilians

The use of cluster munition deployed airstrikes by Syrian and Russian aircraft on civilian populations has been reported on multiple occasions.[7] On 4 August 2016 two internally displaced persons (IDP) camps in Atarib district in Aleppo governorate were bombed with cluster munitions during an airstrike that left four children dead; "the attack appeared to deliberately target an extremely vulnerable population with indiscriminate weapons."[8] Such attacks have been used on the opposition as well. Government forces used at least 13 types of internationally banned cluster munitions in over 400 attacks on opposition-held areas between July 2012 and August 2016.[9]

The use of barrel bombs by Russian and Syrian aircraft on civilians has also been reported. Indiscriminate attacks of heavy weaponry by the Syrian regime have been used on "markets, schools, medical facilities and squares; in order to maximize deaths and injuries, often the second round of bombs is dropped on those gathered to assist the injured."[10] The use of heavy weaponry on civilians is a violation of several international treaties; the 2008 Convention on Cluster Munitions prohibits the use of cluster munitions, and the Protocol III of the Convention on Conventional Weapons (CCW) prohibits certain uses of incendiary weapons. While Russia and Syria are not among the 120 countries that have banned cluster munitions, Russia is a state party to the CCW protocol on incendiary weapons, and both countries are held to the standards of international customary law and *jus cogens*[11] norms that prohibit crimes against humanity, including the use of heavy weaponry on civilians.[12]

C. Use of Chemical Weapons on Syrian Civilians

The Report of the Independent International Commission of Inquiry on the Syrian Arab Republic documented massive attacks of sarin-filled rockets on the civilian population in Eastern Ghutah in August 2013.[13] Article IV of the Convention requires state parties to destroy any stockpiles of chemical weapons, and the use of chemical weapons constitutes a war crime.[14] The Syrian government's alleged continued use of chemical weapons has killed, maimed, and destroyed the lives of many Syrian civilians. Such crimes rise to the level of crimes against humanity and war crimes under the direction of the Assad regime.

D. Use of Torture on Syrian Civilians

Instances of torture have occurred since the onset of political demonstrations in 2011. The non-governmental Human Rights Data Analysis Group estimated "at least 17,723 deaths in government custody between March 2011 and December 2015, as a result of torture and other ill-treatment."[15] Systematic torture has been carried out by Syrian forces on men, women, children, and the elderly. Torture is widely condemned by the international community and has risen to the level of *jus cogens*. On 19 August 2004, Syria ratified the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT). Within CAT, states are obliged to effectuate legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction, and may not use exceptional circumstances, whether a state of war or a threat of war, internal political instability, or any other public emergency, to invoke as a justification of torture.[16] Acts of torture carried out by the Syrian government violate *jus cogens* norms of the prohibition of torture, and administrative and judicial measures within the Syrian government have failed to safeguard the rights of civilians within the country.

The threat of war or internal political instability does not exempt the Syrian government from this duty.

E. Enforced Disappearances

Accounts of enforced disappearances and arbitrary detainment have occurred in Syria since the start of the conflict. According to the Syrian Network for Human Rights (SNHR), at least 100,000 Syrians remain forcibly disappeared.[17] Article VII of the Rome Statute classifies enforced disappearances as crimes against humanity when committed as part of a widespread and systemic attack.[18]

F. Targeted Attacks on Syrian Women and Children

The United Nations Universal Periodic Review of the Syrian Arab Republic reported accounts of gender-based sexual violence, forced and early marriages, "honor" crimes, and the lack of adequate protection, access to justice, and victim services.[19] The disproportionate sexual attacks on women and girls, "carried out by government forces and associated militias during ground operations, house raids, at checkpoints, and during detention," contribute to a widespread and systematic attack directed against civilian populations, amounting to crimes against humanity.[20] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) mandates the elimination of all acts of discrimination against women by persons, organizations, or enterprises and requires national tribunals and other public institutions to ensure effective protection of women against discrimination.[21]

Targeting children as victims of violence is in direct violation of the Convention on the Rights of the Child (CRC), ratified by the Syrian Arab Republic on 15 July 1993. Under the Assad regime, targeted attacks on schools by the Syrian government have destroyed school buildings and educational materials, and continuously threaten the lives and wellbeing of children, as well as their right to access education that is free from state-sanctioned violence. Children have recently become a huge target for attacks in Syria—half of all worldwide attacks on schools between the years 2011 and 2015 are attributed to Syria.[22] As a member of the CRC, Syria must recognize that every child has the inherent right to life, and ensure to the maximum extent possible, the survival and development of the child.[23] The U.N. Committee on the Rights of the Child (CRC) noted Syria's obligation as a state party to refrain from excessive and lethal force, and to always prevent future violence against children, from all groups functioning within its borders.[24] However, the Assad regime has drastically failed to promote and protect the rights of Syrian children.

G. Refugee Crisis and Internal Displacement

As a result of constant war and destruction, the Syrian conflict has caused an enormous refugee crisis. To date, over 6.7 million Syrians are internally displaced within the country. 2.5 million children are displaced within the borders of Syria, contributing to the largest internally displaced population in the world. While uprooted from their homes, internally displaced people (IDP) have not entirely escaped ensuing threats of attack and are still extremely vulnerable due to the country's instability. Over 6.6 million Syrian refugees also exist worldwide, seeking safety in countries like Lebanon, Turkey, Jordan, and beyond.[25] Lastly, over 13.4 million people need humanitarian aid and protection assistance in Syria to date.

IV. Involvement of the U.N. Security Council Permanent Member States

A. U.N. Security Council Veto Power

Fifteen member states make up the U.N. Security Council–which includes five permanent member states, consisting of Russia, China, the United States, the United Kingdom, and France; along with ten rotating elected members that serve a term of two years. The U.N. Security Council functions to maintain peace and security within the international community.[26] Under the U.N. Charter, the Security Council has the power to investigate disputes and recommend methods of action including sanctions, and military intervention. The Security Council must vote to adopt certain resolutions proposed by other bodies and organs of the United Nations. The U.N. Charter provides each member one vote, with all decisions on procedural matters made affirmative by nine votes.[27] While each member of the Security Council's vote weighs the same, the permanent member's veto power renders the Security Council powerless to pass a resolution without the affirmative vote or abstention of one of the five permanent member states. So long as "any one of the five permanent members cast a negative vote in the 15-state-member Security Council, the resolution or decision [will] not be approved."[28]

Herein lies the issue in the responsiveness of the United Nations to the conflict in Syria; Permanent Member State status allows countries to prioritize political interest over the functional duties of the Security Council. The U.N. Security Council's five permanent member states' veto power undermines the nature of the body to serve as a fair and objective mechanism for the protection of human rights. Russia, China, the United States, the United Kingdom, and France have the ever-wielding power to gridlock the United Nations into cessation.[29] Not only can Permanent Member States exercise their veto power to further foreign political interests, but Permanent Member States also enjoy impunity for harmful and violent intervention within and across borders. The disproportionate power of authority Permanent Member States obtain through the UNSC delegitimizes the U.N. as a fair and partial intergovernmental mechanism to maintain international peace and security. This abuse of power by members of the largest

intergovernmental organization in the world undermines the commitment set forth by the U.N. Charter; "to save succeeding generations from the scourge of war . . . and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . ."[30]

1. Russia's Involvement via U.N. Security Council

The existence of the Security Council's veto power essentially gives Permanent Member States the authority to block any resolution that conflicts with the interests of ally-states and geopolitical interests. Russia has been a close ally of Bashar al-Assad and his governing regime and had military bases in Syria before the 2011 conflict.[31] Russia's interest in maintaining Syria as a close ally has led to military intervention against opposition-rebel groups and Western-backed forces. Before the conflict, Russia has been "largely absent from the Middle East for the better part of the previous two decades; Russia intervened to save Bashar al-Assad's regime and reasserted itself as a major player in the region's power politics."[32] As rebel groups such as the Free Syrian Army (FSA) and Kurdish rebel group, People's Protection Units (YPG) began to make headway against the Syrian government, Russia's military intervention in Syria began to expand. The collapse of the Assad regime would likely threaten Russia's interest as a major player in the Middle East by eliminating a regional ally. Since Russia's involvement in the Syrian conflict, Russia's relationship with Turkey has improved "since the fall of the Soviet Union; trade and energy ties, as well as a shared sense of alienation from the West, are now the key drivers of that relationship." As geopolitics begin to shift in the region, world powers like Russia have used their leverage within the U.N. Security Council to further personal political interests.

The conflicting interests of pursuing accountability for human rights violations committed by the Assad regime, and maintaining close relations with the Syrian government have been prevalent in Russia's attempts to block resolutions that trigger intervention from the United Nations. Russia's relationship with Syria at the expense of international intervention and criticism causes a conflicting interest within the purposes of the Security Council. Russia has exercised its veto power to block meaningful resolutions that would otherwise help prevent and mitigate ongoing conflict in Syria.

In October of 2011, draft resolution S/2011/612 was brought before the Security Council for a vote. The draft condemned systematic human rights violations and the use of force against Syrian civilians by government authorities, calling upon U.N. member states to exercise vigilance and restraint over the distribution of arms and financial services related to the conflict. The draft resolution also called for the immediate end to all violence, cooperation with the Office of the High Commissioner for Human Rights, and the implantation of a political process within Syria free from violence, fear, and intimidation. The draft was brought to the U.N. Security Council for adoption and was promptly vetoed by Russia and China–both allies of the Syrian regime—halting any meaningful attempts by the U.N. to mitigate the growing conflict at the start of the war.[33] Russia continued to funnel financial and armed resources to the Syrian regime under Head of State Bashar al-Assad, and has since contributed to multiple airstrikes using Russian aircraft, causing widespread death and destruction to civilian populations, further destabilizing the country.

In February 2012, states including Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, United Kingdom, and the United States among others, drafted the S/2012/77 resolution which supported the Plan of Action of League of the Arab States of 2 November 2011. The draft aimed to achieve a peaceful resolution to the crisis and condemned widespread "force against civilians, arbitrary executions, killing, and persecution of protestors and members of the media, arbitrary detention, enforced disappearances, interference with access to medical treatment, torture, sexual violence, and ill-treatment, including against children." The draft resolution also demanded the withdrawal of all Syrian military and armed forces from cities and towns and ordered the guarantee of the freedom of peaceful demonstration. Russia and China promptly struct down this draft resolution with their veto power and Permanent Representative of Russia to the UN, Vitaly Churkin, released a statement reproving the draft for its lack of proposal to end attacks by armed groups or those affiliated with extremists.[34]

From July 2012 to December 2019, Russia exercised its veto power, effectively striking 12 draft resolutions. Russia has exercised its veto power four times as of 2018 to block draft resolutions seeking to establish investigative mechanisms into chemical weapons use in Syria. "The Joint Investigative Mechanism (JIM) died on 17 November after several attempts by the Security Council to save the panel failed to meet Russian demands," which was originally established in 2015 to identify those responsibly, or otherwise involved in the use of chemical weapons, including chlorine or any other toxic chemical, in the Syrian Arab Republic.[35] Russia's justification for denying multiple draft resolutions includes statements made by Russian U.N. Ambassador Vassily Nebenzia, articulating the U.S. draft resolution was not balanced—alluding to the lack of condemnation towards acts committed by armed insurgency groups and extremists. In failing to reestablish the JIM

however, "Russia withdrew its own rival draft resolution to renew the inquiry, after unsuccessfully pushing for its proposal to be considered second and not first, as council rules required."[36] Russia has questioned the findings of the original JIM, which amongst other things, concluded that the Syrian government used chlorine as a weapon against civilians multiple times. Russia continues to politicize human rights violations in Syria, by shifting accountability from the Assad regime to non-government affiliated armed groups in Syria. This attempt disregards the continued human rights violations and war crimes by all armed parties to the conflict and fails to act on the use of chemical weapons on civilians, which regardless of whom the actions can be attributed, are *jus cogens* crimes.

2. China's Involvement via U.N. Security Council

China has largely maintained a relatively low profile in the Syrian war, holding the view that "Syria's sovereignty, independence, and territorial integrity must be respected and upheld."[37] China has been relatively reluctant to intervene in states' sovereignty and has publicly criticized the imperialist practices of Western nations like the United States. China's involvement through its exercised veto power is a bit nuanced: while economic ties in Syria exist via China's investment in Syria's oil sector, and China's role as Syria's largest supplier of imported products, "given the scale of the Syrian economy and oil production, such economic interests are not significant enough for China to protect Assad's government."[38] Syria's stock in oil, however, may have its significance in other ways. China may be concerned about a possible Western-led invasion amidst interest in oil control. The destabilization of Syria has caused an array of fraction groups vying for governing control over Syria. With the possibility of a new leader emerging, China may be concerned about preventing a pro-western replacement and shifting regional power regarding Iran's geographical position to Syria, and static tensions between the U.S. and Iran.[39] Due to Syria's close relationship with Iran, it is likely in China's best strategic interest to maintain the Assad regime to prevent a further imbalance of power between Chinese and Russian-backed allies, versus Western allies.

As a state that largely supports state sovereignty, China's interests in vetoing certain resolutions include preventing imposed foreign intervention. Chinese Foreign Ministry Spokesperson Hong Lei remarked that China supports "relevant parties in Syria properly resolving internal differences through dialogue and negotiation."[40] China's view on conflict resolution through balanced practices partially explains vetoing patterns regarding draft resolutions. However, the U.N. Security Council functions not to bolster geopolitical interests and political ideology held by single-member states with unbalanced power, it functions to protect international peace and security. As such, the existence of the permanent member state's veto power undermines that function and gives way to personal interference at the cost of civilian livelihood.

China's involvement through its power as a Permanent Member of the Security Council has stifled progressive action in several ways by vetoing over 10 draft resolutions concerning the conflict in Syria and failing to protect civilian lives from crimes against humanity, including access to humanitarian aid by Syrian refugees, and referral to the International Criminal Court for war crimes committed by government and military personnel. With more than 13.5 million people in need of humanitarian aid in Syria, the draft resolution S/2016/1026 called for a seven-day cease-fire in Aleppo city, once Syria's largest populated city, now a battleground between government forces and rebel groups for the past several years.[41] The cease-fire proposed in the draft resolution would allow and facilitate immediate, safe, sustained, and unimpeded humanitarian access to all of Aleppo by the United Nations and its implementing partners.[42] While the draft resolution received 11 votes, surpassing the nine required votes to pass the resolution, China and Russia's veto blocked the resolution and prevented the cease-fire that would have allowed some 250,000 to receive comprehensive humanitarian aid.[43]

A 2019 draft resolution, S/2019/961 called for the Syrian government to allow access to humanitarian aid and recalled its demand for the full and immediate implementation of resolution 2254 (2015) to facilitate a Syrian-led and Syrian-owned political transition, to eliminate conflict in Syria by allowing the people of Syria to determine their leader through a democratic process. This draft resolution proposed by Belgium, Germany, and Kuwait, failed both China and Russia's veto. China's use of veto power continues to stratify Syrian civilians to a life of constant warring with little international intervention.

B. U.S. Role in the Syrian Conflict

Like Russia and China, the United States has a growing stake in the Syrian war while actively participating in its capacity as a Permanent Member State on the Security Council. The U.S. has cynically acted to overthrow regimes to insert Western-backed leaders in its attempts to establish American hegemony in the Middle East and Northern Africa. U.S. intervention as neo-imperialist militarism has directly aided in regime changes within countries like Iran, Guatemala, and more recently, Libya.[44] Syria's instability has become a game of geopolitics for countries like the U.S., Russia and China. As such, the U.S. betrays its position on the Security Council and violates international law and human rights commitments by using military intervention in Syria to maintain its stake as a world power in

the region. Unlike Russia and China, the use of strategic veto power through the Security Council has not been the U.S.'s main tactic; rather it seeks to forcefully remove Bashar al-Assad from power to establish a new leader in the country.

U.S. operations against Syria would likely set the stage for an eventual fracas with Iran–the U.S. major opponent in the region. Iran's geographical location is a "major factor in the power relations of the Middle East and Central Asia."[45] Control over Iran would allow for domination over the Persian Gulf, "through which passes the bulk of supertankers that transport the oil of Saudi Arabia and the Gulf States to the world."[46] With the increasing insecurity of the Assad regime over parts of Syria and growing rebel groups, the U.S. took the opportunity to intervene in the conflict—becoming a major ally to opposition groups aiming to overthrow the current regime. Under the Obama Administration, the U.S. invested over $500 million in a program to train and organize 5,000 Syrian fighters against the Assad regime. The program, however, was a huge failure, as the head of Centcom, General Lloyd J Austin III, testified that "only four or five" Syrians trained by the U.S. military remained in the fight.[47] Many CIA-trained Syrian rebels armed with weapons and other military equipment have since joined other rebel groups, including extremist groups the U.S. has publicly condemned.[48] This huge blunder came at the expense of prolonged violence and civilian causalities.

Not only has U.S. intervention in Syria created a conflicting interest in the foundation and principles of the U.N. Security Council to maintain peace and security through its attempted influence in regime change, but the use of U.S. military weapons deployed on Syrian civilians has aided in the growing number of casualties and human rights violations within the country. The United States has attempted to garner public support for military intervention in Syria by bolstering the need for humanitarian aid. However, actions by the U.S. have not been limited to providing humanitarian aid to civilians. Reports by Amnesty International of airstrikes by U.S.-led aircraft estimate a death toll of 1,600 innocent civilians while leveling the city of Raqqa, Syria in 2017.[49] More recently, in February 2021, the Biden Administration announced U.S. airstrikes on targeted bases in Syria used by Iranian militants. The Biden Administration claims the attacks were calculated and precise; however, neither Congressional nor international approval of the attacks was sought before taking extreme military action that resulted in the death of 22 individuals.[50] "The Pentagon defended the legality of the strikes, arguing Article II of the Constitution grants the president powers as commander in chief, and citing article 51 of the U.N. charter, providing countries the right to "self-defense" in response to an attack." However, Mary Ellen O'Connell, a professor at Notre Dame Law School, criticized the U.S. attack as a violation of international law. "The United Nations charter makes clear that the use of military force on the territory of a foreign sovereign state is lawful only in response to an armed attack on the defending state for which the target state is responsible," she said. "None of those elements [were] met in the Syria strike."[51] Not only did the Biden administration violate international law, but the United States' respective motives for the future of Syria do not align with the United Nations' demand for a Syrian-led and Syrian-controlled political process. The U.S.-led airstrikes and military intervention in Syria to overthrow the governing Assad regime demonstrate American imperial and hegemonic ambition. While the U.S. has *not* been a major proponent of vetoing draft resolutions presented to the Security Council, it is likely the U.S. will act in its political interests to establish its desired results even at the detriment of stability and protection of human rights.

Various disagreements on how to frame the conflict have created dissent amongst the Security Council, gridlocking the body into further inaction. Countries like Russia, China, and the United States disagree on the type of response to the conflict as some countries propose military intervention while other countries like China prefer noninterference on state sovereignty. Framing the conflict requires naming the parties liable for violations. As allies of the Assad regime, Russia and China are wary of placing blame on the Syrian government for human rights violations, while Western countries like the U.S. emphasize Assad's involvement in efforts to undermine the regime as a legitimate authority. The issue of imposed sanctions, regime change, and the possibility of military intervention are highly controversial topics amongst members of the Security Council, and exhaustive negotiations have largely ensued at the detriment of growing civilian casualties. While Syrians look towards the U.N. for justice and accountability, it is clear the onus of failure has fallen in part, on the Permanent Member States of the U.N. Security Councill to carry out that mission. Syrians may find a different route to justice through the International Criminal Court; however, similar egoistic hurdles to the ICC are quickly recognized.

V. Hurdles to Accountability for Crimes Committed Against the Syrian People

A. ICC was Created to Assert Accountability for Egregious Human Rights Violations

The International Criminal Court (ICC) is the only permanent international judicial body to prosecute individuals for acts of genocide, crimes against humanity, war crimes, and crimes of aggression. The ICC investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community. As established in the Rome Statute, the ICC may prosecute crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.

Evidence of these crimes has occurred in Syria since the start of the conflict. Crimes against humanity including large-scale attacks of murder, rape, imprisonment, enforced disappearances, and torture has been documented by many reports by independent human rights organizations, and the United Nations Human Rights Council. Since the beginning of the conflict, an estimated number of 207,000 civilian casualties have been reported, 25,000 of those deaths were children under the age of 18.[52] According to the Syrian Network for Human Rights (SNHR), at least 100,000 Syrians remain forcibly disappeared, and nearly 15,000 killed through acts of torture by Syrian government forces since March 2011.[53] Human Rights Watch reported approximately 100,000 ISIL suspects and family members, most of which are women and children being held in desert camps and prisons, on the Syrian-Turkish border.[54] War crimes through the deliberate attacks on hospitals, schools, and mosques, continue to occur under the Assad regime. The Human Rights Council reported half of all worldwide attacks on schools between the years 2011 and 2015 are attributed to Syria. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) reported at least 157 attacks on Syrian schools in 2019 alone.[55] Deliberate and indiscriminate attacks on hospitals have also occurred, destroying medical aid, and killing medical personnel, prohibiting essential care for injured civilians in Syria; "Hospitals have been attacked more than 400 times over the past decade, according to data provided to DW by the Syrian Archive."[56] From this data, it is clear such violations rise to the level of severity for investigation by the court to be prompted.

B. The ICC as a Court of Last Resort

The ICC was intended to overcome claims of "sovereign immunity," and acts as a court of last resort, where heads of state and high-ranking government and military figures can be held to account for their crimes when domestic courts cannot or will not prosecute. When victims of crimes are unable to seek justice through national court systems due to leveraging the power of governmental perpetrators, the responsibility to seek justice falls on international and foreign courts to exercise legal jurisdiction; "the ICC does not replace national criminal justice systems; rather, it complements them . . . [intervening] only if the state concerned does not, cannot or is unwilling genuinely to [investigate, or where warranted, prosecute]."[57] While Syria maintains an elaborate court system divided into several jurisdictions composed inter alia of civil, criminal, administrative, and Supreme Constitutional Court, the Assad regime is an authoritarian regime that has stifled the powers of an independent legal and judicial system to review the government's behavior during times of recent conflict.[58] Under the Assad regime, judges and lawyers have consistently been subject to intimidation by the regime and Jihadist groups.[59] Head of State Bashar al-Assad, high-ranking government officials, military figures, foreign officials, militia leaders, and extremist leaders participating in crimes against humanity and war crimes are open to prosecution by international judicial bodies because national Syrian courts have failed to do so. The ICC has reason to initiate investigations into alleged crimes in the Syrian war, however, the ICC must first establish jurisdiction before commencing legal proceedings.

C. Limited Jurisdiction of the ICC in Syria

The International Criminal Court has limited jurisdiction over Syria, as Syria is not a state party to the Rome Statute.[60] As a general rule, "the Court may exercise its jurisdiction in situations where the alleged perpetrator is a national of a State Party or where the crime was committed in the territory of a State Party."[61] However, three exceptions allow for jurisdiction to be extended over non-state parties and actors.[62] Pursuant to Article 12.3 of the Rome Statute, the ICC can extend its jurisdiction over the territory of a non-state party that has (1) referred the situation to the ICC. The state which accepts the jurisdiction of the ICC shall cooperate with the ICC with no delay or exception.[63] The Rome Statute also allows for extended jurisdiction over non-state parties where (2) a crime has been committed by a non-state party actor against a national of a state party.[64] The last exception for ICC jurisdiction to be extended over a non-state party is (3) through referral by the United Nations Security Council pursuant to a resolution adopted under Chapter VII of the U.N. Charter.[65]

D. ICC Investigation Through UNSC Referral

While the ICC has limited jurisdiction in Syria, the ICC can investigate alleged crimes against humanity and war crimes through United Nations Security Council (UNSC) referral to the International Criminal Court.[66] This attempt to establish jurisdiction through referral by the UNSC has been blocked due to UNSC Permanent Member States' unimpeded veto power, specifically in regards to Russia's position as an ally to Bashar al-Assad, and China's interest in preventing imposed foreign intervention. Russia's strong allyship of the Assad regime has prevented the matter of Syria from being referred to the International Criminal Court for adjudication. In May of 2014, China and Russia used their veto power to block draft resolution S/2014/348 to refer the situation in the Syrian Arab Republic to the International Criminal Court.[67]

The draft resolution S/2014/348 was backed by more than 60 countries who petitioned to refer the Syrian conflict to the International Criminal Court, echoing the call by the United Nations High Commissioner for Human Rights briefing that emphasized the importance of referral of the situation in the Syrian Arab Republic to the Prosecutor of the International Criminal Court. [68] The draft resolution, however, "failed to pass by a vote of 13 in favor to 2 against (China, Russian Federation), with no abstentions."[69] While 60 countries petitioned

for a judicial response, only two countries (Russia and China) prevented what would have been a monumental step towards a transition to peace and accountability for the people of Syria. Russia and China abused their power as Security Council Members by prioritizing their political interest of preserving their ally state over a possible remedy to the ongoing conflict. In response to the decision not to refer Syria to the ICC made exclusively by Russia and China, Deputy Secretary-General Jan Eliasson emphasized the importance for Syrians to exercise their fundamental right to justice, "and the United Nations . . . duty to defend it . . . warning that if the Council could not agree, the credibility of the entire Organization would continue to suffer."[70] Syria's case reminds us that the ICC and the U.N. are limited justice.

VI. Remedies for Syrian Civilians Under Foreign Courts

While failures of the UNSC have seeped into the functions of the ICC, foreign institutions may be able to hold countries and government actors accountable for human rights violations through the administration of domestic court proceedings. In February 2020, former Syrian officials Anwar Raslan and Eyad al-Gharib were arrested by German and French police for alleged crimes against humanity over the torture of detainees in Damascus.[71] The Higher Regional Court in Koblenz, Germany found al-Gharib guilty of crimes against humanity "for his role in aiding and abetting the torture of detained protesters in Damascus," and was sentenced to four-and-a-half years in prison.[72] "The verdict in the western German city of Koblenz marks the first time a court outside Syria has ruled on state-sponsored torture by the regime of Syrian President Bashar Assad" and will hopefully set precedent for future criminal proceedings to arise.[73] The German court's decision might pave the way for future litigation and may serve as redress for human rights violations when international courts fail to do so.

VII. Conclusion

Security Council Permanent Member State status delegitimizes the U.N. as a fair and impartial intergovernmental body dedicated to mitigating disputes and reestablishing peace and security in Syria and across the globe. Through unimpeded veto power use and military interventions sanctioned by foreign governments, the U.N. Security Council has become a body of self-regarding world powers, wielding their authority to the detriment of civilian life. Syria is in desperate need of comprehensive access to humanitarian aid, cessation of violence, and a fair and transparent pluralistic political process. Justice for Syrian civilians should not hinge on the veto power of five powerful nations in the global community. The Security Council cannot function as an apparatus to maintain peace and security while members of the Council actively participate in human rights violations in furtherance of their geopolitical gain. The U.N. is in desperate need of reorganization and allocation of powers to include multilateralism and inclusivity to maintain its position as an impartial intergovernmental body. I propose a reimagined structure for the Security Council that would encompass 15 general member seats for terms no longer than five years, divided amongst regions, and voted into by its represented region, with limits on lobbying budgets. I also propose the abolition of veto power as no one country should have the power to block the consensus of 14 other member states. So long as world powers preserve their supremacy of power, the conflict will continue, and prolonged adjudication of justice for millions of Syrians whose lives have been wholly uprooted and devastated will continue for years to come.

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Is Extraterritoriality the Golden Ticket Out of Corporate Liability? How the Modern-Day Willy Wonka's Chocolate Factory Evaded Liability Under the Alien Tort Statute in *Nestlé v. Doe*

By Alyaa Chace

When the last tree is cut down, the last fish eaten and the last stream poisoned, you will realize that you cannot eat money.[1]

-Cree Indian Proverb

I. Introduction

Nemo bis punitur pro eodem delicto . . . in fact, some aren't punished at all.[2] Corporate liability under the Alien Tort Statute (ATS) has been the subject of debate since the Statute's revival in 1979.[3] The ATS was passed as a part of the Judiciary Act of 1789 in an effort to cure the defects of the Articles of Confederation, which James Madison referred to as "an inadequate vehicle for guiding the fast-growing United States and its more than three million people through a treacherous world."[4] The ATS, presently codified in 28 U.S.C. § 1350, provides that, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations[5] or a treaty of the United States."[6] Foreign plaintiffs seeking redress in United States federal courts often depend on this Statute when bringing claims regarding human and environmental rights offenses carried out on foreign soil by corporate defendants.[7] In *Kiobel v. Royal Dutch Petroleum Co*,[8] the Supreme Court held that the ATS does not allow federal courts jurisdiction over actions brought for violations of the law of nations that have occurred in territories outside of the United States.[9] The Court held that any extraterritorial application of United States law goes against the legislative intent of the ATS.[10] The alleged offenses would have to "touch and concern" U.S. territory with "sufficient force" in order to overcome the extraterritorial limitation.[11] The Court further narrowed the application of the ATS in 2018 in the case of *Jesner v. Arab Bank, PLC*.[12] Referencing its decision in *Kiobel*, the Court held specifically that corporations may not be sued under the ATS when the alleged violations took place outside the United States.[13]

The Court's decisions in *Jesner* and *Kiobel* foreclose corporate liability for actions occurring abroad under the ATS, notwithstanding alleged violations of the law of nations or United States treaties.[14] Generally, scholars agree that the Framers' intent in creating the ATS was to give federal courts jurisdiction over claims brought by foreigners seeking redress for certain violations of international law, particularly for violations of the law of nations.[15] At the time, the Framers were concerned with the national government's limited ability to enforce international law throughout the country.[16] Their concerns manifested in 1781 when the Continental Congress appealed states' punishment of violations of international law.[17] They began to realize the limitations of federal power that beset the Articles of Confederation in that, among other things, the government "possessed no domestic legislature or funding powers to implement treaties."[18] An attack on a French diplomat in 1784 further emphasized the need to expand governmental ability to enforce international law.[19] Justice Souter refers to this chain of events as "[t]he anxieties of the pre-constitutional period."[20] As a result, the ATS was subsequently drafted in 1789 as part of the Judiciary Act with the hope that it would provide some amount of jurisdiction over international law violations that existed at the time.

While it has been over two hundred years since the drafting of the ATS, debate continues to exist surrounding the Statute's application to tort claims involving U.S. defendants for acts occurring outside United States territory. While judicial interpretation regarding what constitutes an international violation has evolved relative to the world's changing standards of decency, the Court maintains a strong stance on the lack of extraterritorial reach of the Statute. The issue with the Court's originalist reading of the Alien Tort Statute is that it explicitly

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absolves corporations of accountability for violations of recognized international norms, so long as the violation occurs outside the "touch and concern" of United States soil. It is an incorrect application of international law to focus on the issue of proximity of the defendants' misconduct to the United States, and remand or dismiss a case based purely on an absolute extraterritorial prohibition.

This article will argue that the Court's two-step framework established in *Jesner* for evaluating extraterritoriality issues under the ATS needs to be amended. As such, Part II of this article will review the legislative history of the ATS including an analysis of the Framers' intent. Part III will discuss the reawakening of the ATS with a discussion of two hallmark cases, *Filartiga v. Pena Irala*[21] and *Sosa v. Alvarez-Machain*.[22] Part IV will focus on the application of the ATS in recent cases, including the extraterritorial limitation established in *Kiobel* and broad pardoning of corporate liability in *Jesner*. The final sections of this article will focus on the Supreme Court case of *Nestlé USA, Inc. v. Doe* where the Court evaluated the companies' conduct and determined whether it was substantial enough to overcome the extraterritorial presumption established in *Kiobel*. Further, this article will apply the analysis in the United Kingdom's Supreme Court case *Okpabi v. Royal Dutch Shell Plc.* to *Nestlé* to demonstrate how the extraterritoriality prohibition should be revised. The ATS was intended to be used as a way for plaintiffs to gain redress against defendants that have violated international law; in order for the Statute to be exercised in the claimant-friendly way it was intended to be, the extraterritoriality limitation needs to be evaluated and ultimately, removed.

II. Overview of the Alien Tort Statute

The Alien Tort Statute, a U.S. federal law adopted in 1789 originally as part of the Judiciary Act, provides federal courts with the jurisdiction to hear any civil action brought by a foreign plaintiff for a tort committed in violation of the law of nations or other United States treaty.[23] William Blackstone, a renowned English jurist of the 18th century, viewed the law of nations as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[24] Blackstone was a natural law jurist and held great influence at the time the ATS was drafted, especially over the founding generation.[25] Natural law jurists accept that, "law can be considered and spoken of both as a sheer social fact of power and practice, and as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them."[26] Essentially, natural law jurists will use principles of practical reason as a method of reaching substantive results both in law and in theory.[27]

In the 18th century, violations of the law of nations included violations of express safe-conducts, violations of the rights or immunities of ambassadors and other public officials, infractions to treaties to which the U.S. is a party, and piracy.[28] These categories of offenses were prevalent at the time, but this list was in no way considered to be exhaustive.[29] In fact, Congress encouraged states to conduct tribunals to decide whether certain offenses should be added as violations to the law of nations.[30] Instead of interpreting the statute on its face, or rather taking a "four corners" approach, natural jurists believed it was important to employ methods of practical reason to address evolving standards of decency should they arise.[31] There was an understanding that international issues that existed in the 18th century would change as society further advanced and evolved. The Alien Tort Statute was subsequently written to function as a means of redressing future offenses to the law of nations.[32]

Today, jurists take a rather positivist approach to interpreting the Alien Tort Statute. Legal positivists support a strict adherence to the textual interpretation of existing law.[33] However, this vastly differs from the modern practices of international lawyers and is largely condemned by traditional natural law theorists, including Blackstone. Leslie Green, a prominent analytical philosopher of law, articulated:

> No legal philosopher can be only a legal positivist. A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied . . . and also of the pivotal questions of what laws we should have and whether we should have law at all. Legal positivism does not aspire to answer these questions, though its claim that the existence and content of law depends only on social facts does give them shape.[34]

The focus on facticity is part of what makes legal positivism problematic. An institutional adherence to positivism fails to account for relevant moral and political considerations that very much contribute to the practice of law in modern society.

Today, Blackstone's language describing the law of nations is often alluded to in many decisions involving the Alien Tort Statute. In *Jesner v. Arab Bank*, the defendant was accused of financing terrorist organizations to carry out kidnappings, killings, and other violations of international human rights abroad.[35] In order to evaluate whether these acts would fall under the reach of the ATS, Justice Sotomayor established a two-part test. In Part One, the Court is asked to determine whether the violation of an international norm is one that is "accepted by the civilized world."[36] If the answer is yes, and the

norm allegedly violated is "specific, universal, and obligatory," the federal court may recognize this as a cause of action.[37] This standard now clarifies what an international norm entails and moreover, what a violation of such norm involves. The standard, in a sense, refutes Justice Gorsuch's interpretation of Blackstone, which asserts the erroneous belief that the First Congress did not mean to consider a violation of the law of nations to arise under federal law, but under general common law.[38] Eighteenth century jurists regarded the law of nations as "part of the laws of [the United States], and of every other civilized nation."[39] At the time, there was no delineation between state and federal common law, and as such, the law of nations was considered "a binding part of both state and federal law."[40] For Justice Gorsuch to make this delineation today is a mishandling of Blackstone's interpretation of customary international law violations. This is problematic because it limits our understanding of violations of international norms, and in turn, limits the court's federal jurisdiction over these matters. Justice Sotomayor's two-part test pushes the needle forward by reinterpreting what an international norm constitutes and opening the door for the Court to access these causes of action.

A. Corporate Liability Under the ATS

In analyzing the text and legislative intent of the Alien Tort Statute, there exists no language that expressly excludes corporate defendants from the class of defendants included under the Statute.[41] In fact, "international law imposes obligations, including substantive prohibitions, that are intended to govern the behavior of states and private actors," including corporations.[42] The obligations include "substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture."[43] International law determines what substantive conduct violates the law of nations and it has not excluded corporations outside the scope of actors capable of committing these violations, thus capable of being tried under the Alien Tort Statute. The only limitation that has been alluded to is a prohibition on filing suit against foreign corporations due to concerns regarding maintaining peaceful foreign relations, which will be further explained in this article's discussion of *Jesner v. Arab Bank*.[44] Because ATS claims often cause friction between the United States and the nations where the alleged misconduct occurred, enforcement mechanisms regarding how to punish foreign defendants are often left to the foreign territory's discretion.[45] The Court attributes the responsibility to weigh foreign policy concerns to executive branches, not the judiciary.[46]

III. Reawakening of the ATS

After two hundred years, the Alien Tort Statute has reawakened from its dormancy. The Statute was "reborn" in 1979 in *Filartiga v. Pena-Irala*.[47] In this case, the Second Circuit held that the Alien Tort Statute granted federal courts jurisdiction over actions brought by foreign plaintiffs seeking damages for violations of international human rights law, including torture.[48] The case of *Filartiga v. Pena-Irala* involved two Paraguayan citizens, the family of 17-year-old Filartiga, who alleged that the defendant, Pena, an inspector general of police, kidnapped, tortured and murdered Filartiga in Paraguay in retaliation for his father's political beliefs.[49] After Filartiga's father commenced a criminal action in Paraguay, the courts had his attorney arrested and subsequently disbarred.[50] Filartiga's sister later came to the United States seeking political asylum, and while living in Washington D.C., she learned of Pena's presence in Brooklyn, NY.[51] She reported this information to the Immigration and Naturalization Service which arrested Pena and ordered his deportation.[52] While he was being held in Brooklyn, New York pending deportation, Filartiga's sister commenced a civil action against Pena for the wrongful torture and death of her brother.[53]

The appellants relied on the Alien Tort Statute, specifically the provision that allows federal courts jurisdiction over civil actions for torts committed in violation of the law of nations, to establish federal jurisdiction for their claims.[54] Having examined customary international law, including applicable case law, the UN Charter of the Organization of American States, and the Universal Declaration of Human Rights, the Second Circuit held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[55] Therefore, because the law of nations, which is considered a part of federal common law, was violated, subject matter jurisdiction also existed.[56] Since this decision, the ATS's reach has expanded to cases involving torture, kidnapping, illegal detention, genocide, environmental violations, and war crimes.[57] The decision was aligned with Blackstone's and other natural law jurists' intentions of employing practical reasoning to ensure that future violations of customary law would be added to the "list" to account for evolving standards of decency.[58]

The decision in *Filartiga* reinstated the Alien Tort Statute as a vehicle for foreign plaintiffs to bring suits against defendants for human rights abuses. It recognized international law as part of the federal common law. However, just 14 years later in *Sosa v. Alvarez-Machain*,[59] the Supreme Court began to place strict limitations on the Statute's reach, specifically in regard to extraterritoriality.[60] The Supreme Court held that the Alien Tort Statute did not allow for actions to be brought by private individuals for violations of the law of nations that occurred outside of U.S. territory.[61] This case involved the abduction and murder of a U.S. Drug Enforcement Agency (DEA) official by a Mexican drug cartel in 1985.[62] The DEA hired Mexican nationals to capture the defendant, who had participated in the murder, and bring him back to the United States to be tried.[63]

The defendant filed multiple suits against the United States and the Mexican nationals, one of whom was Sosa, under the Alien Tort Statute.[64] The Court set forth a two-step framework, one similar in kind to the approach taken by Justice Sotomayor in *Jesner*, in its analysis: First, the Court determined whether the international norm violated was one "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[65] If yes, the Court would consider whether hearing the case would be an appropriate exercise of judicial discretion.[66] Because the Court did not recognize Alvarez-Machain's claims against the government regarding his capture as falling within the traditional categories specified within the law of nations (i.e. piracy and infractions against ambassadors), the Court did not even consider step two of the framework.[67] The Court stated that because the detention of the officer was for less than one day, and the officer was kept in the custody of law enforcement agents, there were no international norms violated under the ATS that would provide redress for his claims.[68]

The limitations imposed on the ATS in the holding in *Sosa* can be juxtaposed with the more expansive interpretation of international norm violations in *Filartiga*. *Sosa* insists that federal courts should not recognize violations of international norms that fall outside the substantive historical conduct specified in the text of the Statute at the time it was enacted.[69] In contrast, the Second Circuit in *Filartiga* creates an analogy between modern conduct and historical conduct by equating a modern torturer with a pirate who may have tortured a slave.[70] The strict adherence to the text of the ATS in *Sosa* is more restrictive and almost reverses the decision in *Filartiga* on the ground that the alleged conduct need be expressly condemned in the law of nations. While the Alien Tort Statute continues to allow plaintiffs to raise complex issues in federal court, judicial limitations on the Statute's reach continue to be narrowed, severely limiting foreign plaintiffs' success, and absolving liability of defendants for violations of the law of nations in many circumstances.

IV. Jurisdictional limitations of the Alien Tort Statute

A. Limits on Jurisdiction Based on Extraterritoriality

In *Kiobel v. Royal Dutch Petroleum*,[71] the Court limited the reach of the ATS strictly to conduct carried out on United States soil.[72] The alleged conduct must substantially "touch and concern" the territory of the U.S. in order for the Court to have jurisdiction over the action.[73] If the conduct occurred elsewhere, there could be no extraterritorial application of United States law; in other words, the action could not be brought under the ATS.[74] In *Kiobel*, petitioners filed a putative class action against Shell Petroleum Company of Nigeria for its alleged complicity in human rights crimes carried out by the Nigerian government.[75] Petitioners alleged unlawful detainment, torture, and murder of Nigerian nationals, some of whom were family members of petitioners.[76] The Second Circuit held that the Alien Tort Statute did not impose civil liability on corporations under any circumstance.[77] Like the Supreme Court later held in *Jesner*, the Second Circuit Court of Appeals in *Kiobel* concluded that in order for corporations to be held civilly liable under the ATS, Congress would need to explicitly make an exception.[78] The Supreme Court granted certiorari.[79]

The issues on certiorari were (1) whether under the ATS, corporations were immune from liability for violations of the law of nations, including torture, extrajudicial executions, or genocide; and (2) whether the ATS allows courts to recognize a cause of action for violations of the law of nations occurring in territories outside of the United States.[80] The Court first addressed the second issue regarding the extraterritorial application of United States law for violations of the law of nations. The Court unanimously held that the traditional interpretation of the Alien Tort Statute presumes that there be no extraterritorial application of U.S. law.[81] The Court relied on its decision in *Morrison v. National Australia Bank Ltd.*,[82] which provides that, "[w]hen a statute gives no clear indication of an exterritorial application, it has none."[83] Because the ATS does not expressly allow extraterritorial reach, the Court held that any claims brought under the ATS must allege conduct that has "touch[ed] and concern[ed]" United States territory with "sufficient force."[84] The decision in *Kiobel* reaffirmed the decision in *Sosa*, permitting federal courts to recognize common law violations of international law, but restricting any application of U.S. law extraterritorially.

In *Morrison*, the Court evaluated whether the extraterritorial application of a provision in the Securities and Exchange Act was a jurisdictional question or one on the merits.[85] This was determined by analyzing what conduct is expressly prohibited under the statute.[86] The Court stated that the ATS itself applied only to securities transactions involving domestic dealings.[87] In evaluating the language of the ATS, the Court found that the scope of the Statute did not provide a cause of action for misconduct dealing with *foreign* stock transactions.[88]

The holdings in *Sosa*, *Morrison*, and *Kiobel* strongly evince the Supreme Court's determination that the ATS does not allow jurisdiction over claims involving conduct occurring outside of the U.S.[89] However, this conclusion is fundamentally flawed. The Court takes the Statute's lack of express extraterritorial authorization as a prohibition on such application. A plain reading of the ATS specifies "any civil action" in its statutory language, not expressly limiting civil actions to those occurring domestically, like the Securities and Exchange Act. The argument can just as easily be made that this statutory

language could also extend to conduct occurring outside of the U.S. so long as there is *a civil action* regarding a violation of customary international law.[90]

In *Jesner v. Arab Bank, PLC.*,[91] the Court relied on *Kiobel* as controlling precedent holding that the Alien Tort Statute does not allow claims against foreign corporations when all the relevant conduct takes place outside the United States.[92] The case was brought by foreign plaintiffs who accused the Arab Bank, headquartered in Jordan with a branch functioning within the United States, of financing terrorist organizations involved in the injuring, kidnapping, and killing of civilians abroad.[93] Petitioners claimed that the Bank used its New York branch to transfer money to terrorists and launder money for a Texas based charity with ties to Hamas.[94] The Court again excused corporate liability based partially on its reasoning that the Bank's activities did not "touch" U.S. territory with sufficient force so as to fall within the reach of the ATS.[95]

Like the defendants in *Morrison*, who were involved in conducting stock transactions, the Bank's activities in *Jesner* involved CHIPS transactions, an electronic payment system that enables transactions and transfers to be carried out in U.S. dollars.[96] The transactions were carried out in the Arab Bank's New York branch and a charity in Texas was used to transfer funds directly to terrorists.[97] Petitioners sought millions in damages from a Jordanian Bank for attacks that were carried out by foreign terrorists in the Middle East.[98] The only way the extraterritorial hurdle could be overcome, according to the majority in *Jesner*, was if the corporation was incorporated in the United States or had its principal place of business in the United States.[99] The Court would then have personal jurisdiction which would permit the Bank to be held accountable under U.S. law.[100] However, because the Court found that the Bank's operations in New York and Texas were too limited to satisfy the substantial "touch and concern" requirement, the Court did not exercise personal jurisdiction over the claims.[101]

The Court also emphasized that this litigation affected diplomatic relations with Jordan, causing tension with a powerful ally.[102] Holding Arab Bank accountable could have damaging effects on Jordan's economy and the cooperative relationship that the U.S. holds with Jordan as a counterterrorism ally.[103] The Court used "judicial caution" in this case to guard against foreign policy concerns and disruptions to foreign relations that could have larger implications.[104] This is the fragile side of holding foreign corporate defendants liable and also demonstrates why suing foreign corporations under the ATS is nearly impossible. The Court treads on thin ice and seems to rely on the extraterritoriality limitation to hold that the foreign defendant in *Jesner* could not be given its due under the ATS.

This decision allowed a multinational corporation to be excused from even the most egregious harms and violations of international law merely because the acts did not take place on United States soil.[105] Although both international and domestic law would recognize these alleged harms as violations of the law of nations, the extraterritorial argument in *Kiobel* creates an insurmountable jurisdictional hurdle.

V. Overcoming the Extraterritorial Limitation with *Okpabi v. Royal Dutch Shell PLC*[106]

Many ATS cases brought in recent years involve foreign corporations acting in complicity with governments to carry out numerous rights violations. Most often, these corporate defendants are accused of aiding and abetting under the Alien Tort Statute. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[107] plaintiffs alleged that Talisman Energy Inc., a Canadian oil and gas producer extracting resources in Sudan, was complicit with the government of Sudan in commissioning genocide, war crimes, resource pillaging, and other crimes against humanity.[108] The district court denied Talisman's motion to dismiss on comity grounds for multiple reasons. The court found that the action required a determination of whether Talisman acted in violation of customary international law and that Canadian courts, as opposed to U.S. courts, were not able to evaluate civil suits for violations of international law.[109] Citing to the Supreme Court's ruling in *Sosa*, the district court also recognized that a cause of action imposing accessorial liability for violations of international law under the ATS was a viable cause of action and that plaintiffs would need to present sufficient evidence demonstrating that the corporation acted with the *purpose* of harming the affected civilians in Sudan.[110]

On appeal, the Second Circuit created a standard of *mens rea* for aiding and abetting liability in ATS actions.[111] The court held that in order for plaintiffs to succeed on an aiding and abetting claim, they must show that the corporation had purpose, rather than mere knowledge, in working with the government to carry out these violations.[112] Otherwise, the court could not impose civil liability on foreign corporations.[113] The reason for the narrowness of this standard is explained in *Kiobel,* where the Supreme Court regarded aiding and abetting suits filed under the Alien Tort Statute as a means for plaintiffs to "use corporations as surrogate defendants to challenge the conduct of foreign defendants."[114] Essentially, the prevailing view amongst U.S. federal courts is that aiding and abetting is too vague of a cause of action under the ATS, and has resulted in the courts' creation of a standard of proof too high for plaintiffs to overcome.[115]

Notably, in *Okpabi v. Royal Dutch Shell Plc.*,[116] a United Kingdom Supreme Court case, the Court circumvented this hurdle involving corporate conduct in extraterritorial disputes by taking a completely different approach.[117] The case involved over 40,000 citizens of a farming and fishing community in

the Niger Delta ("Claimants"), called the Ogale Community.[118] The Claimants alleged that numerous oil spills occurred as a result of the oil multinational's operations in the region.[119] "[T]hese oil spills . . . caused widespread environmental damage, including serious water and ground contamination," that contaminated the drinking water and disabled the community members from safely fishing, farming, and washing as needed.[120] The suit was brought against Royal Dutch Shell (RDS) and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd. (SPDC).[121] Claimants alleged that RDS should be held accountable for its subsidiary's actions, owing Claimants a duty of care which was ultimately breached when foreseeable environmental damages occurred in the Community.[122] Claimants maintained that since RDS exerted significant control and oversight over SPDC's operations and were responsible for promulgating defective safety policies that were implemented by SPDC in the Niger Delta, they should assume responsibility for SPDC's actions.[123]

In considering these claims, the UK Court referred to its decision in *Vedanta v. Lungowe*.[124] The Court wrote that focusing on sufficient proximity is not the correct approach because 'the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence' . . . It raises no novel issues of law and is to be determined on ordinary, general principles of the law of tort regarding the imposition of a duty of care.[125]

The Court further expanded on how to determine whether a duty of care arises in the context of a parent/subsidiary relationship: "[W]hether a duty of care arises: '. . . depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operation (including land use) of the subsidiary.'"[126] Essentially, it is insufficient for the Court to focus merely on control and proximity. Instead, the Court needs to evaluate "the extent to which the parent did take over or share with the subsidiary the management of the relevant activity."[127] In this case, the relevant activity was pipeline operation, which was the direct cause of the oil spillage and subsequent water contamination.

The UK Court, after applying this standard, found that the Court of Appeals erred in treating the parent's liability as a separate and distinct category of negligence.[128] Unlike the vague standard set forth in *Presbyterian*, which urges the Court to find that the corporation had purpose in aiding and abetting foreign governments, the standard in *Vedanta* and subsequent application in *Okpabi*, provides sufficient detail to determine the level of involvement the parent needed to meet in order to be held accountable for conduct carried out by its subsidiaries on foreign land.[129] In other words, the "not my backyard, not my problem" perspective is defeated, so long as plaintiffs can make a sufficient showing that the parent played a substantial role in managing, directing, and overseeing the actions that ultimately perpetuated the damages or harms. Not only does this give plaintiffs asserting aiding and abetting allegations a fighting chance, it also more importantly circumvents the extraterritorial limitation imposed on the ATS. Instead of focusing on proximity and applying the "touch and concern" standard, allowing claimants the chance to show whether a duty of care has been breached is not only more in line with customary tort law, but it also expands the jurisdictional reach of the ATS, as it was intended to be. This standard was introduced by the appellants' case which contended that a duty of care, under *Vedanta*'s interpretation of the duty, arose from RDS's exercise of substantial control and dominion over the management and monitoring of SPDC's operations.[130]

VI. Application of the Vedanta/Okpabi Duty of Care Standard to *Nestlé v. Doe*

The recent United States Supreme Court case, *Nestlé USA, Inc. v. Doe I*,[131] presented the Court with another claim brought by foreign respondents under the Alien Tort Statute. The respondents in this case were former enslaved children from the Ivory Coast who were kidnapped and forced to work for 14 hours a day without pay on cocoa plantations.[132] The petitioners, Nestlé USA, Inc., a multinational corporation, and Cargill, Inc., a domestic corporation, were involved in extensively sourcing and producing cocoa in the Ivory Coast. The respondents alleged that petitioners should be held liable under the ATS for aiding and abetting a system of child slave labor in the Ivory Coast.[133] The companies have continued to reap the benefits of cheap cocoa in the Ivory Coast due to "a system built on child slavery to depress labor costs."[134] The U.S. District Court for the Central District of California granted the petitioners' motion to dismiss, holding that corporations could not be held liable under the ATS and that the respondents failed to prove that the conduct relevant to the Statute occurred in some capacity in the United States.[135] The U.S. Court of Appeals for the Ninth Circuit reversed the District Court's dismissal holding that aiding and abetting crimes fall within the ATS's scope.[136] The Court of Appeals further held that the narrow domestic conduct alleged by the respondents, specifically regarding the petitioners' spending of money in order to maintain ongoing business with the cocoa farms and U.S. employees' involvement in inspecting the operation of the farms in the Ivory Coast, were relevant to the allegations made under the ATS.[137] For these reasons, the court remanded the case to allow respondents the opportunity to amend their complaint to include details on whether the conduct that occurred outside the U.S. could be attached to the domestic corporation itself.[138]

There was an outpouring of amicus briefs on the issues during the time the Supreme Court case was pending. In a Brief

for the National Confectioners Association, the World Cocoa Foundation, and the European Cocoa Association in support of petitioners, the authors wrote:

> The decision of the court of appeals represents the worst form of judicial intrusion into foreign relations under the Alien Tort Statute . . . if left to stand, [it] risks undoing the progress achieved under the collaborative framework the political branches chose to address forced child labor on overseas cocoa farms, and discouraging American companies from participating in future efforts.[139]

Many cocoa manufacturers feared that if the respondents were able to overcome the presumption of extraterritoriality, many American companies would become vulnerable to ATS lawsuits. After all, both Nestlé USA, Inc. and Cargill Inc. maintain headquarters in the United States, which regularly manage corporate operations overseas.[140] The companies were laden with fear that respondents would succeed in proving that the conduct, while it had occurred on Ivory Coast soil, had been managed from U.S. based headquarters, touching, and concerning with sufficient force, United States territory.[141]

The Supreme Court ultimately held in an 8–1 opinion that the respondents improperly sought an extraterritorial application of the ATS.[142] The conduct related to aiding and abetting indicated a "mere corporate presence" relating more to general corporate activity than domestic conduct occurring in the U.S.[143] In deciding the case, the Court once again referred to *Kiobel*, stating that "the ATS does not expressly . . . evince a 'clear indication of extraterritoriality'" and that respondents "must establish that 'the conduct relevant to the statute's focus occurred in the United States . . . even if other conduct occurred abroad.'"[144] Essentially, even if the claimants alleged relevant conduct under the Statute, there would be no redress if they could not prove the conduct occurred within the United States. This holding is aligned with the Court's rulings in both *Kiobel* and *Presbyterian*, in that it quashes claimants at the gateway.[145] To arrive at this determination, the Court applied a two-step framework for analyzing the issues of extraterritoriality explaining that:

> [F]irst, [they] presume that a statute applies only domestically, and [they] ask, 'whether the statute gives a clear, affirmative indication' that rebuts this presumption . . . Second, where the statute . . . does not apply extraterritorially, plaintiffs must establish that 'the conduct relevant to the statute's focus occurred in the United States.'[146]

Contrary to the duty of care standard applied in *Okpabi*, the Court limits its evaluation of the relevant conduct to only the conduct occurring in the United States, focusing on proximity and less on substantive actions.

While the Court stated that general corporate operations are insufficient to overcome the extraterritorial hurdle, its evaluation of these operations is lacking and overlooks the fact that both companies extensively managed and economically aided the cocoa plantations in the Ivory Coast from United States soil.[147] Henceforth, the standard for evaluating whether Nestlé USA and Cargill owed the Ivory Coast nationals a duty of care will be applied pursuant to the *Okpabi*/*Vedanta* standard.[148]

To reiterate, in *Okpabi*, the United Kingdom Supreme Court held the parent company accountable for actions carried out by its foreign subsidiary because they exercised substantial corporate control in creating the policies that were implemented by their Nigerian subsidiaries, which in turn breached their common law duty of care to protect Nigerian nationals against foreseeable harms arising out of oil extraction.[149] The UK Court determined that this conduct surpassed general corporate activity due to the extent to which the parent company delegated and managed its subsidiary from UK soil.[150] Nestlé USA and Cargill are both U.S. based companies that are involved with the purchasing, processing, and selling of cocoa in the Ivory Coast.[151] While they did not personally own cocoa farms in the Ivory Coast, they were extensively involved in managing and funding many of the farms located there.[152] "They . . . provided those farms with technical and financial resources—such as training, fertilizer, tools, and cash—in exchange for the exclusive right to purchase cocoa."[153] Moreover, respondents alleged that the petitioners "knew or should have known" that enslaved children were working the plantations.[154] The petitioners allegedly had "economic leverage over the farms but failed to exercise it to eliminate child slavery."[155]

The petitioners argued that a domestic parent company exercising oversight over its subsidies in the Ivory Coast was not enough to surmount the presumption of extraterritoriality under the ATS. The Court, after brief review, aligned its holding with the petitioners concluding that the conduct alleged was general corporate activity.[156] It regarded the conduct as mere decision making, which although were made and approved of in the United States, could not sufficiently overcome the extraterritorial application.[157]

In *Okpabi*, the Court made the important delineation between a parent that controls operations versus a parent that issues mandatory policies:

> [I]t is . . . important to distinguish between a parent company which controls, or shares control of, the material operations on the

> one hand, and a parent company which issues mandatory policies and standards which are intended to apply throughout a group of companies in order to ensure conformity with particular standards. The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of Page 36 a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care.[158]

The Court referred to *Vedanta* as an example. In this case, the plaintiffs relied on group-wide policies and group guidelines to demonstrate the level of control exercised by the parent on the subsidiary.[159] The Court held that this was insufficient to show the parent company had substantial control over their subsidiary so as to overcome the presumption of extraterritoriality. These facts are distinguishable from the facts in *Nestlé USA* where the parent corporation did not merely implement policies, it actively managed and funded cocoa farms to gain exclusive rights over their cocoa production.[160] In a sense, the plantations were employed by the companies and the child slaves were effectively employees. As respondents contended, the companies were in a position of economic superiority. The cocoa farms were subsidized by the companies' funds and the companies, allegedly knowing of the child exploitation on these farms, did not withhold or abstain from funding or aiding the farms to stop the child exploitation. As the Court specified, control "depends on: 'extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise, or advise the management of the relevant operations…of the subsidiary."[161] The way in which the parent companies in the *Nestlé USA* case controlled the "subsidiary" was not in policy implementation. The parent company was supplying the farms with the resources they needed to operate in order to gain exclusive control over the cocoa manufactured therein. This not only supersedes general corporate activity but is a tacit way of gaining control of an entity through economic superiority. The companies profited from the cheap labor and continued to fund a system of child exploitation to their own avail.

The holding in *Nestlé USA, Inc. v. Doe* is problematic in multiple ways. First, it narrows the extraterritorial limitation on the ATS by setting forth vague guidelines on what constitutes general corporate liability and what constitutes extensive control sufficient to overcome the presumption. However, in *Okpabi*, the Court is specific in explaining that implementation of operational policies is de facto management of a company and constitutes general corporate activity.[162] Nevertheless, in *Nestlé USA, Inc. v. Doe*, the Court classified privately funding and supplying entities to carry out the production of a globally consumed product as "general corporate activity."[163] This decision makes permissible violations of "international and domestic standards relating to the responsibilities of business enterprises in relation to human rights . . . ."[164] It applies a vague standard, similar to the still undefined "touch and concern" standard, in order to sidestep resolving issues of accountability. This stands contrary to the purpose of the ATS, intended to be a claimant-friendly statute, capable of addressing these violations head-on. These arbitrary measures of general corporate activity and proximity to U.S. territory are inconsistent with not only the intentions of the ATS, but more generally, customary international law. In the literal sense, this is nothing short of a misappropriation of justice.

VII. Conclusion

Where does this leave us? After *Kiobel*, the Supreme Court's stance on extraterritorial application of U.S. law was established. The presumption against extraterritoriality could not be overcome unless plaintiffs could prove that the conduct at issue had touched and concerned the territory of the United States. Unless the Court expands on the holdings in *Kiobel*, *Jesner*, or more broadly, on the limitation on extraterritoriality, the results will remain the same. More cases alleging relevant misconduct under the Statute will continue to be dismissed simply because the conduct has occurred outside of United States soil.

While most of the corporations in cases brought under the Alien Tort Statute are "American" companies in all sense of identity, the misconduct they are implicated in usually occurs overseas, making it difficult to invoke United States law. If the U.S. federal courts were to invoke *Okpabi* and apply the standard set forth in *Vedanta*, the courts would have a more focused and detailed protocol for evaluating relevant corporate conduct and determining whether substantial control has been exercised; this would enable the Court to hold parent corporations liable for actions carried out by its agents or subsidiaries. It is likely that had the standard been applied in *Nestlé USA, Inc. v. Doe*, the actions of the parent companies may have been found to surpass general corporate activities. The conduct entailed more than decision-making and implementation of group principles; the companies' actions manifested an active purpose to supply cocoa farms in order to benefit from cheap labor at the expense of enslaved children. Not only does this *touch and concern* a U.S. domestic multinational with sufficient force, it also exposes a breach of customary international law. While this may not allow for all claims alleging violations occurring outside the United States to be brought against domestic defendants, it does pierce the corporate veil enough to offer foreign claimants a fighting chance.

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A Region Unprotected: The Caribbean's Failure to Implement the 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

By Lena Raxter

Abstract

An estimated 90% of world trade is conducted by sea. Consequently, a terrorist incident—particularly one on vulnerable and strategic sea routes—would be devastating for the global economy. Nevertheless, there is only one international treaty that adequately addresses this concern—the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and its 2005 amendments (2005 SUA). The 2005 SUA are of particular importance because they explicitly add a regime to address biological, chemical, and nuclear (BCN) weapons. Nevertheless, the 2005 SUA have significantly fewer states parties as compared to the 1988 SUA.

This article addresses the importance of the 2005 SUA and the implementation of this convention in the Caribbean region. In the first section, the article provides an overview of the 1988 SUA and the provisions added by the 2005 SUA; the importance of the 2005 SUA in the Caribbean region; and how states implement a treaty into domestic law. In the second section, the article analyzes the arguments in favor and against implementing the 2005 SUA for the Caribbean region. Lastly, in the third section, the article makes recommendations for the implementation of the 2005 SUA in the Caribbean. Lastly, the article concludes that the failure to implement the 2005 SUA leaves the Caribbean region dangerously exposed to the threats that first prompted the creation of the 2005 SUA. Consequently, it is more advantageous for states to become party to the convention than to remain outside of its sphere of protection. Therefore, the article urges the Caribbean states to comply with the recommendations made above by completing the necessary steps to benefit from the rights and obligations accorded by the 2005 SUA.

I. Introduction

Considering that an estimated 90% of world trade is conducted by sea, a terrorist incident—particularly one on vulnerable and strategic sea routes—would be devastating for the global economy.[1] In 1985, the *Achille Lauro* terrorist attack emphasized this risk, spurring the creation of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA). Fifteen years later, the September 11th attacks in New York prompted the global community to create and adopt the 2005 SUA amendments to fill the newly discovered holes in the maritime safety framework. Together, the two SUA treaties form a comprehensive regime on maritime security that addresses the issue of maritime terrorism by creating a streamlined regime to prevent and respond to acts of terrorism that occur at sea.[2]

Even though the international community created both SUA agreements in response to major terrorist attacks, the 1988 SUA maintains significantly more global support than the 2005 amendments. For example, in the Caribbean, 12 of the Caribbean Community and Community Market (CARICOM) states[3] are party to the 1988 SUA;[4] however, only seven are party to the 2005 Amendments (2005 SUA).[5] This leaves the region critically exposed to serious threats.

This article first provides background on the 1988 and 2005 SUA. Next, it addresses the complex issues in the Caribbean that implicate the region's maritime security framework. To help understand how states implement international agreements, the article briefly outlines the two theories of treaty implementation—monism and dualism. The article then outlines the arguments in favor of implementing the 2005 SUA, and those against its implementation. Lastly, the article provides recommendations for how the Caribbean states can benefit from the protection accorded by the 2005 SUA. The article ultimately concludes that the Caribbean's failure to implement the 2005 SUA leaves the region dangerously exposed to the threats that prompted the creation of the amendments; therefore, the states of the Caribbean should immediately take the necessary steps to implement the 2005 SUA.

II. Background

Together, the 1988 and 2005 SUA create a comprehensive regime to streamline maritime security, in an integrative ef-

fort to prevent and disrupt maritime terrorism.[6] This regime specifically implicates a variety of threats in the Caribbean region: maritime drug and human trafficking; the conflict in Venezuela; and the transport of biological, chemical, and nuclear (BCN) weapons. This section first provides background information on the 1988 SUA. It then outlines the key additions added to the safety regime by the 2005 SUA. Lastly, it addresses the threats in the Caribbean region that are of particular importance to this issue.

A. The 1988 Convention

In 1985, terrorists hijacked the Italian cruise ship, *Achille Lauro*, killing one passenger.[7] In the wake of the *Achille Lauro* attack, and with the full support of the United Nations (U.N.) General Assembly,[8] the International Maritime Organization (IMO) adopted a series of measures aimed at protecting the safety of ships, their passengers, and their crews.[9] Further, the IMO Assembly called for a review of the maritime security architecture, with a focus on the efforts to prevent maritime terrorism.[10]

In their discussions, the legal advisors of the Foreign Ministries of Austria, Italy, and Egypt agreed that the definition of an "act of piracy," as defined by existing international law in 1985, did not include the seizure of the *Achille Lauro*.[11] In contrast to piracy, terrorism at sea had previously never been an issue; therefore, there were no specific international rules addressing maritime terrorism.[12] Consequently, Austria, Italy, and Egypt proposed creating the "Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation" to directly address the issue of maritime terrorism.[13] Moreover, the states proposed that the convention should be modeled on existing anti-terrorism conventions—specifically, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft;[14] 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;[15] and the 1979 Convention Against the Taking of Hostages.[16]

As a result of this work, the international community created and adopted the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA).[17] Today, 166 of the 193 U.N. Member States are states parties to the convention.[18] Further, the international community also created an optional protocol that addresses the issue of protecting and preventing terrorism on fixed platforms attached to the continental shelf, including terrorist attacks on oil platforms.[19]

B. The 2005 Amendments

As with the *Achille Lauro* attack, the events of Sept. 11, 2001, "exposed the vulnerability of the global transport infrastructure both as a potential target for terrorist activity and as a potential weapon of mass destruction."[20] It became evident that the existing framework was insufficient to protect ships, their cargo, their crew, and their passengers from the new threats posed by terrorist groups.[21] Consequently, the international community decided to revise the 1988 SUA to address concerns that it focused too heavily on responding to terrorist attacks, rather than preventing them.[22]

In 2002, a study group within the IMO Legal Committee identified two key issues with existing legal instruments. First, the categories of unlawful acts did not encompass modern-day terrorist threats—including the threats posed by BCN weapons.[23] Second, no provisions existed for law enforcement to board foreign flag vessels on the high seas, whether to address criminal activity or assist a vessel under attack.[24] Addressing these two issues therefore became the primary focus of the 2005 SUA.

The resulting regime includes mechanisms for coordinating a rapid multi-state maritime interdiction when there are reasonable grounds to suspect that the vessel, or a person on board the vessel, is involved in illicit activity—incorporating "*new and emerging threats*."[25] Such threats are broad and all-encompassing, including "any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose."[26] Moreover, by utilizing such a broad definition, the 2005 SUA allows for the criminalization of civilian, commercial, and dual-use items based on their intended use or purpose.[27]

As a result, the 2005 SUA expanded the scope of the convention significantly by creating a regime that allowed for the prevention, or prosecution, of individuals who use a ship as a means of committing a terrorist attack—including transporting terrorists or cargo intended for uses associated with weapons of mass destruction programs.[28] Moreover, the 2005 SUA established a mechanism to facilitate the boarding of vessels suspected of engaging in these activities in international waters, provided the flag state explicitly authorizes the boarding.[29] The most important amendments are the following:

- **Article 3*bis*, 3*ter* and 3*quarter* (Unlawful Acts provision)** clarifies the conditions under which a person commits an offense within the meaning of the convention. Article 3*bis*(1) adds the offense of intentionally using a ship in an action "likely to cause death or serious injury or damage" in order to "intimidate a population, or to compel a government . . . to do or to abstain from doing any act," whether or not the act involves the use of weapons of mass destruction.[30] It also adds the offense of intentionally using a ship to transport any BCN weapon(s); any special fissionable material, provided the offender knew of its intent to be used in an activity not subject to IAEA safeguards; or any "dual-use" materials.[31] Article 3*bis*(2) limits the liabil-

ity for the latter to only non-states parties of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), under specified conditions.[32] Article 3*ter* broadens the scope of liability by making it unlawful to intentionally transport another person upon a ship, knowing that the individual has committed an offense provided in the convention or any offenses set forth in the nine anti-terrorism conventions listed in the Annex.[33] Article 3*quarter* makes it an offense to intentionally injure or kill, or attempt to injury or kill, any person in connection with the commission of any offense provided in the convention or any offenses set forth in the Annex.[34] Article 3*quarter*(3)(d) and (e) also provide for accomplice liability.[35]

- **Article 8*bis* (Boarding provision)** elaborates on the responsibility and roles of the master of the ship, the flag state, and the receiving state when delivering to the authorities of any state party any person believed to have committed an offense under the convention.[36] The Article also covers cooperation and boarding procedures, which a state party follows when it has "reasonable grounds" to suspect a ship—flying the flag of a state party—or a person on board the ship is, has been, or is about to be involved in the commission of an offense under the convention.[37]

- **Article 11*bis* and 11*ter* (Extradition provision)** updates the extradition provisions to provide for protections for political offenses and human rights. Article 11*bis* states that political offenses should not be considered as a basis for extradition under the convention.[38] Article 11*ter* states that, under the convention, states are not obligated to extradite or afford mutual legal assistance when the request for extradition is believed to have been made for the purpose of prosecuting and punishing an individual due to the person's race, religion, nationality, ethnic origin, political opinion, or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.[39]

C. Importance of the 2005 SUA in the Caribbean

While the Caribbean region faces numerous serious issues with maritime security implications, this article will focus on three of the most severe threats that the SUA would address. First, the Caribbean has a long history of maritime trafficking of both drugs and humans, which is further complicated by the geography of the region. Second, the situation in Venezuela has caught the attention of non-regional hostile actors and poses a risk to regional peace and security. Lastly, the potential transport of BCN weapons remains a critical concern for the region. As explained above, the provisions of the 2005 SUA are specifically designed to address each of these issues.

1. Drug and Human Trafficking

The geography of the region poses a significant threat due to the close proximity of multiple islands and states. The region maintains three main trafficking routes into the United States (U.S.).[40] Additionally, traffickers often use private boats—including go-fast boats, pleasure crafts, and fishing vessels—to move drugs and people the shorter distances between various Caribbean islands.[41] For example, Havana, Cuba is only 90 miles from Key West, Florida. Further, Guyana shares a border with Venezuela, and Trinidad and Tobago is only 6.8 miles away from the Venezuelan coast. Grenada is also less than 100 miles from Venezuela. For a boat traveling at 50 knots per hour (about 57 miles per hour), it would take under five minutes to travel to the former, and less than two hours to travel to the latter. With such a quick travel time, it is imperative that states within the region can respond to reports of illicit activity quickly.

A report from the Joint Inter-Agency Task Force South indicates that 80% of drug movement in Latin America and the Caribbean takes place by sea, demonstrating the importance of having a robust maritime interdiction regime in the region.[42] In the 1980s, the Caribbean region was the primary transit route to bring drugs into the U.S. from South America.[43] However, the region has come a long way since then—in 2012, less than 5% of the cocaine entering the U.S. came from the Caribbean.[44] According to the U.S. Senate, this substantial decrease is largely due to increased interdiction efforts by the U.S. and regional partners[45]—a testament to how successful regional cooperation and international agreements can be in decreasing illicit activity. Nevertheless, issues continue—in 2020, the prime minister of Dominica appealed to the nation's Haitian community to stop the illicit migration of undocumented Haitians from Dominica to the neighboring French islands of Martinique, Guadeloupe and St Maarten.[46]

2. Venezuela

The conflict within Venezuela has attracted the attention of Russia, Turkey, Iran, China and Hezbollah.[47] Similar to how the involvement of Russia in Cuban affairs resulted in the Cuban missile crisis, the involvement of these powers in Venezuelan affairs could threaten the security and stability of the Caribbean region. There have been multiple instances where Iran, a heavily sanctioned state, has attempted to send supplies to Venezuela, another heavily sanctioned state. The most recent occurred in early July 2020, resulting in the U.S. attempting to seize four tankers of gasoline that were on route to Venezuela from Iran.[48] Considering the controversy surrounding Iran's nuclear program, experts fear that Iran may attempt to ship Venezuela nuclear weap-

ons or other illicit BCN materials.[49] This fear makes implementing the 2005 SUA even more important.

3. Movement of BCN Weapons

It is a classic and prevailing fear that non-state actors, such as organized crime syndicates or terrorist, may obtain BCN weapons and transport these using a ship.[50] This fear was further accentuated after the September 11 attacks, which used airplanes as a form of weapon.[51] For the Caribbean, this fear is amplified by the close proximity of the states. Nevertheless, the region has no protection from the transport of BCN weapons.[52] Consequently, due to the substantial destruction that BCN weapons can inflict, there is a severe need for the region to respond to the threats through multilateral cooperation.[53] The goal of the 2005 SUA is to facilitate coordination between states when the states suspect a ship, which does not fly their flag, of illicit activity—including the shipment of BCN weapons. Consequently, an effective solution to the region's issue is the ratification and implementation of the 2005 SUA.

D. The Implementation of Treaties Into Domestic Law

To properly understand the issue at hand, it is important to understand how international law interacts with domestic law. All legally binding rules originate either in national or international legal systems. National law is the law that applies within a state, regulating the conduct and relations of the citizens of that state.[54] International law, on the other hand, is the law between states, providing rights and obligations with which consenting states must comply.[55] Neither legal order has the power to change or create rules within the other—if an international rule applies within a state to the citizens of that state, it is because there is a corresponding national rule that allows the application of the international rule.[56]

Two key approaches govern the interaction of international and domestic law: dualism and monism. Under a dualistic system, the legislature of a state must incorporate all international obligations into domestic law before the obligation is binding upon the state. Treaties are therefore considered "non-self-executing" because they must be implemented into national legislation before the state—or individuals within the state—will be bound by the obligations provided in the treaty.[57] As such, the executive branch—e.g., the president or prime minister—must first ratify treaties, then the legislative branch—e.g., Congress or Parliament—must incorporate the treaty into domestic law.[58] Consequently, a treaty does not affect the rights of a private person until it enters force by signature, ratification or some other agreed procedure and it is subsequently incorporated into the domestic legal system via incorporating legislation.[59] Further, with the exception of customary international law and preemptory norms of international law, the national rule would take preference over the international rule if there is a conflict of laws.[60]

Conversely, under a monistic system, any international obligations undertaken by the state are immediately binding upon it, without the need for implementing legislation.[61] Treaties are thus considered "self-executing" because they are immediately incorporated into domestic law once a state agrees to be bound by the treaty.[62] Further, signed and ratified treaties often take precedence over national legislation.[63] Nevertheless, even in a monist system there are requirements for a treaty to be "self-executing." Specifically, the treaty must (1) create clear and enforceable rights and duties, and (2) create these rights and obligations for individuals.[64]

These approaches are not mutually exclusive—states may address international obligations using a combination of both dualism and monism. The question of whether a treaty is "self-executing" or "non-self-executing"—or a combination of the two—varies widely based on both the case law and constitutional provisions of a specific state.[65] For example, the U.S. has a long history of monism.[66] Nevertheless, in 2007, the U.S. Supreme Court held that treaties must be incorporated into U.S. law unless the treaty is considered "self-executing."[67] Because the determination is dependent on state-specific factors, there is significant variation in the state practice of addressing international obligations.[68]

III. Analysis

The 2005 SUA entered into force in 2010 and addresses numerous of the most pressing issues in the Caribbean region. Nevertheless, in stark contrast to its predecessor—the 1988 SUA—a limited number of states have become states parties to the 2005 SUA.[69] Of the states in the Caribbean region, eight have not yet acceded to the 2005 SUA.[70] Moreover, of the states that have become state party to the treaty, many have not taken steps to effectively implement it.[71]

A. Justifications in Favor of Implementation

Several arguments exist for the implementation of the 2005 SUA; however, this article will focus on the five most relevant for this discussion. First, the 2005 SUA fills the holes in maritime safety regulation left by the most important international agreement governing maritime activities—the United Nations Convention on the Law of the Sea (UNCLOS). Second, the 2005 SUA avoids politically risky topics. Third, it is the only treaty so far that addresses the emerging issue of BCN weapons in a maritime security context. Fourth, the treaty is modeled after previous widely accepted international agreements. Finally, fifth, the 2005 SUA builds upon—and helps states comply with—key U.N. Security Council resolutions.

1. Relationship with the United Nations Convention on the Law of the Sea

Article 110 of UNCLOS provides five reasons a state may board a vessel that is not currently in its jurisdiction: (1) to confirm the ship's registration; (2) based on a suspicion of slavery; (3) based on a suspicion of piracy; (4) based on a suspicion of illegal broadcasting; and (5) some other authorized reason, such as sanctions enforcement.[72] After first viewing the vessel's documents, authorities may only examine the ship further if suspicion still exists that the ship is involved in illicit activity.[73]

The 2005 SUA alters this regime by allowing authorities to board and search a vessel to find evidence of illicit activity, provided the authorities first confirm the vessel's nationality.[74] This system functions irrespective of the vessel's documents; consequently, it provides authorities with a broader mandate to board and search vessels. Further, the 2005 SUA Protocol creates an implied consent regime—if the flag state so wishes, it can notify the IMO Secretary General in advance that it authorizes the boarding and search of any ship flying its flag.[75] The flag state may also condition the authorization in any way it sees fit. Consequently, the 2005 SUA fills the holes left in the maritime security by UNCLOS.

2. Avoiding Politically Risky Topics

One significant politically risky topic that the 2005 SUA purposely avoids is providing a definition of terrorism.[76] Instead, Article 3*bis*(1)(a) criminalizes actions with a "terrorist purpose," which integrates the definition found in the 1999 International Convention for the Suppression of the Financing of Terrorism.[77] Since the 2005 SUA does not attempt to create a new definition and instead adopts a commonly accepted method to address the issue of terrorism, more states are able to become states parties to the treaty without fear of political repercussions.

Further, like most other anti-terrorism conventions, the core provisions of the 2005 SUA relate to the extradition and prosecution of suspects—rather than other, more contentious topics.[78] The 2005 SUA also avoids the politically risky issue of an absolute obligation to extradite or prosecute, therefore allowing for non-extradition based on requests for political asylum or to protect human rights.[79]

3. Regulation of BCN Weapons

The 2005 SUA is the only treaty so far that addresses BCN weapons in a maritime context. Article 3*bis*(1) criminalizes the use "against or on a ship or discharging from a ship any explosive, radioactive material or [BCN weapon] and other nuclear explosive devices—in a manner that causes or is likely to cause death or serious injury or damage."[80] Adopting the definition included in the Biological Weapons Convention, the 2005 SUA defines biological weapons as "microbial or other biological agents, or toxins."[81] Similarly, adopting the definition included in the Chemical Weapons Convention, chemical weapons are defined as "toxic chemicals and their precursors," excluding those intended for "industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes" or "purposes directly related to protection against toxic chemicals and to protection against chemical weapons." [82] It also criminalizes the shipment of such weapons. However, the 2005 SUA does not cover chemical agents used for law-enforcement, such as those used for riot-control or for military purposes.[83] Nevertheless, the 2005 SUA "weaves a tighter, more-integrated legal structure to counter terrorism vertically throughout the spectrum of land, sea, and air, as well as horizontally along the continuum of crime and violence from planning and conspiracy to carrying out a violent attack."[84]

4. Use of Previous Agreements as Models for the 2005 SUA

As illustrated above, multiple sections of the 2005 SUA are modeled after already existing international agreements.[85] The provisions of Article 3*bis* are almost identical to the Convention Against the Taking of Hostages.[86] Further, Article 11*bis* is modeled is modeled after the 1997 International Convention for the Suppression of Terrorist Bombings.[87] The 2005 SUA also draws from the statute of the IAEA and other multilateral terrorism conventions to construct the criminal offenses defined in the convention.[88] Given the similarities between the 2005 SUA and these other treaties, one could argue that the state should become party to the 2005 SUA because the convention simply reiterates obligations with which the state already complies.

However, a state may also use this argument as a justification for not becoming a state party to the 2005 SUA: if a state is already bound to comply with the obligations set forth in the convention, it is unnecessary to sign another agreement that simply reiterates these obligations. Nevertheless, this argument is somewhat illogical as the reiteration of obligations does not negatively affect the state in any manner; instead, it would provide the state with more goodwill from the international community because the state would be seen as fully complying with multiple international treaties.[89] That said, it is possible that a state may be opposed to the provisions within the original treaty—upon which the 2005 SUA is modeled—which could explain the reluctance of some states to become a state party to the 2005 SUA.

5. U.N. Security Council Resolutions

According to a statement made by the U.S. Representative to the U.N., the 2005 SUA would help "implement our common obligations under U.N. Security Council (UNSC) resolution 1540" by creating "an international legal basis to impede and prosecute the trafficking of weapons of mass destruction, their delivery systems, and related material on the high seas."[90]

Under the practice of the UNSC, any resolution passed under Chapter VII is binding upon all 193 UN Member States, and therefore each state must comply with the obligations the resolution creates.[91] However, the conclusion of the US Representative applies not only to resolution 1540, but also resolution 1373.[92] Resolution 1540 requires that all states "adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use [BCN] weapons and their means of delivery, in particular for terrorist purposes."[93] Further, to comply with UNSC resolution 1373, states must "[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information."[94] To this end, it is in the best interest of states to become states parties to the 2005 SUA because it creates a regime wherein states share information and cooperate together to fulfill the requirement of combatting the transport of BCN weapons and their delivery systems—therefore complying with their international obligations under resolutions 1540 and 1373.[95]

B. Arguments Against Implementation

As many reasons as there are that justify the implementation of the SUA, equally as many exist justifying a state's choice not to implement it. This article will analyze five of these arguments. First, states may fear that the convention infringes upon their sovereign ability to govern criminal jurisdiction within their territory. Second, states may believe that the boarding regime created in Article 8*bis* is overly broad and limits states rights. Third, states may dislike the heavy involvement of the U.S. in the drafting of the 2005 SUA. Fourth, states may view the definition of "dual-use" within the 2005 SUA as ambiguous. Lastly, states may believe the 2005 SUA is unnecessary due to the existence of similar regional and bilateral agreements.[96]

1. Sovereignty over Criminal Justice

Article 6 of the 1988 SUA provides that states parties *must* establish certain categories of jurisdiction over the offenses included in the convention and *may* establish jurisdiction over other offenses.[97] The 2005 SUA amended this Article in three ways. First, states parties must establish jurisdiction over the offenses provided in Article 3, 3*bis*, 3*ter*, and 3*quarter*.[98] Second, states parties must now notify the Secretary General when they establish such jurisdiction.[99] Third, states parties must now establish such jurisdiction when an offender committed the crime in another state but the state party refuses to extradite the offender to the state with territorial jurisdiction.[100] States that have refrained from ratifying the 2005 SUA may argue that their failure to do so is based on a threat to the state's sovereignty because this regime forces the state to modify its internal law.

While states are entitled to sovereignty over their legislative affairs, and understandably act in a manner that protects that right, the fear that the 2005 SUA infringes on this right is mislaid. It is in every state's best interest to criminalize offenses commonly recognized by other states, otherwise the state may become a safe haven for criminal activity.[101] Furthermore, under Article 8*bis*(8), a flag state maintains the right to exercise exclusive enforcement jurisdiction over all offenses discovered by the boarding state.[102] It is only when the flag state is willing that it would relinquish this right under Article 6.[103] Therefore, under the 2005 SUA, no action can be taken without express flag state authorization.[104] The flag state is also allowed to condition such authorization in any way it sees fit.[105] Consequently, should the flag state wish to exercise its rights, it is still the responsibility of that state to prosecute offenders under its domestic law. Additionally, it is important to note that the boarding regime does not change existing international law or infringe on the existing rights of states. The 2005 SUA affirms that pre-existing rights not regulated by the convention—such as flag-state control, traditional rights, and freedom of navigation—remain as they were prior to the 2005 SUA.[106] As a result, state sovereignty is neither violated nor threatened. States should therefore defer to actions that are in their best interest—i.e., ratifying the 2005 SUA to ensure that their state does not become a criminal safe haven.

2. Boarding Regimes

Article 110 of UNCLOS allows states to board a foreign vessel upon the high seas as long as there are "reasonable grounds" to suspect that the ship (a) is involved in piracy; (b) is involved in slave trade;[107] (c) is involved in unauthorized broadcasting, and the flag state seeking to board the vessel has jurisdiction under Article 109; or (d) has no nationality.[108] Beyond these listed justifications, UNCLOS does not allow the boarding of foreign vessels on the high seas. That said, Article 17 of the 1988 Vienna Drug Convention extends this list to include vessels suspected of involvement in illicit narcotic activity.[109]

Under Article 8*bis* of the 2005 SUA, the justifications for the boarding of a foreign vessel on the high seas are ex-

tended to include situations where there are "reasonable grounds" to suspect that the vessel or a person on board has been, is currently, or is about to be involved in the commission of an offense under the convention.[110] Further, states parties are required to "co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by this Convention . . . and . . . respond to [boarding] requests . . . as expeditiously as possible."[111] Consequently, non-party states may argue that the boarding provisions are too broad and ultimately limit state's rights.

The above argument is defective because it fails to comprehend that Article 8*bis* simply "provides a framework for expedited decision making that states parties may adopt to facilitate coordination."[112] Rather than imposing concrete obligations upon the state, the Article merely creates a coordinated regime that allows for cooperation when boarding a foreign vessel that flies the flag of another state party.[113] Further, it limits this regime to only situations when the requesting state has "reasonable grounds" to believe that the vessel—or a person on board the vessel—has previously, is currently, or is about to commit an offense prohibited by the convention.[114]

Increasing the cooperation between states is in fact the principal purpose of the additions in Article 8*bis*. In addition to the above modification, Article 8*bis*(3) addresses the issues of boarding a small craft or large commercial vessel while at sea, and requires that the boarding state consider any particular dangers or difficulties that may occur when boarding a ship under way.[115] Article 8*bis*(4) then provides a mechanism through which a state party which has "reasonable suspicion" that a vessel is participating in illegal conduct can request the assistance of other states parties to interact with a vessel when it is encountered outside of the territorial sea and is flying another state's flag. Through this mechanism, the two states work together to address the suspected criminal activity by potentially boarding the vessel; searching it for evidence of the offenses under Article 3; and possibly detaining the vessel, cargo, and persons on board. The new regime also creates a cooperation mechanism between warships attempting to board a suspicious vessel and the vessel's flag state during incidents at sea.[116]

Consequently, rather than hampering the rights of states parties, Article 8*bis* increases the cooperation of states in the region and the effectiveness of each state's maritime policing efforts. Moreover, for regions where the states are close geographically—such as the Caribbean—the time to reach the sovereign territory of one state from another may be a matter of minutes.[117] Therefore, rapid state cooperation is imperative to maritime policing. The expediated cooperation regime created by Article 8*bis* is an effective solution through which states can achieve this goal. Most importantly, the boarding regime created in the 2005 SUA requires both parties—the flag state and the boarding state—to be party to the treaty. Therefore, for the regime created by the 2005 SUA to be effective, more states must become state party to it.

3. Heavy Involvement of the United States of America

Another criticism of the 2005 SUA is that it represents an attempt to universalize the Proliferation Security Initiative (PSI). The PSI is a voluntary, multilateral effort initiated by the U.S. in 2003, with the goal of enhancing interdiction capabilities and increasing coordination between states to disrupt trade in weapons of mass destruction, delivery systems, and related material.[118]

This argument does have merit because Article 8*bis* of the 2005 SUA contains many similarities to the PSI bilateral agreements. For instance, the goal of both the PSI and the 2005 SUA is to encourage states to create coordinated procedures through which states may cooperate for joint operations. Further, consent to board is imperative in both agreements—no actions can be taken without authorization of the flag state. Nevertheless, Article 8*bis* of the 2005 SUA also has many differences from the PSI bilateral agreements. For instance, consent to exercise jurisdiction is not implicit in the consent to board.[119] States parties are also required to designate a "competent authority" (or authorities) to manage interdiction requests.[120] Additionally, flag states confirm a vessel's "nationality" under the 2005 SUA, whereas the vessel's "registry" is confirmed under the PSI.[121] Consequently, the 2005 SUA allows for presumptive flag state authorization, rather than requiring registration checks.[122]

For the Caribbean specifically, many of the states in the region support the PSI, namely: Antigua and Barbuda; Bahamas; Belize; Dominica; Dominican Republic; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago.[123] Of these states, four—the Bahamas; Belize; Dominica; and Trinidad and Tobago—are not states parties to the 2005 SUA.[124] Consequently, it would be illogical for any of these four states to use the similarity to the PSI agreements as justification their failure to become party to the 2005 SUA.

4. The Ambiguous Definition of "Dual-Use"

Article 3*bis*(2) of the 2005 SUA prohibits the transport on board a ship of "any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose."[125] During the drafting stage, this language was criticized as "largely functional, and in part, indeterminate."[126] Moreover, the provision could be problematic as it criminalizes the ac-

tions of a seafarer carrying the materials without the requisite general knowledge or intent.[127] Such a concern is warranted, considering that often the seafarer would not be aware of the contents of a container since containers are generally sealed and loaded at port.[128] As a result, the IMO Legal committee only agreed to the wording by a majority, not by unanimity.[129] Ultimately, the interpretation of this provision depends on a question of fact and subjective intent—leaving a great deal to *ad hoc* bilateral agreements as to whether any given shipment may warrant interdiction.[130]

In practice, however, it is more likely that a boarding state will look towards the guidelines of co-operative forums—such as the Wassenaar Arrangement on dual use technologies[131]—rather than its own national standards.[132] Moreover, the transportation of "dual-use" materials is not considered an offense when the material was transported to or from the territory—or otherwise transported under the control of—a state party to the Treaty on the Non-Proliferation of Nuclear Weapons.[133] Most importantly, the 2005 SUA is an ambitious document which "creates a new international crime of proliferation, several new terrorist offenses, a ship boarding regime and a method of strengthening the Treaty on the Non-Proliferation of Nuclear Weapons."[134] It was negotiated in a large multilateral forum—the IMO legal committee—with the full support of another large multilateral forum—the United Nations General Assembly. The final text is a long, overarching document which reflects extensive compromises by multiple parties.[135] While some have further criticized the document for being overburdened with verbiage and minor inconsistencies, it is important to keep in mind the difficulty in creating an overarching document that balances such a substantial number of competing interests.[136] Therefore, rather than focusing on the verbiage in the document, states should look towards the practical implications of the treaty.

5. Other Existing Agreements

For states in the Caribbean, the existence of a regional agreement—the 2008 CARICOM Maritime and Airspace Security Cooperation Agreement (MASCA)[137]—may justify the refusal to join the 2005 SUA. Both MASCA and the 2005 SUA are similar in that they are intended to promote regional security by providing a mechanism for cooperation in the region when conducting law enforcement operations, including combatting terrorism.[138] Further, like the 2005 SUA, MASCA creates both an implied and express consent regime, and a coordinated boarding regime.[139] However, while the agreements are similar, there are vital differences that ultimately support the adoption of the 2005 SUA. Most importantly, MASCA has significantly less support than the 2005 SUA—it currently only has four states parties and is not yet in force.[140] Further, the 2005 SUA is the only agreement that directly addresses the prevention of the use of ships to move BCN weapons. Consequently, the 2005 SUA is one of a kind—meaning it would be misguided to decline becoming a state party to the 2005 SUA due to the existence of MASCA.

States may also adopt bilateral agreements with one another.[141] For example, many bilateral boarding agreements exist between the U.S. and states within the Caribbean region.[142] However, it is unclear whether any such agreements exist between solely between Caribbean States. Furthermore, as is the nature of bilateral agreements, these agreements are not uniform.[143] Consequently, it is more advantageous for the international community to rely on a single multilateral agreement—namely, the 2005 SUA—rather than bilateral agreements that can—and often do—differ significantly.

IV. Recommendations

The monist system is rare in the Caribbean: only two states are monistic—the Dominican Republic,[144] and Haiti.[145] Of these, only one—the Dominican Republic—is a state party to the 2005 SUA. As such, only the Dominican Republic has taken the steps to protect itself properly from the serious maritime threats that the 2005 SUA addresses. This article strongly recommends that Haiti follow the Dominican Republic's example and become a state party to the 2005 SUA at its earliest possible convenience. Because Haiti is a monistic system, once it becomes a state party, the state will benefit from the protection accorded by the convention.

The dualist system is more prevalent in the Caribbean, with nine states employing this method of treaty incorporation: Antigua and Barbuda;[146] Jamaica;[147] St. Lucia;[148] Bahamas;[149] Barbados;[150] Belize;[151] Dominica;[152] Grenada;[153] and Trinidad and Tobago.[154] Moreover, because of the two-step process required by dualism, the implementation of the 2005 SUA is more complicated for these states.[155] Three of these states are already states parties to the 2005 SUA—Antigua and Barbuda; Jamaica; and St. Lucia.[156] However, only one of these states—Antigua and Barbuda—has adopted the necessary implementing legislation. Shortly after acceding to the 2005 SUA in 2015, the state's House of Representatives passed a bill incorporating the obligations provided in the 2005 SUA into the domestic legislation of the state.[157] Consequently, the rights and obligations outlined in the 2005 SUA are fully binding upon Antigua and Barbuda. Jamaica and St. Lucia, on the other hand, have not adopted the necessary implementation legislation yet. Given the importance of the 2005 SUA, this article strongly recommends both Jamaica and St. Lucia complete the implementation process at their earliest conve-

nience to properly benefit from the protection accorded by the convention. As for the other states—Bahamas, Barbados, Belize, Dominica, Grenada, and Trinidad and Tobago—this article urges these states to follow the example set by the Antigua & Barbuda by both becoming a state party and incorporating the 2005 SUA into domestic law as soon as possible.

Suriname is the only state in the Caribbean that clearly utilizes a combination of both systems.[158] However, Suriname has not yet become a state party to the 2005 SUA. Consequently, this article urges Suriname to become a state party to the treaty at its earliest convenience. In such circumstance, because the 2005 SUA (1) creates clear and enforceable rights and duties, and (2) creates these rights and obligations for individuals,[159] the convention will be considered "self-executing" and therefore the state will immediately benefit from the protection accorded by the treaty.

Lastly, it is unclear which system Guyana, St. Kitts and Nevis, and St. Vincent and the Grenadines follow. Nevertheless, all three of these states have acceded to the 2005 SUA.[160] However, none of these states has passed the necessary implementing legislation. Consequently, if these states utilize a dualist system, this article urges them to pass such implementing legislation. Conversely, if these states utilize a monist system, they already benefit from the protection accorded by the 2005 SUA.

V. Conclusion

Considering the arguments made in the above sections, it is evident that, while there are several arguments that can be made against the 2005 SUA, each is met with a significant counterargument. As a result, it is more advantageous for states to become party to the 2005 SUA than to remain outside of its sphere of protection. Further, the failure to implement the 2005 SUA leaves the Caribbean region dangerously exposed to the threats that first prompted the creation of the amendments. Consequently, this article urges the Caribbean states to comply with the recommendations made above by completing the necessary steps to benefit from the rights and obligations accorded by the 2005 SUA.

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Endnotes

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2. James Kraska, *Effective Implementation of the 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 70 Naval War College Rev. 1, 11 (2017).
3. This includes Antigua & Barbuda; Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Monserrat (a British overseas territory); St. Kitts & Nevis; St. Lucia; St. Vincent & the Grenadines; Suriname; and Trinidad & Tobago. Member States & Associate Members, https://caricom.org/member-states-and-associate-members (last visited Oct. 27, 2021).
4. Belize, Haiti, and Suriname are not States parties. Status of IMO Treaties, Int'l Maritime Org. 440-45 (July 21, 2021), https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20-%202021.pdf [hereinafter "Status of IMO Treaties"].
5. Antigua & Barbuda, Guyana, Jamaica, Monserrat (by virtue of the United Kingdom's status), St. Kitts & Nevis, St. Lucia, and St. Vincent & the Grenadines are States parties. Bahamas, Barbados, Belize, Dominica, Grenada, Haiti, Suriname, and Trinidad & Tobago are not. *Id.* at 455-56.
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10. International Maritime Organization, Review of Measures and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers and Crews and the Safety of Ships, IMO Doc. RES/A.924(22) (Jan. 22, 2002).
11. Tuerk, *supra* note 1, at 343-44.
12. *Id.*
13. *Id.* at 344-45.
14. Only five of the States in the region are States parties: Antigua & Barbuda; Bahamas; Barbados; St. Vincent & the Grenadines; and Trinidad & Tobago. *See* Convention for the Suppression of unlawful seizure of aircraft, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971).
15. All the States in the region are States parties. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 U.N.T.S. 178 (entered into force Jan. 26, 1973).

16. All the States in the region except for St. Lucia are States parties. *See* International Convention against the Taking of Hostages, 1316 U.N.T.S. 205 (entered into force June 3, 1983).
17. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 U.N.T.S. 221 (entered into force Mar. 1, 1992) [hereinafter "1988 SUA"].
18. Status of IMO Treaties, *supra* note 4, at 440-45.
19. *See generally* Mikhail Kashubsky, A Chronology of Attacks on and Unlawful Interferences with Offshore Oil and Gas Installations, 1975-2010, 5 Perspectives on Terrorism 139 (2011).
20. Tuerk, *supra* note 1, at 344-45.
21. *Id.*
22. *Id.* at 338.
23. *Id.* at 356.
24. *Id.*
25. Kraska, *supra* note 2, at 16.
26. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf art. 3bis(1)(b)(iv), U.N. Doc. LEG/CONF.15/21 (entered into force July 28, 2010) [hereinafter "2005 SUA"].
27. Kraska, *supra* note 2, at 14.
28. Tuerk, *supra* note 1, at 338.
29. *Id.*
30. 2005 SUA, *supra* note 26, at art. 3bis(1).
31. *Id.*
32. *Id.* at art. 3bis(2).
33. *Id.* at art. 3ter.
34. *Id.* at art. 3quarter.
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36. *Id.* at art. 8bis.
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69. *See* Status of Conventions, https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx (last visited July 14, 2021); Status of IMO Treaties, *supra* note 4, at 440-45.

70. Specifically: Bahamas; Barbados; Belize; Dominica; Grenada; Haiti; Suriname; and Trinidad & Tobago. Status of IMO Treaties, *supra* note 4, at 440-45.

71. Kraska, *supra* note 2, at 11.

72. United Nations Convention on the Law of the Sea art. 110(2), 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) [hereinafter "UNCLOS"].

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74. *Id*. at 56.

75. 2005 SUA, *supra* note 26, at art. 8bis(5).

76. *See generally* Stephen Nathanson, Terrorism and the Ethics of War 9-74 (2010).

77. All the States in the region are States parties. *See* International Convention for the Suppression of the Financing of Terrorism, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002).

78. 2005 SUA, *supra* note 26, at art. 10.

79. *See generally* Lori Fisler Damrosch & Sean D. Murphy, Int'l Law: Cases and Materials 790-92 (6th ed. 2014) (providing a basic overview of the concept of "obligation to extradite or prosecute," also known as aut dedere aut judicare); Int'l Law Comm'n, The obligation to extradite or prosecute (aut dedere aut judicare) U.N. Doc. A/68/10, at 108-110 (2014); Int'l Law Comm'n, The Obligation to Extradite or Prosecute (aut dedere aut judicare), U.N. Doc. A/CN.4/612 (Mar. 26, 2009) (providing government comments and observations on the obligation to extradite or prosecute); Questions Relating to the Obligation to Prosecute or Extradite (*Belg. v Sen.*), Judgment, 2012 I.C.J. 422, ¶ 94-95 (July 20) (analyzing the concept of the obligation to extradite or prosecute).

80. 2005 SUA, *supra* note 26, at art. 3bis(1).

81. *Id*. at art. 1(d)(i).

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84. Kraska, *supra* note 2, at 15.

85. *See supra* footnotes 14 to 16 and accompanying text.

86. International Convention against the Taking of Hostages, 1316 U.N.T.S. 205 (entered into force June 3, 1983).

87. All the States in the region, except for Haiti and Suriname, are States parties. *See* International Convention for the Suppression of Terrorist Bombings, 2149 U.N.T.S. 256 (entered into force May 23, 2001).

88. *See* 2005 SUA, *supra* note 26, at arts. 1(2)(b), 3ter. The Annex of the 2005 SUA includes the treaties relied upon during the drafting of the Convention.

89. It must be noted that, while this may be illogical, it does occur. For example, the U.N. Convention on Rights of Persons with Disabilities is modeled upon the American Disability Laws; however, the U.S. has yet to ratify the Convention. *See generally* Kevin Walker, *Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Postsecondary Education for Persons with Intellectual Disabilities*, 12 Northwestern J. Int'l Hum. Rts. 115 (2014).

90. Douglas Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, 12 J. Conflict & Security L. 1, 28 (2007).

91. *See generally* Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 Euro. J. Int'l L. 879 (2006).

92. Both resolutions were passed under Chapter VII. *See* Security Council, Resolution 1373, U.N. Doc. S/RES/1373 (2001); Security Council, Resolution 1540, U.N. Doc. S/RES/1540 (2004).

93. S/RES/1540, at ¶ 2.

94. S/RES/1373, at ¶ 2(b).

95. *See supra* section "Movement of BCN Weapons."

96. *See supra* section "Use of Previous Agreements as Models for the 2005 SUA."

97. 1988 SUA, *supra* note 17, at art. 6.

98. 2005 SUA, *supra* note 26, at art. 6.

99. *Id*.

100. *Id*.; *see* Malcolm N. Shaw, Int'l Law 488-93 (8th ed. 2017) (explaining territorial jurisdiction); cf. Sompong Sucharitkul, Terrorism and International Law, Golden Gate U. Dig. Commons 33-34 (1987).

101. *See generally* Int'l Crime Control Strategy, https://clintonwhitehouse4.archives.gov/WH/EOP/NSC/html/documents/iccs-frm.html (explaining the Clinton administration's foreign policy strategy aimed at eliminating international criminal safe havens).

102. 2005 SUA, *supra* note 26, at art. 8bis(8).

103. *Id*.

104. *Id*. at art. 8bis.

105. *See id*.

106. *Id*.; Tuerk, *supra* note 1, at 347; *see* 2005 SUA, *supra* note 26, at preamble, art. 9.

107. It is important to note the distinction between "slave trade" and "human trafficking"—the former being more limited in scope than the later. *See* Combating Transnational Organized Crime Committed at Sea: Issue Paper, United Nations Off. on Drugs and Crime 21 (2013).

108. UNCLOS, *supra* note 72, at art. 110(1).

109. All the States in the region are States parties to this treaty. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 art. 17, 1582 U.N.T.S. 95 (entered into force Nov. 11, 1990).

110. *See supra* footnotes 36 to 37 and accompanying text.

111. 2005 SUA, *supra* note 26, at art. 8bis.

112. Kraska, *supra* note 2, at 17.

113. *Id*.

114. *Id*.

115. 2005 SUA, *supra* note 26, at art. 8bis(3).

116. Kraska, *supra* note 2, at 16.

117. *See supra* section "Drug and Human Trafficking."

118. The Proliferation Security Initiative (PSI) At a Glance, Arms Control Assoc. (March 2020), https://www.armscontrol.org/factsheets/PSI.

119. *See* 2005 SUA, *supra* note 26, at art. 8bis.

120. *Id*. at art. 8bis(15).

121. *Id*. at art. 8bis(5).

122. *Id*. at art. 8bis.

123. Endorsing States List, https://www.psi-online.info/psi-info-en/botschaft/-/2205942 (last visited November 4, 2021).

124. Status of IMO Treaties, *supra* note 4, at 440-45.

125. 2005 SUA, *supra* note 26, at art. 3bis(1)(b)(4).

126. Guilfoyle, *supra* note 90, at 29.

127. Tuerk, *supra* note 1, at 360.

128. *Id*.

129. International Maritime Organization Legal Committee, Report of the Legal Committee on the Work of its Ninetieth Session, I.M.O. Doc. LEG/90/15, ¶¶ 33-41 (May 9, 2005) [hereinafter "LEG/90/15"].

130. Guilfoyle, *supra* note 90, at 29.

131. The Wassenaar Arrangement is a multilateral arrangement on export controls for conventional weapons and dual-use goods and technologies. Co-founded in 1996, it is currently composed of 42 countries; however, none of our focus countries are Participating States. *See What is the Wassenaar Arrangement?*, https://www.wassenaar.org/the-wassenaar-arrangement (last visited July 14, 2021).

132. Guilfoyle, *supra* note 90, at 29.

133. 2005 SUA, *supra* note 26, at art. 3quater.

134. Guilfoyle, *supra* note 90, at 28.

135. LEG/90/15, *supra* note 129, at ¶¶ 30-31.

136. Guilfoyle, *supra* note 90, at 28.

137. CARICOM Maritime and Airspace Security Cooperation Agreement, 68 L. of the Sea Bull. 20 (July 4, 2008).

138. *Id*. at preamble, arts. 2(1),

139. *Id*. at art. 9.

140. *See* CARICOM Maritime and Airspace Security Cooperation Agreement, 68 Law of the Sea Bulletin 20 (2008).

141. *See* generally Malgosia Fitzmaurice, Treaties, in Max Planck Encyclopedia of Int'l Law ¶ 33 (2021).

142. *See* generally Joseph E. Kramek, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 Inter-American L. Rev. 121 (2000).

143. Regional Trade Integration Under Transformation, World Trade Org. ¶ 20 (2002).

144. República Dominicana Constitucion de 2010 ("Recognizes and applies the norms of general and inter-American International Law to the extent that its government authorities have adopted them . . . . The current norms of ratified international conventions will govern internally, once they have been officially published.").

145. 1987 Constitution of the Public of Haiti ("Once international treaties or agreements are approved and ratified in the manner stipulated by the Constitution, they become part of the legislation of the country and abrogate any laws in conflict with them.").

146. Morlachetti, *supra* note 58, at 9.

147. David M. Aaron, *Reconsidering Dualism: The Caribbean Court of Justice and the Growing Influence of Unincorporated Treaties in Domestic Law*, 6 L. & Prac. Int'l Cts. & Tribunals 233, 268 (2007); Seafood and Ting Int Ltd., 58 WIR 269 (1999) (providing an exception for treaties that create legitimate expectations).

148. Morlachetti, *supra* note 58, at 9 (noting that, in a Universal Periodic Review, the government of St. Lucia explicitly stated it is a dualist legal system).

149. *See H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*, (2 AC 44 (1990) ("[D]omestic courts have no jurisdiction to construe or apply a treaty."); *Higgs v. Minister of National Security*, 2 AC 228 (2000) ("[U]nincorporated treaties cannot change the law of the land."). But *see* Phillimore in The Parlement Belge, 4 PD 129 (1879) (providing an exception for unincorporated treaties that give rise to legitimate expectation).

150. *Boyce v. The Queen*, [2004] UKPC 32, [2005] 1 A.C. 400 (P.C. 2004) (appeal taken from Barb.) (U.K.) ("The rights of the people of Barbados in domestic law derive solely from the Constitution."). But *see Attorney General of Barbados v. Jeffrey Joseph and Lennox Boyce*, CCJ Appeal No. CV2 (2005) (providing an exception for unincorporated treaties that give rise to legitimate exceptions).

151. *Reyes v. The Queen*, 11 UKPC 11 (2002), 2 A.C. 235, 247 (P.C.) (appeal taken from Belize) (U.K.) ("It is open to the people of any country to lay down the rules by which they wish their State to be governed.").

152. While the 1978 Constitution is silent on the issue of treaty-making authority, Article 12 addressing the freedom of movement provides an exception for acts done in "compliance with any international obligations of the Government particulars of which have been laid before the Senate and the House." The emphasized portion of this text suggests that the House and the Senate must first consent to international obligations, therefore meaning that the State functions under a dualist system. *See* Dominica Constitution of 1978.

153. Morlachetti, *supra* note 58, at 9 (noting that, in a Universal Periodic Review, the government of Grenada explicitly stated it is a dualist legal system).

154. *Thomas v. Baptiste*, 54 WIR 387, 422 (1998) (expressly rejecting the notion of self-executing treaties). But *see Ismay Holder v. Council of Legal Education*, HCA No. 732 (1997) (holding that an unincorporated, ratified treaty created legitimate expectations that the rights applied to citizens).

155. *See supra* section "The Implementation of Treaties Into Domestic Law."

156. Status of IMO Treaties, *supra* note 4, at 455-56.

157. Antigua and Barbuda, Resol. of the House of Representatives Ratifying the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA 2005) and the Protocol of 2005 for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (SUA Prot 2005) (2016). The State also recently amended this law in 2020 via the Antigua and Barbuda Merchant Shipping Act. *See* Antigua and Barbuda Merchant Shipping Act (2020).

158. *Public Prosecutor v. Bouterse*, First instance decision, ILDC 1892, ¶¶ 2.2-2.4 (SR 2012), 11 May 2012 (interpreting the constitution to allow for self-executing treaties; however, due to the Constitutional requirements of Article 103, this quality varies treaty-by-treaty based on the obligations prescribed).

159. *See supra* footnote 64 and accompanying text.

160. In 2019, 2007, and 2010, respectively. Status of IMO Treaties, *supra* note 4, at 455-56.

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PUBLICATIONS

Arbitration and Mediation

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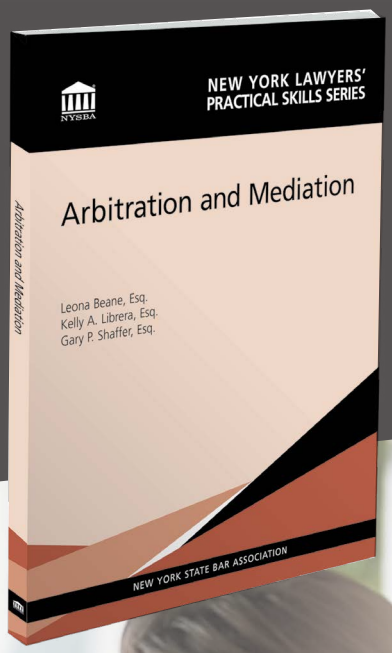

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