

THE LEGALITY OF NORTH KOREA'S NUCLEAR  
POSITION: LESSONS REGARDING THE STATE  
OF NUCLEAR DISARMAMENT IN  
INTERNATIONAL LAW

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I. INTRODUCTION

While North Korea's nuclear exploits are well known, the legal implications of its nuclear testing are less clear. North Korea has carried out six nuclear tests to date, and its most recent, in September 2017, may have been a hydrogen bomb.<sup>1</sup> The legal implications of such testing remain largely theoretical, but nonetheless worth exploring. An analysis of which laws North Korea may have breached through its nuclear testing sheds light on the state of nuclear weapons in customary international law.

This Comment will provide a brief introduction and evaluation of two sources of North Korea's liability under international law for nuclear testing. First, that North Korea violated Security Council Resolutions calling for it to cease nuclear testing, and more generally, calling for nuclear non-proliferation. Much has already been written about the interpretation of

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1. *North Korea Nuclear Tests: What Did They Achieve?*, BBC (Sept. 3, 2017), <http://www.bbc.com/news/world-asia-17823706>.

these resolutions, and this piece serves to highlight the main arguments. Second, North Korea may be liable for nuclear testing under customary international law regarding negotiating towards nuclear disarmament in good faith. The existence of this custom was argued by the Marshall Islands in its case against the United Kingdom.<sup>2</sup> This Comment will argue that the most likely violation by North Korea is that of the resolutions specifically addressing it, but there is also a decent case to be made for a customary law violation.

It should here be noted that a potential third source exists that will not be discussed in this piece. North Korea may still be bound by the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)<sup>3</sup> if its withdrawal from the NPT was invalid.<sup>4</sup> This Comment will, for argument's sake, proceed on the basis that its withdrawal was valid and it is no longer a party to the NPT.

## II. WAS VIOLATING U.N. SECURITY COUNCIL RESOLUTIONS A BREACH OF INTERNATIONAL LAW?

North Korea's failure to comply with Security Council resolutions is one source of legal liability. Article 25 of the U.N.

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2. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, 2016 I.C.J. Rep. 833 (Oct. 5).

3. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161 [hereinafter NPT].

4. North Korea first announced its intention to withdraw in 1993, leading to the creation of the Geneva Agreed Framework to introduce talks for its continued compliance with the NPT. This broke down effectively in 2002, and North Korea announced its withdrawal in 2003. See Cristian DeFrancia, *Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures*, 45 VAND. J. TRANSNAT'L L. 705, at 20. Issues remain as to (i) whether the notice period under Article X of the NPT was sufficient, given that North Korea relied on its 1993 notice and (ii) whether substantively, North Korea met the Article X requirements of there being "extraordinary events," citing as it did threats posed to it of a pre-emptive nuclear strike by the USA. See *North Korea's Statement on NPT Withdrawal*, KCNA (Jan. 10, 2003), <https://web.archive.org/web/20170908185911/http://kcna.co.jp/item/2003/200301/news01/>; *North Korea Withdraws from Nuclear Treaty*, GUARDIAN (Jan. 10, 2003), <https://www.theguardian.com/world/2003/jan/10/northkorea1>; see also Raven Winters, *Preventing Repeat Offenders: North Korea's Withdrawal and the Need for Revision to the Nuclear Non-Proliferation Treaty*, 38 VAND. J. TRANSNAT'L L. 1499, 1509 (2005); see generally Michael J. Glennon, *NPT Withdrawal*, 30 FLETCHER F. WORLD AFF. 43 (2006).

Charter, states that all member States “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>5</sup> Article 103 further holds these obligations take precedence over conflicting obligations from other international agreements.<sup>6</sup> The U.N. Charter is further binding on all members of the United Nation as treaty law.<sup>7</sup> Moreover, as enshrined in Chapter VII of the Charter, the Security Council can determine where there is a threat or breach to peace, or aggression, and accordingly take measures “to maintain or restore international peace and security.”<sup>8</sup>

The legally binding force of Security Council resolutions should first be queried. A narrow interpretation of “decisions” under Article 25 would confine the legal force of Security Council resolutions to only those made with Chapter VII powers. Yet even then, not all resolutions made with Chapter VII powers may be binding, as Article 39 states that the Security Council “may make *recommendations*, or decide what measures must be taken” in order to maintain international peace and security.<sup>9</sup> In each case the specific wording should be scrutinized. Accordingly, there are two possible breaches.

First, having determined nuclear proliferation to be a threat to peace and security in Resolution 1540,<sup>10</sup> the Security Council passed a series of resolutions condemning North Korea’s nuclear testing, beginning with Resolution 1695.<sup>11</sup> North Korea’s nuclear testing likely breached the obligations imposed under these resolutions, which have called for North

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5. U.N. Charter art. 25.

6. U.N. Charter art. 103. (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”)

7. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 (On the “*Pacta sunt servanda*” principle – that “Every treaty is binding in force on the parties to it. . .”). [hereinafter ‘Vienna Convention’] See also Frederic L. Kirgis, *Treaties as Binding International Obligation*, ASIL INSIGHT, Vol. 2 Issue 4, (May 14, 1997) at <https://www.asil.org/insights/volume/2/issue/4/treaties-binding-international-obligation>.

8. U.N. Charter art. 39.

9. U.N. Charter art. 39 (emphasis added); see also Rosalind Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?*, 21 INT’L & COMP L. Q. 270 (1972).

10. S.C. Res. 1540 (Apr. 28, 2004).

11. S.C. Res. 1695 (Jul. 15, 2006).

Korea to both rejoin the NPT and cease its nuclear program.<sup>12</sup> Resolution 1718 decided, among other things, that North Korea would abandon its nuclear program, “act strictly in accordance with the obligations applicable to parties” under the NPT, and agree to IAEA safeguard arrangements.<sup>13</sup> More recently, through Resolutions 2375 and 2397, the Security Council has increased sanctions against North Korea for its sixth nuclear test and further ballistic missile testing respectively, both including language “(r)eachfirm(ing) its decisions” that the state should cease its nuclear program.<sup>14</sup> North Korea’s violation of these Resolutions may therefore itself be considered a breach under international law.<sup>15</sup>

Resolution 1695 “[s]trongly urge[d]” North Korea to return to Six-Party talks, and to return to the NPT at an early date.<sup>16</sup> The only thing it expressly “decide[d]” was to remain seized of the matter.<sup>17</sup> It further failed to mention Chapter VII powers. These suggest that it may not be legally binding<sup>18</sup>, al-

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12. See S.C. Res. 1695, *supra* note 11, at ¶2,6 and 7 (demanding that North Korea abandon its ballistic missile program, strongly urging that North Korea abandon its nuclear weapons program and return to the NPT, IAEA safeguards, and Six Party Talks, as well as supporting the resumption of such talks. North Korea can be considered to have violated all of these requirements in continuing nuclear and ballistic missile testing, and in failing to return to the NPT). See also S.C. Res. 1540, *supra* note 10, at ¶3 (deciding that all states should take measures to prevent the proliferation of nuclear weapons and their means of delivery, which North Korea has not done, evinced by its continued testing of both nuclear and ballistic means).

13. S.C. Res. 1718, ¶ 6 (Oct. 14, 2006).

14. See S.C. Res. 2375, ¶ 2 (Sep. 11, 2017) (forbidding work authorizations for North Koreans and imposing sanctions concerning a ban on North Korea’s textile exports and banning the sale of natural gas to the country in response to nuclear testing by North Korea on September 2, 2017); S.C. Res. 2397, ¶ 2 (Dec. 22, 2017) (imposing sanctions restricting the sale of fuel to the country in response to North Korea’s launching of a ballistic missile on November 28, 2017). Both resolutions called for the country to cease its nuclear and ballistic operations and resume entry into the NPT.

15. See Christopher J. Le Mon, *International Law and North Korean Nuclear Testing*, ASIL Insights, vol.10, no. 27 (Oct. 19, 2006), at [https://www.asil.org/insights/volume/10/issue/27/international-law-and-north-korean-nuclear-testing#\\_edn20](https://www.asil.org/insights/volume/10/issue/27/international-law-and-north-korean-nuclear-testing#_edn20), (addressing Security Council Resolution 1718 as a form of regulation on North Korea).

16. S.C. Res. 1695, *supra* note 11, ¶ 6.

17. *Id.* ¶ 8.

18. For the standard applicable in determining the effect of a Security Council Resolution, see *Legal Consequences for States of the Continued*

though countries have expressed mixed views on whether this is the case.<sup>19</sup> By contrast, resolutions beginning from Resolution 1718 have consistently and expressly used Chapter VII powers.<sup>20</sup> Moreover, the later resolutions, in “(r)eachfirm(ing) its decisions” in calling for North Korea to cease all operations related to its nuclear program or ballistic missiles, bringing it directly in line with the wording of Article 25 of the UN Charter, further reinforce this.<sup>21</sup> The specificity of this language would suggest that the Security Council intends more than a mere recommendation. In addition, most of the resolutions, including Resolution 1718, appear to contain targeted sanctions that are not overly broad.<sup>22</sup> Hence, North Korea’s continued nuclear and ballistic missile testing would be a breach of these later legally binding resolutions.

Concerns may arise that in obligating North Korea to accede to and comply with the NPT, the Security Council is imposing a treaty on a non-consenting party and therefore violating the principle of *pacta sunt servanda*.<sup>23</sup> This ability is not expressly found within the U.N. Charter; but, as Professor Talmon rightly points out, there is a distinction to be made

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Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep 53, 16, at ¶114 (Jun. 21) (“In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”).

19. The United States and Japan view it as legally binding, while China and Russia do not. See Eric Yong-Joong Lee, *Legal Analysis of the 2006 U.N. Security Council Resolutions Against North Korea’s WMD Development*, 31 *FORDHAM INT’L L. J.* 1, 17–18.

20. S.C. Res. 1718, *supra* note 13, pmbl., ¶ 10 (Oct.14, 2006). The preamble states, “Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41.” *Id.* pmbl.

21. See S.C. Res. 2375 and S.C. Res. 2397, *supra* note 14.

22. See Geoffrey S. Carlson, An Offer They Can’t Refuse—The Security Council Tells North Korea to Re-Sign the Nuclear Non-Proliferation Treaty, 46 *COLUM. J. TRANSNAT’L L.* 420, 454 (2008) (considering that S.C. Res 1718 targets only a single state with economic sanctions, contrasting this to S.C. Res 1540, which was intended to create “global norms in a unilateral, binding, and general manner.”).

23. See Vienna Convention *supra* note 7, at art. 34 (stating that “[a] treaty does not create either obligations or rights for a third State without its consent”).

between imposing the obligations of a treaty on a third state, and incorporating the substance of the treaty within its resolutions.<sup>24</sup> In the latter situation, the source of the obligation is the resolution and not the treaty, and therefore does not violate the principle.<sup>25</sup> Moreover, the principle of consent can be deemed to have been fulfilled when the parties signed the U.N. Charter, thereby giving their consent to the U.N. Security Council to exercise their Chapter VII powers.<sup>26</sup> Under this interpretation, North Korea would therefore have violated the Security Council obligations specifically pertaining to it that called for it to comply with the NPT and cease its nuclear program.

Second, there may have been Security Council resolutions that have obliged all member states to prevent the proliferation of nuclear weapons on their territory. Specifically, Resolution 1540 held that nuclear proliferation was a threat to international peace and security.<sup>27</sup> Mainly concerned with preventing non-state actors from obtaining nuclear and other weapons of mass destruction, the resolution *decided* that “all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery.”<sup>28</sup> The express language of “decides” was used,<sup>29</sup> and the resolution expressly stated that this was being done under the Security Council’s chapter VII powers.<sup>30</sup> If such a general obligation towards non-proliferation exists, then North Korea’s nuclear and ballistic testing would violate this obligation.

Furthermore, this resolution is remarkable in terms of addressing *all states* rather than any specific one, which would then liken Security Council resolutions to a form of global leg-

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24. Stefan Talmon, *Security Council Treaty Action*, 62 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL [HELLENIC REV. INT’L L.] 65, 88 (2009) (arguing that the adaptation of treaties by the Security Council is not inconsistent with *pacta sunt servanda*).

25. *Id.*

26. *Id.*

27. S.C. Res. 1540, *supra* note 10.

28. *Id.* ¶ 3. at 25., should be considered.oes not pose a significant difficulty.s is not inconsistent with the aim of preven

29. *Id.*

30. *Id.* ¶ 16.

isolation.<sup>31</sup> A brief overview of common objections to this are as follows: first, that as a matter of consent, it is questionable whether this quasi-judicial function was really intended by the creators of the U.N. Charter, and therefore whether state consent under Article 25 extends to cover such instances;<sup>32</sup> second, that doing so exceeds the bounds of the Security Council's peace and security mandate, in failing to take action against a specific threat;<sup>33</sup> and third, that insofar as any proportionality principle applies to what the Security Council can do, it has been breached.<sup>34</sup> The difficulty with all of these arguments is that ultimately, the Security Council interprets its own mandate;<sup>35</sup> and moreover, these difficulties might be accommodated by taking an evolutive interpretation of the U.N. Charter.<sup>36</sup> In terms of precedent, Resolution 1373 was also similarly general.<sup>37</sup>

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31. José Enrique Alvarez, *The Impact of International Organizations on International Law* 116–120 (2017).

32. See Masahiko Asada, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, 13 J. CONFLICT SECURITY L. 303, 323–325 (2008) (pointing out that the common view is that the collective security system established by the U.N. Charter envisioned a system whereby sanctions are used to respond to specific threats, rather than for general rules).

33. See Eric Rosand, *The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542, 557 (2005) (noting that some scholars have qualified Chapter VII as limited to peace-enforcing measures, restricted to addressing particular situations, but further recognizing that threats like terrorism and counter-proliferation require a global reaction).

34. See Frederic L. Kirgis Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 517 (1995) (discussing the principle that the Security Council's action must not be disproportionate in tackling the threat to international peace and security).

35. See Carlson, *supra* note 22, at 451 (“[t]he inquiry into whether any Security Council resolution is ultra vires is preemptively hamstrung because there is currently no authoritative interpreter of the Charter other than the UN organs themselves.”).

36. See Rosand, *supra* note 33, at 569 (discussing the evolution of threats to international peace and security, which may justify seeing the U.N. Charter as a “living tree”, for the improved capacity to deal with such threats).

37. S.C. Res. 1373 (Sept. 28, 2001); see also Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 903 (2002) (noting that S.C. Resolution 1373 was not limited to a specific incident, nor was it limited in time); Talmon, *supra* note 24, at 25 (noting that S.C. Resolution 1373 set out “a range of abstract measures for all States to undertake in combating terrorism,” but that the resolution has been positively accepted by the international community).

Yet, the specific context in which Resolution 1540 was passed presents a problem in reading it so generally. It was primarily meant to prevent nuclear weapons from falling into the hands of non-state actors and preventing terrorism.<sup>38</sup> While the resolution may be interpreted as targeting North Korea's development and export of missiles,<sup>39</sup> it may be seen as falling short of addressing the question of nuclear proliferation where non-state actors are not concerned. Given that members of the Security Council themselves continue to develop nuclear weapons,<sup>40</sup> it is difficult to interpret Resolution 1540 as therefore presenting a legal ban on the proliferation of all nuclear weapons.

### III. IS THERE A BINDING CUSTOMARY INTERNATIONAL LAW ON NUCLEAR DISARMAMENT?

North Korea's development of nuclear weapons would be a violation of international law insofar as there is a custom regarding non-proliferation of nuclear weapons, where the creation of any new nuclear weapons is not allowed. Yet, the biggest difficulty in attempting to find a customary international law on non-proliferation is that the NPT currently creates an unequal regime, where only Non-Nuclear Weapons States are not allowed to manufacture or develop nuclear weapons.<sup>41</sup> By contrast, Nuclear-Weapon States are not expressly forbidden from developing new nuclear weapons, only from encouraging, assisting, or transferring nuclear weapons to Non-Nuclear Weapon States.<sup>42</sup> Indeed, Russia's announcement that it has developed new nuclear weapons as of March 2018 further emphasizes this.<sup>43</sup> Insofar as such differential treatment is con-

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38. S.C. Res. 1540, *supra* note 10, pmb1., ¶ 10.

39. *See Lee, supra* note 19, at 9–10 (noting that the United States hoped to restrict export of North Korean weapons, since it had been suspected of supplying missiles to terrorist groups).

40. For instance, Russia has recently announced that it has developed new nuclear weapons. *See* Neil MacFarquhar & David E. Sanger, *Putin's 'Invincible' Missile is Aimed at U.S. Vulnerabilities*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/world/europe/russia-putin-speech.html>.

41. NPT, *supra* note 3, art. II.

42. NPT, *supra* note 3, art I.

43. *See* MacFarquhar and Sanger, *supra* note 40.



cerned, it would be hard to find a custom under international law that would possess a “norm-creating character.”<sup>44</sup>

However, the Marshall Islands arguments present a viable path to finding a custom that could move toward nuclear disarmament, under which North Korea could be found in breach through its nuclear activities.

#### A. *The Argument of the Marshall Islands Case*

A fairly convincing argument for a customary international law of nuclear disarmament was put forth by the Marshall Islands in its memorial in *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* against the United Kingdom.<sup>45</sup> The Marshall Islands argued that there is an obligation under customary international law to pursue nuclear disarmament through negotiations in good faith, based on Article VI of the NPT.<sup>46</sup> This argument is based on three factors.

First, the Marshall Islands relied on a statement by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion regarding Article VI of the Non-Proliferation Treaty:

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.<sup>47</sup>

The court went on to note that “virtually the whole of this international community appears moreover to have been involved” in the unanimous adoption of the U.N. General Assembly resolutions about nuclear disarmament,<sup>48</sup> and also referred to it as a “twofold obligation,”<sup>49</sup> that “goes beyond that

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44. See *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 71–72 (Feb. 20) (noting that a treaty can only be the basis of a custom insofar as it has a “norm-creating character”).

45. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marsh. Is. v. U.K.), Memorial of the Marshall Islands (Mar. 16, 2015), <http://www.icj-cij.org/files/case-related/160/160-20150316-WRI-01-00-EN.pdf>.

46. *Id.* ¶ 189. NPT, *supra* note 3, art VI.

47. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 197 (July 8).

48. *Id.* ¶ 100.

49. *Id.*

of mere conduct”.<sup>50</sup> Relying on this reasoning, the Marshall Islands argued that the Court had, in this opinion, implicitly declared that Article VI of the NPT had attained the status of a customary international law.<sup>51</sup>

Second, this argument looks at the “norm-creating character” of the Article VI. This is present firstly given that it requires the cooperation of and is for the betterment of the whole international community, and secondly since this obligation in the NPT is not subject to any other conditions or derogation. The Marshall Islands further argued that there is widespread and representative participation—given that non-parties to the NPT have expressed support for disarmament—including through supporting resolutions that endorse the obligation concerned.<sup>52</sup> Extensive state practice is evident through “countless initiatives . . . aimed at progressing towards the goal of global nuclear disarmament.”<sup>53</sup>

Third, the existence of this customary international law is supported by the existence of numerous General Assembly and Security Council resolutions on the issue. In particular, the General Assembly has adopted every year since 1997 a resolution titled “Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons.”<sup>54</sup> In Resolution 1887, among others, the Security Council has called on “all other States” to join parties to the NPT in their Article VI obligation.<sup>55</sup>

The Marshall Islands’ memorial concludes that these elements in sum lead to the conclusion that such a customary international law exists,<sup>56</sup> imposing the obligation to pursue and conclude negotiations on nuclear disarmament in good

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50. *Id.* ¶ 99.

51. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Memorial of the Marshall Islands ¶197 (Mar. 16, 2015), <http://www.icj-cij.org/files/case-related/160/160-20150316-WRI-01-00-EN.pdf> [hereinafter “Marshall Islands Memorial”] (arguing that the Court held that Article VI of the NPT on negotiating towards nuclear disarmament was custom).

52. *Id.* ¶ 194.

53. *Id.* ¶ 195.

54. *Id.* ¶ 83 (citing the then most recent resolution, G.A. Res. 72/58, (Dec. 4, 2017)).

55. S.C. Res. 1887, ¶ 5 (Sep. 24, 2009).

56. See Marshall Islands Memorial, *supra* note 51 ¶ 206

faith on *all* States. This obligation would include, of course, North Korea.

### B. *Application to North Korea*

If the reasoning of the Marshall Islands is correct, then North Korea has an obligation to negotiate in good faith for nuclear disarmament. This obligation has two parts: (i) the requirement to negotiate and (ii) the good faith aspect of the obligation.

First, the standard for negotiation requires a genuine attempt, and a consideration of the other parties' interests.<sup>57</sup> While North Korea has engaged in numerous negotiation attempts over the years,<sup>58</sup> it remains doubtful that such action meets the required standard. The *North Sea* case held that negotiation required a genuine attempt at negotiation, more than going through a formal process,<sup>59</sup> which does not appear to be the case here given North Korea's intransigence about disarmament.

Notably, North Korea has, as of March 2018, offered to negotiate with the United States over its nuclear program,<sup>60</sup> but it is unclear if any such negotiations would live up to the good faith standard under international law. Good faith, as held in the *Gabcikovo-Nagymaros* case, requires that the parties

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57. See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russian Federation), Preliminary Objections, Judgment, 2011 I.C.J. Rep. 2011 70, ¶¶ 157–59. (holding that “(n)egotiations entail more than the plain opposition of legal views or interests between two parties. . . . As such, the concept of “negotiations” differs from the concept of “dispute”, and requires – at the very least – a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.”).

58. See Kelsey Davenport, *Chronology of US-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS'N, (Jan. 2018), <https://www.armscontrol.org/factsheets/dprkchron#2017>.

59. *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 85 (Feb. 20) (holding that “the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition. . . .” with respect to the application of the principle of good faith).

60. Mark Landler, *North Korea Asks for Direct Nuclear Talks, and Trump Agrees*, N.Y. TIMES, (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/us/politics/north-korea-kim-jong-un-trump.html>.

act in a reasonable manner such as not to frustrate the purpose of the negotiation.<sup>61</sup> Even before formally withdrawing from the NPT, North Korea had already violated the disarmament terms,<sup>62</sup> and in continuing its nuclear testing has acted in a manner fundamentally contradictory to the purpose of disarmament.

Finally, the obligation as articulated by the Court in its *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion was referred to as a “twofold obligation” that “goes beyond that of a mere obligation of conduct.”<sup>63</sup> The interpretation of this provision as a legally binding obligation is at best unclear, as will be discussed below, but it provides further support for the notion that developing nuclear weapons would be a violation of this obligation. By failing to conclude negotiations on disarmament, and in failing to achieve nuclear disarmament, North Korea has arguably breached customary international law on nuclear disarmament.

### C. *Evaluation of the Argument*

The ICJ’s opinion on this argument remains unknown, as the case brought by the Marshall Islands against the United Kingdom—as well as those brought against other states, including India—was dismissed for lacking a dispute.<sup>64</sup> Notably, in a dissenting opinion regarding the case against India, Judge Trindade criticized the finding of no dispute as being overly

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61. *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. Rep. 7, ¶ 142 (Sep. 25) (holding that “[t]he principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.”).

62. NPT, *supra* note 3, Art. II. (preventing the manufacture or acquisition of nuclear explosive devices by non-nuclear weapon states).

63. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. Rep. 226, ¶ 99 (July 8).

64. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.)*, Judgment, 2016 I.C.J. 160, ¶¶26 – 58 (Oct. 5, 2016) (holding that there was no justiciable dispute since the requirements for a dispute, including notice, had not been met. Considerations included that “(o)n the basis of such statements, it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations. . . . The Court therefore concludes that the first preliminary objection made by the United Kingdom must be upheld” at ¶ 57 – 58.).

formalistic.<sup>65</sup> He went on to find the existence of a custom for disarmament, relying heavily on General Assembly and Security Council Resolutions.<sup>66</sup>

Some problems remain before such a custom can be found. If there is such a custom, then how should its parameters be defined? Would it require agreement on complete nuclear disarmament, or would an agreement to reduce the number of nuclear arms generally suffice? North Korea and the United States appear set to embark on nuclear negotiations, but both have different interpretations of disarmament—would this then fulfill the requirement of good faith negotiations?<sup>67</sup> In interpreting the court's statement that the obligation involves "go[ing] beyond that of mere conduct,"<sup>68</sup> the obligation may be interpreted as requiring the achievement of nuclear disarmament, through negotiations in good faith. But then taken to its logical conclusion, the result of nuclear disarmament would be mandated under customary international law, effectively making nuclear weapons illegal. There is little state practice today to suggest that this is the case, and this would be a high standard that no states would meet. Even an overly strict reading of what concluding negotiations would entail would potentially diverge too far from reality, given the behaviour of Nuclear Weapons States themselves.<sup>69</sup>

A more workable interpretation would perhaps be that there is an obligation to negotiate on nuclear disarmament in

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65. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v India), Judgment, 2016 I.C.J. Rep. 907, ¶ 11 – 15 (Oct. 5, 2016) (Cançado Trindade, J., dissenting).

66. *Id.* ¶ 33 – 65.

67. See Max Fisher, *7 Big Things to Understand About Trump's Talks with North Korea*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/world/asia/trump-kim-north-korea-explainer.html>.

68. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 99 (July 8).

69. The United Kingdom consistently maintains and qualitatively updates its nuclear weapons. See Marshall Islands Memorial, *supra* note 51, at 217-219. Russia recently announced new nuclear weapons. See *Russia's Putin unveils 'invincible' nuclear weapons*, B.B.C. (Mar. 1, 2018) at [www.bbc.com/news/world-europe-43239331](http://www.bbc.com/news/world-europe-43239331).) In response, the United States announced that it too would develop new nuclear weapons. (See David E. Sanger and William J. Broad, *To Counter Russia, U.S. Signals Nuclear Arms Are back in a Big Way*, N.Y. TIMES (Feb. 4, 2018), at <https://www.nytimes.com/2018/02/04/us/politics/trump-nuclear-russia.html>.)

good faith, but not an absolute obligation to achieve it, at least not immediately. The obligation could be interpreted as an agreement to agree on steps towards achieving nuclear disarmament, which would be a more practical and concrete step. This would be consistent with leaving room in the scope of negotiations for compromises towards the disarmament process. In this case, per the good faith as articulated in the *Gabčíkovo-Nagymaros Project* case above,<sup>70</sup> the development of nuclear weapons would be antithetical to the goal of nuclear disarmament, and hence a violation of international law.

It is still questionable whether state practice is consistent enough to prove the existence of a custom for nuclear disarmament. Three of the non-parties to the NPT possess nuclear weapons.<sup>71</sup> Furthermore, the Nuclear Weapons States under the NPT are still in possession of nuclear weapons and have not achieved disarmament.<sup>72</sup> But if the obligation is phrased in the limited way as above, this may not be contradictory to customary international law. If all that is required is participation in nuclear disarmament negotiations, then the widespread ratification of the NPT may be indicative. Of states that are not party to the NPT, most have participated in some form of negotiations towards nuclear disarmament. For instance, India, Israel, and Pakistan, who are all not party to the NPT, are Member States to the Conference on Disarmament, which has previously included discussions on nuclear disarmament.<sup>73</sup>

An alternative way of viewing Nuclear Weapons States is as outliers or persistent objectors to the custom, and not as indicators of inconsistent state practice. While state practice should take into account state practice of States “whose inter-

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70. *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 142 (Sep. 25).

71. Marvin Miller & Lawrence Scheinman, *Israel, India, and Pakistan: Engaging the Non-NPT States in the Non-Proliferation Regime*, ARMS CONTROL ASS'N (Dec. 1, 2003), [https://www.armscontrol.org/act/2003\\_12/MillerandScheinman](https://www.armscontrol.org/act/2003_12/MillerandScheinman).

72. Hans M. Kristensen & Robert S. Norris, *Status of World Nuclear Forces*, FED'N AM. SCIENTISTS, <https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces> (last visited Apr. 5, 2018).

73. *Conference on Disarmament: Member States*, UNITED NATIONS OFFICE GENEVA, [https://www.unog.ch/80256EE600585943/\(httpPages\)/6286395D9F8DABA380256EF70073A846?OpenDocument](https://www.unog.ch/80256EE600585943/(httpPages)/6286395D9F8DABA380256EF70073A846?OpenDocument) (last visited Apr. 5, 2018).

ests are specially affected,”<sup>74</sup> the court in *Marshall Islands* noted that the Marshall Islands had reasons to be specially concerned with nuclear weapons, thus suggesting that those who are “specially affected” may include countries *adversely affected* by nuclear weapons as well.<sup>75</sup> Given the far reaching consequences of nuclear weapons, a liberal interpretation of this could extend this status to all States.<sup>76</sup> Considering then that the large proportion of States are engaged in disarmament efforts, either through the NPT, Nuclear Weapon Free Zones, or other initiatives, and that most do not have nuclear weapons, this may be taken as further indication of consistent and widespread state practice.

In terms of *opinio juris*, the legal weight of consideration that should be given to General Assembly resolutions remains debatable, particularly how much legal weight they should be given. For example, Pakistan noted in its counter-memorial that obligations may not arise from General Assembly resolutions as they are not binding.<sup>77</sup> But, according to the ICJ, obligations may reflect the attitudes of States and thus become the basis of *opinio juris*.<sup>78</sup> Particularly if one accepts the approach

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74. North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20).

75. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, 2016 I.C.J. Rep. 833, ¶ 44 (Oct. 5) (“The Court notes that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament.”).

76. Antônio Augusto Cançado Trindade, *THE UNIVERSAL OBLIGATION OF NUCLEAR DISARMAMENT*, (2017 ed.) at 36, (“By recognizing the existence of a non-nuclear weapon State’s special interest in this question, the Court may have opened the way for other states actually or potentially affected by their accident or willful use, beyond the current possessors, to invoke relevant reasons in support of their claims or the adoption of measures to settle such claims. In view of the possible planetary consequences of a nuclear detonation, wherever it may occur, any State may consider itself specially affected.”).

77. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Counter-Memorial of Pakistan, ¶¶ 7.95–7.97 (Dec. 1, 2005), <http://www.icj-cij.org/files/case-related/159/18920.pdf>.

78. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 188 (Jun. 27) (“This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly reso-

of Professor Anthea Roberts in “modern custom,” that international law concentrates on *opinio juris* to find custom, General Assembly resolutions may be of fair significance.<sup>79</sup>

A separate issue is how widespread the acceptance of the relevant General Assembly resolutions on nuclear disarmament really is. The Court in its *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion noted that the number of negative votes and abstentions in General Assembly resolutions on the illegality of or prohibition of nuclear weapons were insufficient to form an *opinio juris* on the illegality of their use.<sup>80</sup> This may be caveated in two ways: (1) that this statement was with regards to the *prohibition or illegality* of nuclear weapons, and not specifically disarmament obligations, and (2) that this may no longer be the case in the present day. Looking at the General Assembly resolutions following up to the Advisory Opinion, from 1996 to 2016, as well as other resolutions on the elimination of nuclear weapons or the advancement of such negotiations, about a third of States either abstained from or voted against the resolution.<sup>81</sup> Yet, this still means that two thirds of States, the clear majority, voted for the resolutions, as Judge Trindade pointed out.<sup>82</sup> This approach is there-

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lutions . . .”). In this case, the Court held that the acceptance of Resolution 2625 (XXV) could be seen as acceptance of the rules in that resolution, hence found *opinio juris*.

79. Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, at 758 (2001) (arguing that modern custom develops beginning with general statements of rules, developing quickly through international for a like the General Assembly, rather than beginning with state practice).

80. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 71 (July 8).

81. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India)*, Written Reply of India to the Question Put by Judge Cançado Trindade at the Public Sitting Held on the Morning of 16 March 2016, at 3–4 (Mar. 23, 2016), <http://www.icj-cij.org/files/case-related/158/19110.pdf>. In response to Judge Trindade’s question on whether General Assembly resolutions supporting the obligation articulated by the Nuclear Weapons Advisory Opinion constituted *opinio juris*, India noted that approximately 2/3rd of UN member states vote in favour of resolutions regarding nuclear disarmament or its advancement. This number included the resolutions specifically endorsing the Advisory Opinion.

82. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India)*, Judg-



fore preferable, as it would be counter-productive to ignore the intentions of the majority of the world.

Similar comments may be made regarding the weight of Security Council resolutions. In view of the observations made in Part II on the binding force of Security Council resolutions, it appears unlikely that resolutions generally calling for nuclear disarmament such as Resolution 1887 are binding, particularly given the breadth of the proposed obligation and the absence of the language of a decision. However, Security Council resolutions may still be understood as evidence of the *opinio juris* of States.

Even given the above concerns, there remains a fairly convincing case that there is a customary international law towards disarmament, albeit in a more circumscribed fashion than the dual obligation argued for in the Marshall Islands Memorial.<sup>83</sup> The main advantage of such an approach is that it builds on a provision that is also binding on existing Nuclear Weapons States under the NPT, and possibly circumventing the unequal regime that the NPT has created. This obligation would create a possible intermediate step in the process towards nuclear disarmament, by providing for agreements moving in that direction, rather than mandating the achievement of the result right away. There is therefore a strong argument to be made for the existence of such a custom. In this case, North Korea would have violated the obligation by developing nuclear weapons and continuing with nuclear testing.

#### IV. CONCLUSION

What may be deduced from this overview of the legality of North Korea's position is that there are two plausible theories of violation: (1) U.N. Security Council resolutions and (2) customary international law obligating states to negotiate in good faith towards disarmament. The former appears to be a more definite legal violation, but given the widespread international objection to North Korea's nuclear testing, there is also a

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ment, 2016 I.C.J. Rep. 907, ¶ 85 (Oct. 5, 2016) (Cançado Trindade, J., dissenting).

83. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Memorial of the Marshall Islands ¶ 209 (Mar. 16, 2015), <http://www.icj-cij.org/files/case-related/160/160-20150316-WRI-01-00-EN.pdf>.

strong case to be made for the latter. While international law in this area remains unclear, there is a case to be made for a custom to move towards nuclear disarmament that would require States to refrain from the development of new nuclear weapons.

TIME TO PAY THE FIDDLER: MONETARY  
COMPENSATION FOR CAUSING THE MASS  
EXODUS OF REFUGEES\*

WEI JIE NICHOLAS NG\*\*

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I. INTRODUCTION

Between 2011 and 2017, the world experienced one of the most severe refugee crises since the Second World War. Over 5.4 million people were forced out of Syria into countries ranging from neighboring Jordan to far-flung territories like the United Kingdom.<sup>1</sup> In the process, countless people died and even more lost their homes and family members. As President Obama put it, this crisis was nothing short of a “test of our common humanity.”<sup>2</sup> Today, with the defeat of ISIS in their last major stronghold of Raqqa,<sup>3</sup> the Syrian refugee crisis

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1. *Syria Emergency*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Dec. 7, 2017), <http://www.unhcr.org/en-us/syria-emergency.html>. For an overview of the causes, extent and impact of the Syrian Refugee Crisis, see Vappu Tyyskä et al., *The Syrian Refugee Crisis: A Short Orientation* (RCIS Working Paper No. 2017/2, 2017).

2. Laura Koran, *Obama: Refugee Crisis Is Test of Our Humanity*, CNN (Sept. 20, 2016, 6:23 PM), <https://edition.cnn.com/2016/09/20/politics/obama-refugees-summit/index.html>.

3. See, e.g., Anne Barnard & Hwaida Saad, *Huge Blow Dealt to Heart of ISIS As Capital Falls*, N.Y. TIMES, Oct. 18, 2017, at A1; Maria Abi-Habib, *U.S.-Backed*

seems to finally be coming to an end. Yet, while the Syrian refugee crisis improves, the threats of war, violence, and systematic abuses of human rights continue to generate mass refugee exoduses all over the world. For instance, as this Comment is being written, the majority Buddhist government of Myanmar continues to allow violent abuse of the Muslim Rohingya minority community. As a result, within the past half a year alone, over 600,000 Burmese Rohingyas have fled to Bangladesh.<sup>4</sup> Similar situations exist in Burundi, South Sudan, the Central African Republic, and the Democratic Republic of Congo, amongst others.<sup>5</sup>

Regardless of where a given refugee crisis takes place, the costs tend to be particularly severe for states receiving refugees.<sup>6</sup> Such host states typically bear heavy economic costs because of their obligations under the 1951 Refugee Convention<sup>7</sup> and its 1967 Protocol<sup>8</sup> to provide refugees with “all neces-

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*Forces Say They Have Taken Raqqa, Islamic State's Last Urban Stronghold*, WALL ST. J. (Oct. 17, 2017, 6:46 PM), <https://www.wsj.com/articles/u-s-backed-forces-say-they-have-captured-de-facto-islamic-state-capital-1508242244>;

*Raqqa: IS 'Capital' Falls to US-Backed Syrian Forces*, BBC NEWS (Oct. 17, 2017), <http://www.bbc.com/news/world-middle-east-41646802>.

4. *Rohingya Emergency*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Jan. 7, 2018), <http://www.unhcr.org/en-us/rohingya-emergency.html> (finding that between August 25, 2017 and January 7, 2018, 647,000 Rohingyas have fled to Bangladesh).

5. In Burundi, the United Nations High Commissioner for Refugees estimates that over 400,000 refugees have fled since 2015. *Burundi Situation*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Feb. 8, 2018), <http://www.unhcr.org/en-us/burundi-situation.html>. In South Sudan, 2.4 million refugees were generated as a result of the South Sudanese conflict. *South Sudan Emergency*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Jan. 11, 2018), <http://www.unhcr.org/en-us/south-sudan-emergency.html>. In the Central African Republic, over half a million refugees have been generated as a result of poverty, lack of food, and lack of other basic necessities. *Central African Republic Situation*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Jan. 31, 2018), <http://www.unhcr.org/en-us/car-emergency.html>. In the Democratic Republic of Congo, over 1.9 million people have been displaced since January 2017, *DR Congo Emergency*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Jan. 9, 2018), <http://www.unhcr.org/en-us/dr-congo-emergency.html>. The list goes on.

6. Such states are referred to as “host states” throughout this paper.

7. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter 1951 Refugee Convention].

8. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter 1967 Protocol].

sary assistance and . . . the basic necessities of life including food, shelter and basic sanitary and health facilities.”<sup>9</sup> In turn, these high economic costs tend to generate high social costs as the bills are passed on to the general population, which results in high political costs as immigration-friendly governments suffer the brunt of the citizenry’s displeasure.<sup>10</sup> As a result, the socio-economic structures of many host states are excessively strained, causing political destabilization.<sup>11</sup> This paper seeks to explore the solutions that international law can provide for this problem.

To date, international refugee law has largely focused on the obligations that host states have towards refugees, rather than on the obligations of states generating refugees.<sup>12</sup> For instance, the 1951 Refugee Convention exclusively focuses on

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9. Exec. Comm. of the High Comm’r’s Programme, Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII), at II(B)(2)(c), UN Doc. A/36/12/Add.1 (Oct. 21, 1981). For further elaboration of the necessary level of provisions, see International Law Association, *International Committee on Legal Status of Refugees*, 64 INT’L L. ASS’N REP. CONF. 331, 350 (1990) [hereinafter ILA Draft Declaration on Principles of International Law on Compensation to Refugees and Countries of Asylum] (“While the quantity and quality of such goods and services [provided to refugees] must vary according to the resources and capabilities of the countries of asylum, a common standard required by international and municipal law is that of equal treatment with national in certain essential areas. An example of the requirement under international law is art. 23 of the 1951 Refugee Convention: ‘The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.’ The same national treatment is accorded to refugees in rationing (art. 20) and elementary education (art. 22), whether or not they are lawfully staying in the countries of asylum.”).

10. For an empirical study of how the refugee influx has resulted in euroscepticism and political backlash against European governments, see: Eelco Harteveld et al., *Blaming Brussels? The Impact of (News About) the Refugee Crisis on Attitudes Towards the EU and National Politics*, 56 J. COMMON MKT. STUD. 157 (2018) (At 173–74, the study concluded that the influx of refugees during the 2015 European crisis directly caused the generation of discontent with national parliaments, national institutions, and the European Union.)

11. Rainer Hofmann, *Refugee-Generating Policies and the Law on State Responsibility*, 45 HEIDELBERG J. INT’L L. 694, 708 (1985); For a study of the link between the refugee crisis and the rise of right wing extremist nationalism, see: Claudia Postelnicescu, *Europe’s New Identity: The Refugee Crisis and the Rise of Nationalism*, 12 EUR. J. PSYCHOLOGY 203 (2016).

12. Flavia Z. Giustiniani, *The Obligations of the State of Origin of Refugees: An Appraisal of a Traditionally Neglected Issue*, 30 CONN. J. INT’L L. 171, 171

host states' obligations to recognize the status of refugees,<sup>13</sup> to provide gainful employment to refugees,<sup>14</sup> to provide for refugee welfare,<sup>15</sup> and to provide administrative assistance to refugees.<sup>16</sup> It does not, at any point, discuss the obligations of source states. This is problematic on two fronts. First, such a regime provides no disincentives to discourage source states from creating refugee outflows since they suffer no consequences for doing so. This is particularly worrying because it means that the root problem of all refugee crises—the actual creation of refugees—is not addressed at all. Second, host states are disincentivized from participating in the current regime because they are effectively being asked to take on unilateral burdens without any reciprocity from source states.<sup>17</sup> This

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(2015). Refugee-generating states will be referred to as “source states” throughout this paper.

13. 1951 Refugee Convention, *supra* note 7, ch. II.

14. *Id.* ch. III.

15. *Id.* ch. IV.

16. *Id.* ch. V.

17. One of the common strategies that host states employ to refuse participation in the international refugee law regime is to reclassify refugees as “migrants” such that they do not come under the protection of international refugee law. This is made possible by the fact that the definition of a “refugee” resembles a grey standard more than a hard black-letter rule: *See* GUY S. GOODWIN-GILL & JANE McADAM, *THE REFUGEE IN INTERNATIONAL LAW* 49–50 (3rd ed. 2007); JANE McADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* 7 (2007). For examples of such state practice, see: Kay Hailbronner, *Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking*, 26 VA. J. INT'L L. 857, 880–87 (1986). Another common strategy is to turn refugees away at the high seas so as to ensure that they never reach the borders, thereby ensuring that the state's obligation of *non-refoulement* is not engaged: For an example of such practice, see *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (The facts of this case are illustrative. The case concerned the legality of the U.S. President's order to the Coast Guard to intercept vessels transporting asylum-seekers, who claim refugee status, from Haiti to the United States). The present author tentatively opines that this is an unlawful practice. This is because the obligation of *non-refoulement* engages the moment an individual has *prima facie* claim to refugee status: GOODWIN-GILL & McADAM, *supra* note 17, at 232–3. Under the definition of “refugee” in art. 1 of the 1951 Refugee Convention, there is no requirement that an individual be on the territory of a host state in order to qualify for refugee status. Accordingly, an individual who fulfils the conditions of art. 1 is a “refugee” that has the benefit of the obligation of *non-refoulement*, even if he or she is on the high seas. Nevertheless, more research is needed on this point. As a third common strategy, states have resorted to outrightly breaching their obligations under the international refu-

means that host states are less likely to grant basic rights and relief to those that seek refuge within their borders. In turn, this undermines the overarching objective of the current refugee regime—the protection of refugees. Thus, considered holistically, by focusing exclusively on the responsibility of host states, the current regime does not just fail to tackle the problem of refugee creation, but does so without effectively protecting refugees.<sup>18</sup> Accordingly, a method is needed to shift the focus to the responsibility of source states.

This paper explores the legal arguments that host states may make to claim monetary compensation from source states for the costs associated with accepting refugees.<sup>19</sup> Section II discusses two arguments that have been variously suggested: first, the argument based on a quasi-contractual analysis, and second, the argument based on territorial integrity and sovereignty. It will be shown that these strategies are untenable. In contrast, Section III explores how two tenable legal arguments may be made for such a claim of monetary compensation: first, an argument based on the application of the *sic utere tuo* principle found in customary international law, and second, an argument based on a combination of basic principles of human

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gee law regime. Thus, some commentators have argued that the principle of *non-refoulement* and other basic refugee law principles might be subverted if there is no corresponding obligation on refugee-creating nations. See Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53, 63–64 (2016).

18. Some commentators have remarked that this is akin to attempting to treat the *symptoms* of the refugee problem without tackling the root *causes* of the problem. See Hannah R. Garry, *The Right to Compensation and Refugee Flows: A 'Preventative Mechanism' in International Law?*, 10 INT'L J. REFUGEE L. 97, 97 (1998); Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 566 (1986).

19. It has been said that “the Law of Refugees rests on a humanitarian premise – a devotion to the welfare of humanity and a foundation of philanthropy are at its driving force”. See Jennifer Peavey-Joanis, *A Pyrrhic Victory: Applying the Trail Smelter Principle to State Creation of Refugees*, in TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE *Trail Smelter* Arbitration 254, 265 (Rebecca M. Bratspies & Russell A. Miller eds., 2006). Accordingly, to monetize the problem would be to provide the wrong incentives for host states to fulfil their obligations. Nevertheless, it is submitted that this is an overly idealistic conception of international relations. The fact is that self-preservation and state sovereignty are almost always the chief concern of national governments. Therefore, while it is desirable for international law to strive towards humanitarian aspirations, it will still be well served to back this up with hard legal norms.

rights law and state responsibility. Section IV concludes thereafter.

Due to the focused nature of this paper, certain parameters are assumed. First, all the legal arguments assume that the individuals in question are actually “refugees”, and not merely “migrants” or “asylum-seekers.” While there are various definitions of who qualifies as a refugee, the most authoritative definition is found in Article 1 of the 1951 Refugee Convention. In a nutshell, refugees are identifiable by four characteristics: (1) they are outside of their country of origin; (2) they are unable to take advantage of the protection of that country; (3) such inability is attributable to a well-founded fear of persecution;<sup>20</sup> and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>21</sup> This assumption is important because the principle of *non-refoulement* applies to refugees, whereas it does not ordinarily apply to non-refugees.<sup>22</sup> In a nutshell, the *non-refoulement* obligation prescribes that “no refugee should

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20. For further elaboration of what constitutes “persecution,” see Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, 2011 O.J. (L 337) 9,15–16; United Nations High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 51–53, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992).

21. 1951 Refugee Convention, *supra* note 7, art. 1; GOODWIN-GILL & McADAM, *supra* note 17, at 37.

22. 1951 Refugee Convention, *supra* note 7, art. 33; Beyond the 1951 Refugee Convention, it is widely regarded that the principle of *non-refoulement* has acquired the status of customary international law. See United Nations High Comm’r for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, ¶ 15 (Jan. 2007), <http://www.unhcr.org/4d9486929.pdf>; Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, ¶ 253 (Erika Feller et al. eds., 2003); Nafees Ahmad, *Refugees: State Responsibility, Country of Origin and Human Rights*, 10 ASIA-PAC. J. HUM. RTS. & L. 1, 1 (2009). For a widely-criticized authority for the contrary suggestion that the principle of *non-refoulement* has not acquired the status of customary international law, see James C. Hathaway, *Leveraging Asylum*, 45 TEX. INT’L L. J. 503, 536 (2010).



be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture.”<sup>23</sup> As will be shown throughout this paper, this forms a crucial piece of the legal arguments surveyed. Second, this paper assumes that the refugee outflows in question take the form of mass exoduses.<sup>24</sup> This is because the flights of individual persons simply do not produce the type of burden to host states that was explained above. Finally, this paper assumes that the refugee outflows were caused by actions attributable to the source states. This is because the source states clearly cannot be held responsible for outflows they did not cause.<sup>25</sup>

## II. UNTENABLE LEGAL STRATEGIES

### A. *Strategy 1: Argument from Quasi-Contract*

The late Professor Luke T. Lee and the International Law Association (ILA) have famously utilized a quasi-contractual analysis<sup>26</sup> to argue that host states have a right to monetary compensation against source states.<sup>27</sup> To this end, the ILA laid

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23. GOODWIN-GILL & McADAM, *supra* note 17, at 201; *see also* G.A. Res. 2312 (XXII), Declaration on Territorial Asylum, art. 3(1) (Dec. 14, 1967); Katie Sykes, *Hunger Without Frontiers: The Right to Food and State Obligations to Migrants*, in THE INTERNATIONAL LAW OF DISASTER RELIEF 190, 191 (David D. Caron et al. eds., 2014) (“Non-refoulement means the duty not to expel or return international migrants if doing so would result in a deprivation of their rights under international law.”)

24. As the UNHCR has noted, what qualifies as “mass exodus” cannot be defined in absolute numerical terms because it depends on the resources of the receiving State. United Nations High Comm’r for Refugees, *Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx*, ¶ 3 (Sept. 15, 2000), <http://www.refworld.org/docid/437c5ca74.html>.

25. This would be the case if the refugee outflows were caused, for instance, by natural disasters. However, most contemporary mass refugee outflows may be traced to the acts attributable to the source states. For instance, the Myanmar government’s human rights abuses against the Rohingya. *See AZEEM IBRAHIM, THE ROHINGYAS: INSIDE MYANMAR’S HIDDEN GENOCIDE* (2016).

26. The idea of “quasi-contract” is more commonly understood as the “unjust enrichment” under the common law of Restitution. As Black’s Law Dictionary explains, a quasi-contract is “an obligation created by law for the sake of justice; specif., an obligation imposed by law because of some special relationship between the parties or because one of them would otherwise be unjustly enriched.” *Quasi-Contract*, BLACK’S LAW DICTIONARY (10th ed. 2014).

27. Lee, *supra* note 18, at 556–58. Professor Lee explains that this quasi-contractual argument is a time-honored one with a heritage leading back to

down Principle 10 of its Draft Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum, which states that:<sup>28</sup>

The right of a country of asylum to compensation is based, *inter alia*, on the economic, social and other burdens that the presence of large numbers of refugees inevitably imposes upon it, at least in the short run. The shifting of a country's own burdens of caring for its citizens to another country without the latter's consent by means of a refugee movement caused directly or indirectly by the former's action creates a quasi-contractual relationship under which the former owes a duty of compensation to the latter.

In short, this argument starts on the premise that it is the duty of source states to provide for the basic necessities of its own citizens. When they create refugee outflows to host states, the host states end up having to fulfil that duty. Thus, the source states receive an unjustified benefit through relief of the expenses associated with fulfilling this duty. This argument is attractive because it recognizes that source states should bear the costs arising from refugee outflows that they caused, regardless of whether they breached any international obligation in the process. This would allow host states to overcome the greatest hurdle in the quest to claim monetary compensation—the fact that international refugee law does not contain a specific obligation that prohibits source states from creating refugees.<sup>29</sup>

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the era of the League of Nations: "In this regard, it is significant that the report of the Committee on International Assistance to Refugees, presented to the Council of the League of Nations on June 20, 1936, stated: 'In view of the heavy burden placed on the countries of refuge, the Committee considers it an international duty for the countries of origin of the refugees at least to alleviate to some extent, the burdens imposed by the presence of refugees in the territory of other states.'" *Id.* at 557–58; *see also* ILA Draft Declaration on Principles of International Law on Compensation to Refugees and Countries of Asylum, *supra* note 9, at 350–52.

28. ILA Draft Declaration on Principles of International Law on Compensation to Refugees and Countries of Asylum, *supra* note 9, at 350.

29. Ahmad, *supra* note 22, at 15 ("There exists no international legal rule, which in explicit terms puts States under an obligation not to turn themselves into a source of refugees."); Note however, that there have been calls for the progressive development of such a specific obligation: *see e.g.* Garry, *supra* note 18, at 106; In any case, one could attempt, as this paper

Attractive as it is, this argument is untenable. To begin with, there is no treaty or state practice evidencing the existence of such a rule of international law. As Professor Richard Lillich, ILA representative from the United States, explained in a working session leading up to the Draft Declaration: the Draft Declaration “was necessarily a set of principles *de lege Ferenda*. There simply was not sufficient state practice to find, as the Committee’s Report did, an existing duty under customary international law to compensate refugees, much less countries of asylum.”<sup>30</sup> This is unsurprising considering that the ILA themselves started the entire project on the basis that it can “adopt or recommend rules not based strictly on so-called “hard” law”.<sup>31</sup> Indeed, the idea of a secondary obligation to make monetary compensation without the prior breach of a primary obligation is itself unheard of in international law generally. Such liability for lawful acts is a notion that is wholly unrecognized under the regime of the International Law Commission’s (ILC) Articles of State Responsibility.<sup>32</sup>

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does in the remainder of Sections II and III, to rely on general international law obligations to argue for a prohibition against the creation of refugee outflows.

30. ILA Draft Declaration on Principles of International Law on Compensation to Refugees and Countries of Asylum, *supra* note 9, at 357.

31. *Id.* at 332.

32. G.A. Res. 56/83, annex, Articles on Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001) [hereinafter Articles of State Responsibility]. Such liability for lawful acts is a concept that is akin to the domestic law concept of “strict liability.” This concept exceptionally exists in specific treaty regimes, which do not apply here. For instance, it is recognized in the Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187; and the Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251. Interestingly, in 1978, the ILC did consider studies into a topic titled “International Liability for the Injurious Consequences of Acts Not Prohibited by International Law.” Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?*, 39 INT’L & COMP. L.Q. 1, 1 (1990). However that topic was never codified in a set of articles the same way that the Articles of State Responsibility were. *See id.* at 2–4 (discussing the history of this topic); *see also* Eduardo Jiménez de Aréchaga, *International Responsibility*, in 159 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 267, 273 (Symeon C. Symeonides ed., 1978); Michel Montjoie, *The Concept of Liability in the Absence of an Internationally Wrongful Act*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, 503, 512 (James Crawford et al. eds., 2010) (“Unfortunately it seems that the general principles of objective liability derived from the

Furthermore, even if such a concept of a quasi-contractual liability for lawful acts exists, it seems inappropriate in the international refugee law context. Host states are typically only subject to an obligation to provide for the basic necessities of refugees because they have voluntarily signed up to do so under international treaties. These may take the form of the 1951 Refugee Convention and its 1967 Protocol,<sup>33</sup> or in various other regional instruments that provide for the same.<sup>34</sup> While one may speculate as to the motivation behind why host states would become parties to such non-reciprocal treaties, the fact remains that host states have *voluntarily* assumed the legal duty to provide for these refugees.<sup>35</sup> Thus, contrary to what Principle 10 of the ILA's Draft Declaration states, the typical situation is not one where the source state has shifted its "country's own burdens of caring for its citizens to another country *without the latter's consent*."<sup>36</sup> Indeed, one might even go so far as to suggest that the host state is estopped from claiming monetary compensation. After all, its ratification of the relevant instruments serves as a representation that it would care for refugees, and the source state could be said to be relying on these representations when they create refugee outflows.

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work of several international organizations, and especially the works of the ILC, will remain at the level of recommendations.”).

33. See 1951 Refugee Convention, *supra* note 7; 1967 Protocol, *supra* note 8. There are currently 145 states parties to the 1951 Refugee Convention and 146 states parties to the 1967 Protocol. See *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Apr. 2015), <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

34. Such regional instruments include Directive 2013/33, of the European Parliament and of the Council of 26 June 2013 on Laying Down Standards for the Reception of Applicants for International Protection (Recast), 2013 O.J. (L 180) 96, and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention].

35. The potential motivations for making such an ostensibly disadvantageous move would probably mirror the motivations for signing on to other non-reciprocal treaties such as human rights treaties. For instance, one possible motivation could be that a state wishes to be regarded as a member of good standing in the international community so as to obtain diplomatic capital.

36. ILA Draft Declaration on Principles of International Law on Compensation to Refugees and Countries of Asylum, *supra* note 9, at 350 (emphasis added).

Thus, ultimately, while Professor Luke T. Lee and the ILA's quasi-contractual argument might be normatively attractive, it lacks any concrete basis as a legal rule and is inappropriate in the international refugee law context.

### B. *Strategy 2: Territorial Integrity & Sovereignty*

As alluded to in the previous section,<sup>37</sup> international refugee law does not contain any *specific* obligations that prohibit source states from creating refugee outflows. Accordingly, some commentators have sought to rely on *general* rules of international law to ground a claim for monetary compensation. Chief amongst these is the argument that a source state violates the sovereignty and territorial integrity of a host state when it generates refugee outflows.<sup>38</sup> According to this argument, a key manifestation of sovereign equality is the doctrine of territorial integrity.<sup>39</sup> Territorial integrity prohibits a state from physically intruding into another state's territory<sup>40</sup> be-

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37. See *supra* note 29 and accompanying text.

38. See Garry, *supra* note 18, at 104 ("the host State receiving a refugee flow from the State of origin may claim . . . 'injured' status due to a breach of respect for the legal principle of equality of States, which includes State sovereignty and territorial integrity, as customary rights of the nation-State."); Jack I. Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L. L. J. 483, 494 (1985) ("There is no more fundamental principle of international law than the principle that every state is obligated to respect the territorial integrity and rights of other states. Territorial sovereignty includes both a state's right to exercise exclusive jurisdiction over its territory and its legal obligation to prevent its subjects from committing acts which violate another state's sovereignty. Mass expulsions clearly run against the principle of territorial sovereignty because of the burden cast on receiving states.") (citations omitted); Giustiniani, *supra* note 12, at 175 ("Apart from the violation of specific rules of international law, refugee-receiving countries could also claim that the source State, by forcing people to flee en masse, is making an attempt on their sovereignty and territorial integrity."); Hofmann, *supra* note 11, at 708 ("[I]t might be maintained that refugee-generating polices constitute a violation of the country's right to territorial sovereignty").

39. This concept of sovereign equality is grounded in the U.N. Charter, art. 2(1).

40. See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nic.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. Rep. 665, ¶ 4 (Dec. 16) (declaration of Vice-President Yusuf); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 80, (July 22); G.A. Res. 2625

cause sovereignty extends to a state's control over its own borders.<sup>41</sup> When one state causes its people to leave its territory, it is by definition, causing its people to physically enter into the territory of another state. After all, a "decree to leave one country is, in the nature of things, an order to enter another."<sup>42</sup> Thus, the argument goes that the creation of refugees is unlawful.

Nevertheless, while the doctrine of territorial integrity is certainly more orthodox and generally applicable than the concept of quasi-contract, it is still inapplicable in the refugee context. Host states can only claim a breach of territorial integrity if they did not have a choice in taking in the refugees. If they did have a choice in taking them in, it would be a voluntary opening of the borders, not a physical intrusion into their territory. Ordinarily, host states would have a choice in whether to open or close their borders to given persons since border control is a manifestation of state sovereignty.<sup>43</sup> In the context of refugees, this ordinary position is only circumscribed because of the principle of *non-refoulement*.<sup>44</sup> However, when one examines the underlying reason why states are even bound by the principle of *non-refoulement*, it is apparent that, for the overriding majority of states in the world,<sup>45</sup> it is because

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(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

41. See Catherine Dauvergne, *Irregular Migration, State Sovereignty and the Rule of Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 75, 79 (Vincent Chetail & Céline Bauloz eds., 2014).

42. Lee, *supra* note 18, at 555; see also Christian Tomuschat, *State Responsibility and the Country of Origin*, in THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 59, 71–72 (Vera Gowlland-Debbas ed., 1996) ("If [a state] pushes large groups of its own citizens out of its territory, fully knowing that the victims of such arbitrariness have no right of entry to another country but will eventually have to be admitted somewhere else on purely humanitarian grounds, it deliberately affects the sovereign rights of its neighbors to decide whom they choose to admit to their territories.").

43. Dauvergne, *supra* note 41, at 79.

44. Kay Hailbronner, *Comments on: The Right to Leave, the Right to Return and the Question of a Right to Remain*, in THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 109, 114 (Vera Gowlland-Debbas ed., 1996).

45. See *supra* note 33 and accompanying text.

of Article 33 of the 1951 Refugee Convention.<sup>46</sup> It is states themselves who have voluntarily signed on to the 1951 Refugee Convention. Accordingly, states themselves are the ones that voluntarily opened up their borders to refugee inflows.<sup>47</sup> They therefore cannot be said to suffer a physical intrusion that undermines their territorial integrity when refugees pour through their borders. To put it another way, the host state's ratification of the 1951 Refugee Convention becomes the immediate cause for the mass influx of refugees. But for this action, the host states would still have the right to border control, and thus the right to turn away these persons, regardless of what the source state does.

Admittedly, this argument only applies to states parties to the 1951 Refugee Convention and/or related international treaties.<sup>48</sup> It does not apply to states that are only subject to the principle of *non-refoulement* in customary international law since customary law obligations are not voluntary in nature. Nevertheless, this is not a significant concern for two reasons. First, as aforementioned, the overriding majority of states are parties to the 1951 Refugee Convention—145 in total.<sup>49</sup> Second, and more importantly, there is another reason why the territorial integrity principle would still be nonetheless inapplicable. Since the Second World War, the theory of an absolute Westphalian sovereignty has ceased to be the foundation of international law.<sup>50</sup> Rather, the modern notion of sover-

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46. 1951 Refugee Convention, *supra* note 7, art. 33(1) (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

47. Peavey-Joanis, *supra* note 19, at 263 (“[T]he state has given up the right to claim a violation of territorial sovereignty as related to an influx of refugees.”).

48. For example, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa codifies the principle of *non-refoulement*. OAU Convention, *supra* note 34, art. III(3) (“No person may be subjected by a member State to measures such as rejection at the frontier, return or expulsion, which should compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.”).

49. See *supra* note 33 and accompanying text.

50. For an overview of the historical development of international law theory, see LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS xvii–xxix (6th ed. 2014).

eignty is a circumscribed one. States have the general sovereign right to behave as they please within their territory only when there is no restrictive norm that prohibits the given behavior.<sup>51</sup> Where a restrictive norm exists, states no longer have the sovereign right over those matters that the norm governs. In the refugee context, the restrictive customary international law norm of *non-refoulement* exists to disallow states from turning away refugees at their border.<sup>52</sup> Thus, states do not have the sovereign right over border control in matters concerning refugee influx. Their sovereignty does not extend so far. The natural implication is then obvious—a state cannot rely on the non-existent sovereignty over border control against refugee influx as the premise on which to ground its argument for monetary compensation. In other words, the concept of sovereign territorial integrity in the context of refugees is illusory from the outset.

Accordingly, territorial integrity is not a legitimate basis on which a host state may claim monetary compensation. What then forms a tenable basis? It is to this question that the paper now turns.

### III. TENABLE LEGAL STRATEGIES

#### A. *Strategy 1: Sic Utere Tuo*

The first tenable strategy on which to base a claim of monetary compensation is in the customary international law principle of *sic utere tuo ut alienum non laedas*.<sup>53</sup> In a nutshell, this rule mandates that “[t]he state of origin shall take all appropriate measures to prevent significant transboundary harm or

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51. See *The Case of the S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7); see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 56 (July 22); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 21 (July 8).

52. See *supra* note 23 and accompanying text.

53. This rule is recognized as customary international law in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)* and *Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. Rep. 665, ¶ 104 (Dec. 16); *Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, ¶ 101 (Apr. 20); *The Corfu Channel Case (U.K. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9); *Trail Smelter Case (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1965 (U.S.-Can. 1945).



at any event to minimize the risk thereof.”<sup>54</sup> Although the determination of whether a state has taken sufficient preventive measures is necessarily fact dependent, it is certainly the case that a state that positively causes the transboundary harm is in breach of the obligation. Hence, when a host state causes a refugee outflow that inflicts economic harm to a neighboring state, it is in breach of this rule. Accordingly, a source state would be able to sue for monetary compensation for the injuries resulting from this harm.<sup>55</sup>

Although this strategy faces several difficulties, they are not insurmountable. The first legal difficulty is that this *sic utere tuo* rule is paradigmatically applied in the international environmental law context, and has never been applied in the refugee context before.<sup>56</sup> Nevertheless, it is submitted that the lack of practice is not a bar to the applicability of the rule because the rule is a general one that applies to all domains of international law. This much was explicitly confirmed by the International Court of Justice in the 2015 *San Juan River* case, when the Court stated that this principle “applies generally to proposed activities which may have a significant adverse impact in a transboundary context.”<sup>57</sup> Indeed, Judge Xue Hanqin has said the same when she stated in her seminal treatise that “[t]ransboundary damage can arise from a wide range of activities which are carried out in one country but inflict adverse effects in the territory of another.”<sup>58</sup> This is unsurpris-

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54. G.A. Res. 62/68, annex, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, art. 3 (Dec. 6, 2007) [hereinafter Draft Articles on Transboundary Harm].

55. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n pt. II, 26, arts. 28–36, U.N. Doc. A/56/10 [hereinafter Draft Articles on State Responsibility].

56. Giustiniani, *supra* note 12, at 175; Admittedly, even the Draft Articles on Transboundary Harm, *supra* note 54, were promulgated with the environmental law context in mind.

57. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nic.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. Rep. 665, ¶ 104 (Dec. 16).

58. XUE HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* 3 (2003); see also Garvey, *supra* note 38, at 495 (“[A]lthough the Trail Smelter Arbitration concerned ecological damage in the US resulting from fumes to Canada, commentators concur that the Trail Smelter rule extends beyond the matter of pollution to any damage to other states. For instance, the same principle has been manifest in the development of space law concerning

ing since a quick survey of ICJ precedents reveals that the *sic utere tuo* rule has been applied to varied contexts involving ecological damage through pollution,<sup>59</sup> nuclear damage,<sup>60</sup> and even damage to ships caused by explosion of mines.<sup>61</sup> Accordingly, the lack of state practice is perhaps more reflective of the fact that the right case has yet to come along, than the outright inapplicability of this legal principle.

The second difficulty with this argument lies with defining refugees as agents of harm. This generates two distinct concerns. First, it provokes moral discomfort, because “to compare the flow of refugees with the flow of, for example, noxious fumes may appear invidious.”<sup>62</sup> Nevertheless, as uncomfortable as such a comparison might be, the truth is that in the context of mass refugee crises, these individuals are already dehumanized. After all, the mass scale of modern refugee crises can only be grasped in statistical terms. Instead of being referred as individual human beings (e.g. by name), refugees are inevitably referred to as a mere number (e.g. as one in 10,000 that crossed the Mediterranean on a given day). Further, from the perspective of host states that are dealing with the economic costs of mass influxes, refugees are typically commodified as a cost.<sup>63</sup> Thus, this argument is not any more morally discomfiting than the reality already is. To the contrary, if this argument based on the *sic utere tuo* principle were

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objects launched by one state which fall on another and in international litigation concerning nuclear fall-out . . . . The same legal responsibility is reflected, for example, in the prohibitions and obligations of all states concerning the pollution of the high seas, codified in the Law of the Sea Convention.”).

59. *See* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16); Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14 (Apr. 20); Lake Lanoux Case (Spain v. Fr.), [1957] 2 Y.B. Int'l L. Comm'n 194 (Spain-Fr. 1957); Trail Smelter Case (U.S. v. Canada), 3 R.I.A.A. 1905 (U.S.-Canada 1945).

60. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

61. The Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

62. Hofmann, *supra* note 11, at 707.

63. *See* Blocher & Gulati, *supra* note 17, at 45 (“Refugees are already commodified, except that in the current regime they are usually treated as nothing but a cost, as the very label ‘burden-sharing’ suggests”).

to succeed, host states would have a legal recourse to ensure reciprocity for the burden that they are taking on in providing refugees with rights and relief. In turn, this would make host states more willing and able to provide those rights and relief, thereby providing refugees with the dignity that they deserve. Second, one might suggest that refugees are not factually agents of harm because they can actually help the economy of the host state by providing human capital.<sup>64</sup> Nevertheless, although this may be true in the long run when host states are able to fully integrate refugees into the society and economy, it is overly idealistic to believe that it is possible in the short run. For instance, in the ongoing Rohingya refugee crisis, over 600,000 refugees have flowed into Bangladesh over a 6-month period running from August 2017 to January 2018.<sup>65</sup> It is inconceivable that a state's economy could create 600,000 new jobs in such a short time span for all of these refugees to productively contribute to the economy. Accordingly, this concern is overstated.

Thus, the *sic utere tuo* rule presents a well-established legal basis on which a host state may make a claim of monetary compensation. While significant difficulties exist in the argument, they are not insurmountable.

#### B. *Strategy 2: Human Rights Law*

As a starting point, the argument in this section would not be applicable where the source state did not cause the refugee outflows as a result of human rights violations. Most instances of mass refugee outflows, however, tend to be caused by serious human rights violations either as part of a conflict situation, or as part of an orchestrated government campaign.<sup>66</sup> This is unsurprising considering that the entire field of international refugee law originally developed as a *lex specialis* to

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64. See Alexander Betts et al., *Refugee Economies: Rethinking Popular Assumptions*, University of Oxford Refugee Studies Centre (Jun. 20, 2014) <https://www.rsc.ox.ac.uk/files/files-1/refugee-economies-2014.pdf>; Peavey-Joanis, *supra* note 19, at 254;

65. *Rohingya Emergency*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Jan. 7, 2018), <http://www.unhcr.org/en-us/rohingya-emergency.html>.

66. See Giustiniani, *supra* note 12, at 174 (“While mass exoduses have multiple and complex causes, it is accepted that the most common ones with respect to refugee flows are conflicts and gross violations of human rights”).

human rights law.<sup>67</sup> Similar to how international humanitarian law developed as a specific application of human rights law in the context of war, international refugee law developed as a specific application of human rights law in the context of human migration. The 1951 Refugee Convention,<sup>68</sup> the centerpiece of the international refugee law regime, “took as its departure point human rights principles contained in the UDHR . . . Many substantive provisions were based on principles of the UDHR and the embryonic ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), known then as the draft Covenant on Human Rights.”<sup>69</sup> Over time, it has now become “the custom of the UNHCR to view refugee law as part and parcel of the broader international human rights framework.”<sup>70</sup>

Where this precondition is met, the argument proceeds in two distinct steps. First, the host state would have to prove that the source state has violated a human rights obligation. Very commonly, mass refugee outflows would *inter alia* be caused by violations of the right to life,<sup>71</sup> right to food and water,<sup>72</sup> right

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67. For a survey of the development of international refugee law out of the human rights law framework, see McADAM, *supra* note 17, at 29–33.

68. 1951 Refugee Convention, *supra* note 7.

69. McADAM, *supra* note 17, at 29–30 (citations omitted).

70. Alice Edwards, *Human Rights, Refugees and the Right “to Enjoy” Asylum*, 17 INT’L J. REFUGEE L. 293, 295 (2005). This also suggests that in the absence of a specific method to claim compensation in the rules of international refugee law, it is appropriate to fall back on the broader human rights framework, which is precisely what the present author seeks to achieve here.

71. International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. This non-derogable right has been appropriately labelled as “the supreme right” since no other right means anything to a dead man. SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* 167 (3rd ed. 2013).

72. International Covenant on Economic, Social and Cultural Rights, art. 11, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. As a general matter, economic, social and cultural rights, as opposed to civil and political rights, are typically viewed as less important and appertaining more to development rather than to the foundation of human dignity. MANISULI SSENIONJO, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW* 14–16 (2009). On this basis, one might suggest that since the the right to food and water are found in the ICESCR, they are not full-blown rights. Rather, they are merely in the process of progressive development. It is submitted that such a suggestion would be a mistake because the right to food and water are “survival requirements” that are necessary prerequisites to the right to life. *See*,

against torture,<sup>73</sup> or right against cruel, inhuman and degrading treatment.<sup>74</sup> The violation of this primary human rights obligation would generate the source state's secondary responsibility to make reparations to wipe out all the consequences of its unlawful act.<sup>75</sup> Second, having shown that the source state is subject to a secondary responsibility, the host state must prove that it is an "injured state" in order to claim the reparations that flow therefrom.<sup>76</sup> To this end, the host state would have to rely upon Article 42(b)(i) of the Articles of State Responsibility. Here, the rule is that a state is injured if the obligation breached is owed to a group of states including the state in question, and the breach specially affects that state.<sup>77</sup> By its very nature, most human rights obligations are "owed to a group of states" because they are contained in multilateral human rights treaties with near universal state acceptance.<sup>78</sup> Accordingly, what remains is to prove that the state is "spe-

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*e.g.*, JOSEPH & CASTAN, *supra* note 71, at 203–6; BEN SAUL ET AL., THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES AND MATERIALS 892 (2014); Bertrand G. Ramcharan, *The Right to Life* 30 NETH. INT'L L. REV. 297, 305–07 (1983). For examples of case authorities recognizing the existence of the right to life and the right to water, see Soc. & Econ. Action Rights Cent. v. Nigeria, No. 155/96, Merits, Judgment (Merits), African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Oct. 27, 2001), <http://www.achpr.org/communications/decision/155.96>; Yakye Axa Indigenous Cmty. v. Para., Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

73. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; ICCPR, *supra* note 71, art. 7.

74. ICCPR, *supra* note 71, art. 7.

75. Case Concerning the Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13); Draft Articles on State Responsibility, *supra* note 55, art. 31(1).

76. Draft Articles on State Responsibility, *supra* note 55, art. 42.

77. *Id.*

78. For example, there are 170 states parties to the ICCPR, *supra* note 71; 167 states parties to the ICESCR, *supra* note 72; 163 states parties to the Convention Against Torture, *supra* note 73; 196 states parties to the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; and 189 states parties to the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. See *Multilateral Treaties Deposited with the Secretary-General: Chapter IV: Human Rights*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=\\_En](https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_En) (last visited Apr. 5, 2018).

cially affected.” This test is a factual, and not legal, one.<sup>79</sup> It requires that the source state’s breach injure the host state in a way that “distinguishes it from the generality of other states.”<sup>80</sup> For instance, where a state pollutes the high seas in breach of its obligations under the United Nations Convention on the Law of the Sea,<sup>81</sup> and the pollution ends up leaving toxic residue on the beaches of a particular state, that state would be “specially affected.”<sup>82</sup> In the context of human rights obligations, a state that receives a mass refugee influx caused by breaches of human rights is undoubtedly factually distinguished from the generality of other states that are parties to the human rights treaties. Thus, these host states are specially affected states that would be able to claim monetary compensation.<sup>83</sup>

Again, like the argument based on the *sic utere tuo* rule, the human rights argument is not foolproof. Judge James Crawford (then Professor Crawford), the fourth and last special rapporteur in charge of drafting the Articles of State Responsibility, has suggested in a treatise that the beneficiaries of an obligation must be distinguished from those with a mere legal interest in its compliance.<sup>84</sup> It is only the former which can be injured, “irrespective of how or whether the breach has affected” the latter.<sup>85</sup> Since the direct beneficiaries of human rights obligations are individuals, the argument goes that

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79. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, at 119 (2001) [hereinafter Official Commentary to the Draft Articles on State Responsibility].

80. *Id.*

81. United Nations Convention on the Law of the Sea, art. 194, Dec. 10, 1982, 1833 U.N.T.S. 3.

82. Official Commentary to the Draft Articles on State Responsibility, *supra* note 79, at 119.

83. The issue of calculating the compensation quantum is a complex one that would require analysis of principles such as causation and remoteness, amongst others. Accordingly, it is not discussed in-depth in this paper.

84. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 491 (2013) (“It is necessary to distinguish between the primary beneficiary of an obligation (the right-holder directly affected by a breach of an international obligation) and those states with a legal interest in compliance with the obligation, irrespective of how or whether the breach has affected them, and which act in the broader public interest. According to the ARSIWA, it is only the former which are injured.”).

85. *Id.* at 491.

states only have a legal interest in their compliance. Therefore, states cannot be specially affected by breaches of human rights.

Nevertheless, this concern may be allayed on two bases. First, while Judge Crawford is undoubtedly the leading authority on issues of state responsibility, his writings do not *ipso facto* have the force of law. What Judge Crawford has attempted to do was to add an extra legal requirement that was not found either in the text or official commentary to the Articles of State Responsibility. This is crucial. Although Judge Crawford was the special rapporteur on the Articles of State Responsibility project, he was still answerable to the other members of the ILC, and ultimately to the U.N. General Assembly—the body approving the articles. Accordingly, the fact that Judge Crawford held these views but they did not make their way to the final text or commentary suggests that the ILC and/or the U.N. General Assembly rejected them.<sup>86</sup>

Second, and in any case, even if Judge Crawford's requirement was mandated—that only direct beneficiaries of an obligation can be “specially affected” by its breach—one may nevertheless make a good case that states are direct beneficiaries of human rights obligations. To this end, the regime of human rights arguably serves two functions. The first function is the obvious one of providing direct rights to individual persons. The second, less obvious function is the maintenance of global peace, which envisions states as beneficiaries.<sup>87</sup> Since the birth of international human rights law, this has always been a chief objective. As a body of international law, human rights only came into existence in the immediate aftermath of World War II.<sup>88</sup> It found its first iterations in the preamble of the 1945

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86. The *travaux préparatoires* are silent on this point. The paucity of evidence from the negotiating history further supports the need to rely on the plain text of the Draft Articles on State Responsibility, *supra* note 55, and the Official Commentary to the Draft Articles on State Responsibility, *supra* note 79.

87. DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION 22 (2007) (“[P]olitical leaders and scholars continued to look to the protection of human rights as both an end and a means of helping to ensure international peace and security.”).

88. See DAMROSCH & MURPHY, *supra* note 50, at 915 (“[B]eginning with the promises made during the Second World War for the postwar order, human rights became a matter of international concern and progressively a subject of international law.”); MALCOLM N. SHAW, INTERNATIONAL LAW 213

United Nations Charter, which stated that the U.N.'s chief goal was "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person."<sup>89</sup> Thereafter, it was elaborated upon in subsequent instruments such as the 1948 Universal Declaration of Human Rights<sup>90</sup> and the 1966 International Covenants.<sup>91</sup> During these post-war years, the international community was reeling from the horrors of World War II. There was a global consensus that the millions of casualties on both sides meant that there were no true winners in the war.<sup>92</sup> Naturally, there developed a shared belief that the world needed to find new solutions to achieving a lasting peace between states.<sup>93</sup> It was towards this end that international human rights law was established.<sup>94</sup> Specifically, human

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(8th ed. 2017) (recognizing that the concept of human rights certainly pre-existed the Second World War; however, the pre-war notions of "human rights issues were at that stage universally regarded as within the internal sphere of national jurisdiction"). For an explanation of the difference between the development of domestic human rights regimes and the international human rights regime, see LOUIS HENKIN ET AL., *HUMAN RIGHTS* 138–40 (2d ed. 2009).

89. U.N. Charter, pmbli.; see also, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 140 (2013) ("The United Nations Charter itself first gave formal and authoritative expression to the human right regime that began at the end of the Second World War."); Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 785 (2006) ("International human rights law, as we know it today, begins with the Charter of the United Nations.")

90. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

91. ICCPR, *supra* note 71; ICESCR, *supra* note 72; see Thomas Buergenthal, *supra* note 89, at 787. For an overview of the provenance of the UDHR and the two International Covenants, see PHILIP ALSTON & RYAN GOODMAN, *supra* note 89, at 141–42; OLIVIER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW* 14–18 (2d ed. 2014). For an overview of the interrelationship between the U.N. Charter, the UDHR, the International Covenants, and other multilateral human rights treaties, see PHILIP ALSTON & RYAN GOODMAN, *supra* note 89, at 143–44.

92. RHONA K.M. SMITH, *INTERNATIONAL HUMAN RIGHTS* 22–23 (7th ed. 2016); WEISSBRODT & DE LA VEGA, *supra* note 87, at 20–22.

93. WEISSBRODT & DE LA VEGA, *supra* note 87, at 20–22.

94. JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 634 (8th ed. 2012) ("The events of the Second World War, and concern to prevent a recurrence of catastrophes associated with the policies of the Axis Powers, led to a programme of increased protection of human rights and fundamental freedoms at the international level."); SHAW, *supra* note 88, at 214 ("The impact of the Second World War upon the development of



rights law does this by ensuring that there is no “spill-over effect for States from unrest and turmoil in another State” caused by the violation of individuals.<sup>95</sup> Accordingly, since states are direct beneficiaries of global peace, they are direct beneficiaries of human rights. Thus, for present purposes, even under Judge Crawford’s requirement, states can be considered “specially affected” by human rights violations and therefore have a right to sue for monetary compensation.

#### IV. CONCLUSION

At its heart, the overarching tension in many refugee law problems is between humanitarian altruism on one hand, and national sovereignty and self-preservation on the other.<sup>96</sup> When a single refugee who has been the victim of conflict or human rights violations turns up at the border, many host states would undoubtedly take up the humanitarian mantle to provide for him or her. Unfortunately, this is not the reality of modern refugee crises. Rather, it will not be one, but thousands upon thousands of refugees that turn up at the border. In the face of such mass exoduses, host states often find themselves with a choice. Take all of them in and provide for them at heavy economic, social and political costs, or violate their basic humanitarian instincts in self-preservation.

It is for these host states that this paper is perhaps most useful. It has sought to help make the decision easier by exploring the viability of methods to make legal claims for monetary compensation from source states. With these legal claims in hand, the host state can then be assured that they have a means by which to reduce costs that are associated with fulfilling their humanitarian obligations. Admittedly, it might not always be easy to immediately make a direct monetary claim in

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human rights law was immense as the horrors of the war and the need for an adequate international system to maintain international peace and protect human rights became apparent to all”).

95. Ahmad, *supra* note 22, at 13.

96. GOODWIN-GILL & McADAM, *supra* note 17, at 1 (“The refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law.”); Garvey, *supra* note 38, at 487 (“Refugee law thus reaches a dead-end as human rights law because it collides with the principle of national sovereignty”).

an international tribunal against a conflict-laden state or a poor source state.<sup>97</sup> Nevertheless, the claims could be made after the source state has become sufficiently prosperous enough. Indeed, even if the legal claims cannot be directly pursued, it is still highly useful in reducing costs. For instance, it could be used as leverage in future diplomatic negotiations when the source state has stabilized, ultimately allowing the host state to gain favorable concessions in international treaties.<sup>98</sup> Either way, with the cognizance of the existence of these legal claims, it is ultimately hoped that host states will be encouraged to fully embrace their humanitarian obligations and provide refugees with the rights and relief that they so desperately need.

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97. See Giustiniani, *supra* note 12, at 176 (“The reluctance of receiving countries to enforce such a duty is probably due to the fact that source States are mostly poor countries going through conflicts and dire conditions. For the same reasons, in several cases, affected States have instead resorted to coercive actions in order to stop the mass influx.”); Jennifer Peavey-Joanis, *supra* note 19, at 264 (“[R]equiring a refugee-creating state to compensate a nonrefouling state might perpetuate the instability that created a refugee crisis in the first place.”).

98. For instance, in bilateral investment treaties, trade deals, aid deals, or even in other areas such as military cooperation. By gaining a favorable deal, the host state effectively obtains a benefit that offsets some of the costs that arise from taking in the refugees.

THE FUTURE OF CROSS-BORDER LITIGATION IN  
CHINA: ENFORCEMENT OF FOREIGN  
COMMERCIAL JUDGMENTS BASED  
ON RECIPROCITY

BIN SUN\*

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I. INTRODUCTION

According to Article 281 of the Civil Procedure Law of the People’s Republic of China (PRC), international treaties and reciprocity are two legal bases for recognition and enforcement of foreign court judgments.<sup>1</sup> However, due to the scar-

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1. Zhonghua Renmin Gongheguo Minshi Susong Fa (2017 Xiuzheng) (中华人民共和国民事诉讼法(2017 修正) [Civil Procedure Law of the People’s Republic of China (2017 Revision)] (promulgated by the Standing Comm. Nat’l People’s Cong., June 27, 2017, effective July 1, 2017), art. 281, <http://en.pkulaw.cn/display.aspx?cgid=297379&lib=law> (China) (“Where an effective judgment or ruling of a foreign court requires recognition and enforcement by a people’s court of the People’s Republic of China, a party may apply directly to the intermediate people’s court of the People’s Republic of China having jurisdiction for recognition and enforcement or apply to the foreign court for the foreign court to request recognition and enforcement by the people’s court in accordance with the provisions of an interna-

city of treaties on civil and commercial judicial assistance between China and its major trading partners—such as the United States, the United Kingdom, Australia, Germany, or Japan—most enforcements of foreign court judgments have to rely upon the principle of reciprocity.<sup>2</sup>

In judicial practice, Chinese courts generally apply the principle of *de facto* reciprocity, which means that a PRC court will only consider enforcing another state's court judgment when there is a precedent of a Chinese court judgment having been recognized and enforced by that other state.<sup>3</sup> This practice, essentially compelling other states to recognize and enforce China's court judgment first, in fact hinders the realization of extra-territorial effect of foreign court judgment in China.

In the past, there have been several cases in which PRC courts refused to recognize or enforce foreign court judgments on the grounds that no binding treaty on mutual recognition and enforcement of civil judgments existed between China and relevant foreign countries, nor had those two countries established reciprocity relationship. These include Gomi Akira's (a Japanese citizen) application to the Intermediate

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tional treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity."); *see also id.* art. 282 ("After examining an application or request for recognition and enforcement of an effective judgment or ruling of a foreign court in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity, a people's court shall issue a ruling to recognize the legal force of the judgment or ruling and issue an order for enforcement as needed to enforce the judgment or ruling according to the relevant provisions of this Law if the people's court deems that the judgment or ruling does not violate the basic principles of the laws of the People's Republic of China and the sovereignty, security and public interest of the People's Republic of China. If the judgment or ruling violates the basic principles of the laws of the People's Republic of China or the sovereignty, security or public interest of the People's Republic of China, the people's court shall not grant recognition and enforcement.").

2. Holly Blackwell, *Recent Developments in the PRC: A Change in Tide for Arbitration?* KLUWER ARB. BLOG (Dec. 5, 2017), <http://arbitration-blog.kluwerarbitration.com/2017/12/05/recent-developments-prc-change-tide-arbitration>; *see also* Yitong Liu, *Reconsideration of the Function of Reciprocity Principle in Recognition and Enforcement of Foreign Court Judgment*, 3, PEOPLE JUST., 96, 96 (2009) (China).

3. Tao Du, *Reciprocity Principle and the Recognition and Enforcement of Foreign Court Judgment*, 1, GLOBAL L. REV., 110, 110 (2007) (China).

People's Court of Dalian City, Liaoning Province, PRC, for the recognition and the enforcement of a Japanese judicial court decision,<sup>4</sup> Russia National Symphony Orchestra and Art Mont Company's application to Beijing No.2 Intermediate People's Court for the recognition of a judgment of the High Court of Justice in England,<sup>5</sup> and an Australian company's request of enforcement of a judgment by the Supreme Court of Western Australia in the Shenzhen Intermediate People's Court.<sup>6</sup>

Although there are some precedents for the recognition and enforcement of foreign court judgments by PRC courts, they are all based on the existing bilateral treaties and most of them concern bankruptcy judgments.<sup>7</sup> Only in 2017 was there first reported a foreign commercial court judgment being enforced in China based on the principle of reciprocity.<sup>8</sup> This picture now has been changed by two recent cases of PRC

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4. Zuigao Renmin Fayuan Guanyu Woguo Renmin Fayuan Yingfou Chengren He Zhixing Ribenguo Fayuan Juyou Zhaiquan Zhaiwu Neirong Caipan de Fuhan (最高人民法院于我国人民法院应否承认和执行日本国法院具有债权债务内容裁判的复函) [The Reply of the Supreme People's Court of China Concerning Recognition and Enforcement of Japanese Judgment and Rulings on Credit and Debt], Min Ta Zi No.17. Wolters Kluwer China Law & Reference (Sup. People's Ct. 1995) (China).

5. Eluosi Guojia Jiaoxiang Yuetuan, Ate Mengte Youxian Zeren Gongsì Shenqing Chengren Yingguo Gaodeng Fayuan Panjuan An (俄罗斯国家交响乐团、阿特蒙特有限责任公司申请承认英国高等法院判决案) [Russia Nat'l Symphony Orchestra & Art Mont Co. v. Beijing Int'l Music Festival Assoc.], Er Zhong Min Te Zi No. 928 PKU Law (Beijing No. 2 Interm. People's Ct. 2004) (China).

6. See Zuigao Renmin Fayuan Guanyu Shenqingren Fulaxi Dongli Fadongji Youxian Gongsì Shenqing Chengren He Zhixing Aoda Liya Fayuan Panjue Yian de Qingshi de Fuhan (最高人民法院于申请人弗拉西动力发动机有限公司申请承认和执行澳大利亚法院判决一案的请示的复函) [The Reply of the Supreme People's Court of China Concerning the Request for Instructions Re Application of DNT France Power Engine Co., Ltd for the Recognition and Enforcement of a Judgment Rendered by the Supreme Court of Western Australia], 2006 Min Si Ta Zi No. 45 Wolters Kluwer China Law & Reference (Shenzen Interm. People's Ct. 2006) (China).

7. Xiongbing Qiao, *On the Finality Problems in the Recognition and Enforcement of Foreign Judgments*, 1 WUHAN U. INT'L L. REV., 70, 79-80 (2017) (China).

8. Blackwell, *supra* note 2 (Until recent 2017, there was no report of a foreign court judgment being enforced in China on the basis of reciprocity).

courts that have enforced U.S. and Singapore court judgments on the basis of reciprocity.

In addition, China has taken a further step toward the enforcement of foreign court judgments by joining the E.U., Singapore, Mexico, the United States, and Ukraine,<sup>9</sup> as a signatory to The Hague Convention on Choice-of-Court Agreements on September 12, 2017.<sup>10</sup> Once ratified, China will commit to enforcing civil and commercial judgments from other contracting states' courts in accordance with the exclusive jurisdiction clause.<sup>11</sup> It appears that there is a bright future for foreign court judgments to be recognized and enforced in China.

## II. TWO RECENTLY ENFORCED FOREIGN COURT JUDGMENTS

On June 30, 2017, the Wuhan Intermediate People's Court (Wuhan Court) in Hubei Province enforced a monetary judgment (No. EC062608) from the Los Angeles County Superior Court in California (LA court judgment).<sup>12</sup>

The Applicant Li Liu (Plaintiff) and the Respondents Li Tao and Wu Tong (Defendants) were the parties contracting to an Equity Transfer Agreement (ETA) under which Tao agreed to transfer to Liu fifty percent of the shares of Jiajia Management Inc., a company registered in California for a

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9. The United States and Ukraine have signed but not yet ratified the instrument. Mathew Rea & Marcela C. Marotti, *What is All the Fuss? The Potential Impact of The Hague Convention on the Choice of Court Agreement on International Arbitration*, KLUWER ARB. BLOG (June 16, 2017), <http://arbitration-blog.kluwerarbitration.com/2017/06/16/fuss-potential-impact-hague-convention-choice-court-agreement-international-arbitration/>.

10. *China Signs the 2005 Choice of Court Convention*, HAGUE CONF. PRIV. INT'L L. (Sept. 12, 2017), <https://www.hcch.net/en/news-archive/details/?varevent=569>.

11. Convention on Choice of Court Agreements art. 31(2), Jun. 30, 2005, 44 I.L.M. 1294 ("This Convention shall enter into force—a) for each State or Regional Economic Integration Organization subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession . . .").

12. Liuli Yu Taoli Deng Shenqing Chengren He Zhixing Waiguo Fayuan Minshi Panjue Jiufen An (刘利与陶莉等申请承认和执行外国法院民事判决纠纷案) [Liu Li v. Tao Li & Tong Wu for Recognition and Enforcement of a Civil Judgment of a Foreign Court], E Wu Han Zhong Min Shang Wai Chu Zi No. 26 Chinalawinfo (Wuhan Interm. People's Ct. 2015) (China).

consideration of USD 125,000.<sup>13</sup> After the ETA came into effect, Liu made the prescribed payments to the Respondents. However, the Respondents then disappeared and failed to complete the share transfer to Liu.<sup>14</sup> As such, Liu filed a lawsuit (case number EC062608) in July 2014 with the Los Angeles County Superior Court against the two Respondents, alleging that they had fabricated the share transfer and committed a fraud.<sup>15</sup>

As evidence, Liu provided Tong's bank account information which showed he had received a total of USD 125,000 in his account between September and October 2013.<sup>16</sup> Liu's attorney who was hired in the United States posted the lawsuit process to the address of the two Respondents, but did not successfully reach them.<sup>17</sup> In view of this, the Los Angeles County Superior Court issued an order of publication to serve the summons and notices related to the case by publication on *San Gabriel Valley Tribune*.<sup>18</sup> The service by publication was made four times on the news platform between January and February 2015.<sup>19</sup> Since the two Respondents had properly received summons but failed to show up in court, Judge William D. Stewart of the Los Angeles County Superior Court issued a default judgment, holding that the Respondents should jointly and severally repay USD 125,000 to Liu together with prejudgment interest and court costs, totaling USD 147,492.<sup>20</sup> Liu's attorney completed the judgment registration and notification procedures on the date of the judgment in the United States.<sup>21</sup>

As the Respondents owned assets and properties in Wuhan, Hubei Province, China, Liu filed an application to the Wuhan Court seeking to recognize and enforce the US court

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13. *Id.* ¶ 4.

14. *Id.*

15. *Li Liu v. Li Tao*, No. EC062608 (Cal.Super Ct. May 26, 2015), <http://www.lacourt.org/casesummary/ui/casesummary.aspx?casetype=civil#CAS> (finding default judgment per declaration).

16. *Liu Li, E Wu Han Zhong Min Shang Wai Chu Zi No. 26*, ¶ 4.

17. *Id.*

18. *Li Liu*, No. EC062608 (ordering for publication "As to Deft Li Tao" and "As to Deft Wu Tong").

19. *Liu Li, E Wu Han Zhong Min Shang Wai Chu Zi No. 26*, ¶ 4.

20. *Id.*

21. *Id.*

judgment. As evidence, Liu submitted a news report to the Wuhan Court—"First Chinese Court Judgment Recognized and Enforced in the United States" published on China Legal Journals, January 2010—which stated that a civil judgment of the Higher People's Court of Hubei Province in the case of *Hubei Gezhouba Sanlian Industry Co., Ltd. and Hubei Pinghu Tour Boat Co., Ltd. v. Robinson Helicopter Company* was recognized and enforced by the California state court in 2009.<sup>22</sup>

In the ruling, the Wuhan Court held that it had jurisdiction over this case as the property was located within the jurisdiction and was the place of habitual residence.<sup>23</sup> The Court observed that since there was no bilateral treaty on the mutual recognition and enforcement of judgments of foreign courts between the United States and China, Liu's application could be only considered under the principle of reciprocity.<sup>24</sup> As Liu had submitted the evidence of American courts recognizing and enforcing a civil judgment of a Chinese court, *de facto* reciprocity had been established.<sup>25</sup> Accordingly, the Court held that the Los Angeles County Superior Court judgment should be recognized and enforced in China.<sup>26</sup>

Similar reasoning can also be found in *Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co. Ltd*, in which the Nanjing Intermediate People's Court in Jiangsu Province, China, enforced a monetary judgment from the Singapore High Court on December 9, 2016.<sup>27</sup> Although Singapore and

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22. *Id.* (Shouli Zhongguo Fayuan Panjue Zai Meiguo Dedao Chengren Yu Zhixing An (《首例中国法院判决在美国得到承认与执行案》)) ["First Chinese Court Judgment Recognized and Enforced in the United States"], *Zhongguo Falu Qikan* (中国法律期刊) [CHINA LEGAL JOURNALS], (2010) (China).

23. *Id.* ¶ 6.

24. *Id.* ¶ 7.

25. *Id.*

26. *Id.*

27. Gaoer Jituan Gufen Youxian Gongsi (KolmarGroupAG) Yu Jiangsusheng Fangzhi Gongye (Jituan) Jinchukou Youxian Gongsi Shenqing Chengren He Zhixing Waiguo Fayuan Minshi Panjue Jiufen An (高尔集团股份有限公司 (KolmarGroupAG) 与江苏省纺织工业 (集团) 进出口有限公司申请承认和执行外国法院民事判决纠纷案) [Kolmar Group AG v. Jiangsu Textile Indus. (Grp.) Imp. & Exp. Co., The Special-Procedure Civil Ruling of an Application for the Recognition and Enforcement of a Civil Judgement and Ruling of a Foreign Court], Su 01 Xie Wai Ren No. 3 PKU Law (Nanjing Interm. People's Ct. 2016) (China).



China had signed the Treaty of Judicial Assistance on the Civil and Commercial Matters Between the People's Republic of China and the Republic of Singapore treaty in 1997, the treaty is limited to the recognition and enforcement of arbitral awards and does not cover the enforcement of foreign court judgements.<sup>28</sup> Therefore, the recognition and enforcement of Singaporean court judgment has to be based on the principle of reciprocity.

In this case, the Nanjing Court opined that because the High Court of Singapore recognized and enforced a civil judgment of *Giant Light Metal Technology (Kunshan) Co. v. Aksa Far East Pte Ltd.* rendered by the Intermediate People's Court of Suzhou Municipality, Jiangsu Province, China,<sup>29</sup> a *de facto* reciprocity relationship has been established between China and Singapore.<sup>30</sup> Accordingly, the Nanjing Court granted the recognition and enforcement of the *Kolmar Group AG* judgment.<sup>31</sup>

### III. NO MODEL ANSWER YET

While the above cases are positive indications that China is willing to consider enforcement of foreign court judgment on the basis of reciprocity, the precedents do not give a complete answer to the party who wishes to enforce a foreign court judgment in the future. Those issues which are not covered remain to be addressed by future PRC courts. In particular, the applying party should consider the following key factors in the process of enforcement.

#### A. Proof of De Facto Reciprocity

In *Liu*, the Wuhan Court accepted the news report published on the China Legal Journal as a proof of *de facto* reci-

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28. Zhonghua Renmin Gongheguo He Xinjiapo Gongheguo Guanyu Minshi He Shangshi Sifa Xiezhu de Tiaoyue 中华人民共和国和新加坡共和国关于民事和商事司法协助的条约 [Treaty of Judicial Assistance on the Civil and Commercial Matters] art. 2(3), China-Sing., Apr. 29, 1999, [http://www.npc.gov.cn/wxzl/gongbao/2001-01/03/content\\_5007108.htm](http://www.npc.gov.cn/wxzl/gongbao/2001-01/03/content_5007108.htm) (China).

29. *Giant Light Metal Tech. (Kunshan) Co. v. Aksa Far E. Pte Ltd.*, [2014] SGHC 16, ¶¶ 12, 80 (High Ct.) (Sing.) (ordering the Singapore-based defendant to pay the sums of USD 190,000 refund and RMB 7,088 compensation as awarded in Suzhou Judgment).

30. *Kolmar*, Su 01 Xie Wai Ren No. 3, ¶ 5.

31. *Id.*

procuity.<sup>32</sup> It is unknown from the ruling whether the applicant had submitted other evidentiary material to support its proposition or whether the Wuhan Court had conducted internal investigation to verify the enforcement fact by virtue of its judicial power. Nevertheless, the threshold of evidence in terms of form and efficacy on the establishment of reciprocity in this case seems to be fair low.

Unlike the specific evidentiary requirements for the application of recognition and enforcement of a foreign court judgment, PRC law is silent on the proof requirement of reciprocity.<sup>33</sup> The absence of such standard of proof by law will, to some extent, impose uncertainty and risks to the applying party and therefore provides wide discretion to the court in review. It is worth noting that by relying on the same *Robinson* case as a proof of reciprocity, the foreign applicants before the Nanchang Intermediate People's Court, Jiangxi Province, China, failed to obtain a judgment in their favor.<sup>34</sup> The Nanchang Court held no reciprocity relationship has been

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32. Liuli Yu Taoli Deng Shenqing Chengren He Zhixing Waiguo Fayuan Minshi Panjue Jiufen An (刘利与陶莉等申请承认和执行外国法院民事判决纠纷案) [Liu Li v. Tao Li & Tong Wu for Recognition and Enforcement of a Civil Judgment of a Foreign Court], E Wu Han Zhong Min Shang Wai Chu Zi No. 26, ¶ 4 Chinalawinfo (Wuhan Interm. People's Ct. 2015) (China).

33. Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Minshi Susong Fa> de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretations of the Supreme People's Court on Application of the "Civil Procedural Law of the People's Republic of China"], Fa Shi [2015] No. 5., art. 543 Chinalawinfo (Sup. People's Ct. 2015) (China) ("Where the applicant applies to the people's court for recognition and enforcement of an effective judgment or ruling of a foreign court, the applicant shall submit a written application, to which the original or the certified error-free duplicate and Chinese translation of the effective judgment or ruling of the foreign court shall be affixed. If the judgment or ruling rendered by the foreign court is a default judgment or ruling, the applicant shall, at the same time, submit the certification documents on a legal summons from the foreign court, unless the judgment or ruling has expressly stated the fact.").

34. Hebote Chuxi, Mali Ailun Chuxi Shenqing Chengren He Zhixing Waiguo Minshi Panjue, Caiding Yishen Minshi Caiding Shu (赫伯特·楚西·玛丽艾伦·楚西申请承认和执行外国法院民事判决、裁定一审民事裁定书) [Civil Ruling of Hebert Truhe et al.'s Application of Recognition and Enforcement of a Foreign Court Judgment], Gan 01 Min Chu No. 354, ) paras. 2–3 Wolters Kluwer China Law & Reference (Jiangxi Nanchang Interm. People's Ct. 2016) (China).

found between the United States and China, and thus refused to recognize and enforce the judgment rendered by the Philadelphia County Court.<sup>35</sup> In any event, the key to success for a party to enforce a foreign judgment on the basis of reciprocity is to establish *de facto* reciprocity between China and the foreign state.

### B. *The Finality of Foreign Court Judgments*

According to Article 282 of the PRC Civil Procedure Law, a PRC court requires the foreign court judgment to be legally effective,<sup>36</sup> which means the foreign court judgment shall be final. In terms of domestic judgments, effective judgments refer to two categories: (1) the judgments of the Supreme People's Court, and (2) the judgments not appealable in accordance with law or not appealed during the prescribed time limit.<sup>37</sup>

Regarding the finality issue, the Wuhan Court did not specify in its ruling whether the monetary judgment from the Los Angeles County Superior Court was final. Instead, the Court stated that the Applicant Liu had submitted the certified duplicate and Chinese version of the LA court judgment, satisfying the formal requirement for applying for recognition and enforcement of judgments of foreign courts.<sup>38</sup> However, it appears that the Court mixed things up. The submission of the certified duplicate of a court judgment by the applicant may not necessarily prove that the judgment has been legally effective. It is not clear and remains to be seen whether PRC courts will apply the domestic standard to determine a foreign court

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35. *Id.* ¶ 3.

36. Zhonghua Renmin Gongheguo Minshi Susong Fa (2017 Xiuzheng) (中华人民共和国民事诉讼法(2017修正)) [Civil Procedure Law of the People's Republic of China (2017 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017), <http://en.pkulaw.cn/display.aspx?cgid=297379&lib=law> (China).

37. *Id.* art. 155 ("The judgments and rulings of the Supreme People's Court and the judgments and rulings not appealable in accordance with law or not appealed during the prescribed time limit shall be effective judgments and rulings.).

38. Liuli Yu Taoli Deng Shenqing Chengren He Zhixing Waiguo Fayuan Minshi Panjue Jiufen An (刘利与陶莉等申请承认和执行外国法院民事判决纠纷案) [Liu Li v. Tao Li & Tong Wu for Recognition and Enforcement of a Civil Judgment of a Foreign Court], E Wu Han Zhong Min Shang Wai Chu Zi No. 26, ¶ 7 Chinalawinfo (Wuhan Interm. People's Ct. 2015) (China).

judgment being final or not or how PRC courts will deem sufficient that a foreign court judgment is final.

C. *Satisfaction of Service of Foreign Default Judgment*

Regardless of foreign arbitral awards or foreign court judgments, one significant matter for courts to examine is whether the original arbitral tribunal or court has given the respondent a fair chance to defend himself or herself. Should the original court fail to provide such opportunity to the defendant, thereby depriving him of the right of defense, the court should refuse to recognize or enforce the foreign court judgment. The Interpretation of the Supreme People's Court on Application of the "Civil Procedural Law of the People's Republic of China" echoed this concept, requiring the applicant to submit the certification documents on a legal summons from the foreign court if the foreign court judgment is a default judgment.<sup>39</sup>

In *Liu*, the Wuhan Court found the LA court judgment had been specified and registered as a default judgment, and the "applicant ha[d] submitted to the Court supporting documents including an investigative report on the Respondents, the court order of service by publication, and newspapers carrying the service of process by publication."<sup>40</sup> The Court therefore determined that the Los Angeles County Superior Court had legally summoned the two Respondents.<sup>41</sup> Even if Respondents' assertion that they had not received any legal summons to participate in the proceeding were true, such would still not affect the judgment's recognition and enforcement in China.

Here arises a question of application of law of service of process in the area of international private law. Namely, which national law shall be applied by Los Angeles County Superior Court for the service of process during the proceeding? Does the Wuhan Court's holding that the Respondents have been

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39. Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Minshi Susong Fa> de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretations of the Supreme People's Court on Application of the "Civil Procedural Law of the People's Republic of China"], Fa Shi [2015] No. 5., art. 543 Chinalawinfo (Sup. People's Ct. 2015) (China).

40. Liu Li, E Wu Han Zhong Min Shang Wai Chu Zi No. 26, ¶ 7 (translated by author).

41. *Id.*

legally summoned refer to the legality under the Californian law, or PRC law, or both? Does the original court have to consider the requirement of service of process in the foreign court, where the recognition and enforcement is sought?

As seen in the ruling, the Wuhan Court acknowledged that legal and effective service performed in accordance with the law of the court in origin should therefore be accepted by PRC court as effective service.<sup>42</sup> Given that the applicant has submitted relevant supporting documents as required by law, the Wuhan Court held no necessity and no obligation to further examine whether the service of process done in the United States satisfied the service requirement under PRC law.<sup>43</sup>

In this regard, the Wuhan Court's ruling demonstrated a welcome attitude that it would not try to challenge the procedural matter if efforts on due process had been made, or interfere with the enforcement of a foreign court judgment so long as it found *de facto* reciprocity and enforcement would accord with the fundamental principles of PRC laws. However, this recognition does not guarantee that other procedural matters would not be challenged by the party against whom the enforcement is sought. A party may still raise challenges such as whether the court rendering the judgment has jurisdiction over the matter; whether litigation meets the requirements of due process; whether the judgment is final, binding, and enforceable; or whether the enforcement of judgment will contravene the public policy of China.

#### D. *Public Interest*

Given that the PRC Civil Procedure Law stipulates that a foreign court judgment which violates the fundamental principles of the PRC laws and the sovereignty, security, and public interest, shall not be recognized and enforced,<sup>44</sup> Chinese courts are to examine public policy considerations. However,

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42. *Id.*

43. *Id.*

44. Zhonghua Renmin Gongheguo Minshi Susong Fa (2017 Xiuzheng) (中华人民共和国民事诉讼法(2017修正)) [Civil Procedure Law of the People's Republic of China (2017 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017), art.282, <http://en.pkulaw.cn/display.aspx?cgid=297379&lib=law> (China).

the absence of a standard of public policy would lead to the broad discretion of the court. Although Wuhan Court clearly opined that this case is about judicial assistance and therefore it would not review on the merits, it does not ensure that other PRC courts will not review on the merits to determine whether public policy is violated or not.

If an intermediate court refuses to enforce a foreign court judgment on the ground of violation of public policy or other reason of the same nature—unlike the review system of foreign arbitral awards in China where a lower court's decision not to recognize and enforce a foreign arbitral award has to be reported level by level to the Supreme People's Court for approval<sup>45</sup>—there is no judicial review of the procedure for enforcing foreign court judgments in China. Thus, a party facing this result would have to seek alternative remedies to protect its interest.

#### IV. LIMITATIONS OF ENFORCEMENT OF FOREIGN COURT JUDGMENTS

The *Liu* and *Kolmar* cases have been received as an important breakthrough for the pro-reciprocity attitude of PRC

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45. Zuigao Renmin Fayuan Guanyu Renmin Fayuan Chuli Yu Shewai Zhongcai Ji Waiguo Zhongcai Shixiang Youguan Wenti de Tongzhi (最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知) [Notice of the Supreme People's Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by People's Courts], Fa Fa [1995] No.18, ¶ 2 Wolters Kluwer China Law & Reference (Sup. People's Ct. 1995) ("Where a party concerned applies to a people's court for the enforcement of an arbitral award made by a domestic foreign-related arbitration institution, or for the acknowledgement and enforcement of an arbitral award made by a foreign arbitration institution, if the people's court considers that the arbitral award made by the arbitration institution in China falls under any case described in Article 258 of the Civil Procedure Law, or if the foreign arbitral award in question fails to conform to the international conventions China has entered into, or fails to comply with the principle of mutual benefit, the people's court must report to the higher people's court of the jurisdiction concerned for examination before making a decision on non-enforcement or refusal of recognition and enforcement. If the higher people's court agrees with non-enforcement or refusal of recognition and execution, it shall report its examination opinions to the Supreme People's Court. Only after the Supreme People's Court gives its reply can the decision of non-enforcement or refusal of recognition and enforcement be made.").

courts.<sup>46</sup> This liberal position regarding judicial reciprocity is also reflected in the era of “One Belt, One Road,” where the Supreme People’s Court of China on June 16, 2015, issued an opinion allowing Chinese courts to take the first step in establishing reciprocity in order to enhance judicial assistance and to promote mutual recognition and enforcement especially with the countries in the regime of “One Belt, One Road.”<sup>47</sup>

Although these decisions send many positive signals, we should not overlook limitations that still exist in the enforcement environment of foreign court judgments in China.

First, the *Liu* and *Kolmar* cases are both modest monetary judgments—approximately USD 150,000 and USD 250,000 respectively. It is unknown whether enforcement can still be achieved smoothly if the enforcement of a larger foreign judgment is against a state-owned company or leading giant private company. In addition, PRC courts in practice have not yet shared an opinion on foreign judgments which involve enforcement of non-monetary obligations by performance, such as discontinuance of infringement, restitution, or the return of property.<sup>48</sup> These kinds of enforcements, which sometimes

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46. Nick Beckett & Falk Lichtenstein, *Wuhan Intermediate People’s Court Recognizes a US Court Judgement? Breakthrough in Cross-Border Litigation?* LEX- OLOGY (Oct. 20, 2017), <https://www.lexology.com/library/detail.aspx?g=E77ebfc2-bd88-4e3c-b6de-d5713a680d77>.

47. Zuigao Renmin Fayuan Guanyu Renmin Fayuan Wei “Yidai Yilu” Jianshe Tigong Sifa Fuwu He Baozhang de Ruogan Yijian (最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见) [Several Opinions of the Supreme People’s Court Concerning Judicial Services and Protection Provided by People’s Courts for the Belt and Road Initiative], [2015] Fa Fa No. 9, ¶ 6 Wolters Kluwer China Law & Reference (Sup. People’s Ct. 2015) (China) (“If the countries along the ‘Belt and Road’ have not yet concluded any agreement on mutual legal assistance with China, people’s courts may, in accordance with the intent of international judicial cooperation and exchange as well as the promise by the other countries to provide judicial reciprocity to China, carry out the pilot practice that the people’s courts in China provide judicial assistance to the parties in other countries in advance, actively promote the formation of reciprocity relations and actively promote and gradually expand the scope of international judicial assistance . . .”).

48. Zhonghua Renmin Gongheguo Minfa Zongze (中华人民共和国民法总则) [General Provisions of the Civil Law of the People’s Republic of China] (promulgated by Nat’l People’s Cong., Mar. 15, 2017, effective Oct. 1, 2017), art. 179, <http://en.pkulaw.cn/display.aspx?cgid=291593&lib=law>.

may require assistance from a third party to complete,<sup>49</sup> will be more complicated than simple payment of awarded amount.

Second, it appears that the *Liu* and *Kolmar* cases happen to involve reciprocity within the same regions. *Liu* was about mutual enforcement of judgments from California and Hubei Province; *Kolmar* was about mutual enforcement of judgments between Singapore and Jiangsu Province. It remains to be seen whether the reciprocity principle will equally apply to other provincial court judgments. But, what we can infer from the civil ruling of Nanchang court, Jiangxi Province,<sup>50</sup> is that seeking enforcement of judgments within the same regions on the basis of reciprocity will more likely be upheld by PRC courts.

Third, although China has signed the Hague Convention on Choice of Court Agreements, the PRC must still ratify the instrument in order to be legally bound by it.<sup>51</sup> In this regard, no specific timeline has been proposed. Even if China ratifies the Convention, considering the Convention currently has Mexico, the European Union (except Denmark) and Singapore as members,<sup>52</sup> its limited territorial range may still not substantially help the enforcement of court judgment with United States, Japan, and One Belt, One Road countries.

Further, the Hague Convention will apply to civil and commercial cases only when parties from contracting states have agreed on an exclusive choice of court agreement.<sup>53</sup> Considering the potential defects and procedural uncertainty that may be leveraged to challenge enforcement, parties may hesi-

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49. In practice, for example, a share transfer may need approval and assistance of a competent Ministry of Commerce or Administration of Industry and Commerce to complete.

50. Hebote Chuxi, Mali Ailun Chuxi Shenqing Chengren He Zhixing Waiguo Minshi Panjue, Caiding Yishen Minshi Caiding Shu (赫伯特·楚西·玛丽艾伦·楚西申请承认和执行外国法院民事判决、裁定一审民事裁定书) [Civil Ruling of Hebert Truhe et al.'s Application of Recognition and Enforcement of a Foreign Court Judgment], Gan 01 Min Chu No. 354, ) paras. 2–3 Wolters Kluwer China Law& Reference (Jiangxi Nanchang Interim. People's Ct. 2016) (China).

51. Convention on Choice of Court Agreements, *supra* note 11.

52. *Status Table of Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. PRIV. INT'L L. (May 2017), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>.

53. Convention on Choice of Court Agreements, *supra* note 11, art 1(1) ("This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.").



tate to conclude an exclusive jurisdictional clause in an early state of contracting.

#### V. CONCLUDING REMARKS

Although many limitations and uncertainties can be anticipated in the enforcement of foreign court judgment, the recent developments are nevertheless notable. The *Liu* and *Kolmar* cases have shown that PRC courts are willing to consider and enforce foreign judgments on the grounds of *de facto* reciprocity. This positive judicial reciprocity provides a foreign party with a chance to seek protective measures in the future against its counterparty in a foreign court jurisdiction. These reciprocal precedents also facilitate and encourage bilateral trade and investments. Foreign courts, especially in the jurisdictions of those major trading partners, should note this positive shift in attitude and take advantage of the current pro-reciprocity position by demonstrating a willingness to recognize and enforce Chinese judgments.

Meanwhile, it is worth noting the procedural issues arising from the application of enforcement of a foreign court judgment based on reciprocity—such as proof of *de facto* reciprocity, finality, and service of foreign court judgment, as well as compliance with a national public policy—still exist. It remains to be seen whether PRC courts will extend enforcement to non-monetary obligations and non-default judgments and refrain the limit on enforcement within the same regions. In this regard, we await to see more cases emerge and look forward to different judicial systems working toward the goal of creating a coherent and unified patchwork of private international law to address remaining uncertainties and concerns.

