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INTRODUCTION

The Creighton International and Comparative Law Journal is pleased to bring you Volume 12 in which we feature a variety of topics. Rather than restricting each publication to a single area of international or comparative law, the Journal sought to open dialogue to an array of topics in which our authors have diligently researched and insightfully written. The end result, we believe, is a summation of pertinent issues currently facing the world. This edition includes topics ranging from the Death Penalty as it pertains to the Egyptian criminal justice system, Covid-19, and the Permanent Court of Arbitration's decision as it related to the South China Sea.

As the legal frameworks of nations and cultures collide, the pursuit of knowledge and understanding becomes ever more important. An open discussion of the issued faced today is instrumental is shaping the world of tomorrow. The Journal hopes to add to this discussion as a platform for presenting pertinent issues and questions cutting across national and cultural lines. We hope our readers find these articles interesting and educations.

I want to express my gratitude to the board of editors, staff, authors, and our faculty advisors. I applaud all of their hard work which was instrumental in assembling this volume. This publication was made possible by their great rigor and care; therefore, I want to thank each of them for their hard and pronounced efforts. The success of this journal is the sole result of their hard work and dedication.

Caitlyn Clary
Editor-in-Chief, 2021-2022

DEATH PENALTY: IS THAT THE CASE FOR JUSTICE UNDER THE EGYPTIAN CRIMINAL JUSTICE SYSTEM? A NEW UNDERSTANDING

Mohamed A. 'Arafa[1]

I. INTRODUCTION

Recently in most Middle Eastern countries, especially Egypt, the number of capital punishment (death penalty) decisions by the Egyptian courts have been significantly escalating in a manner that has not occurred before in modern legal history.[2] But despite the Egyptian judiciary's contemporary fad of sponsoring executions, there is no obvious legal explanation for the amplified pace in the issuing of death verdicts in highly difficult, and controversial cases. With judges handing out the death penalty left and right to conciliate the public opinion. If judges find it so easy to dole out death sentences *en masse*, then the death penalty must be examined from both a

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[2] Paul Marcus, *Capital Punishment in the United States, and Beyond*, 31 MELBOURNE UNIV. L. REV. 837 (2007). *See*, e.g., *Egypt*: *49 Executions In 10 Days*, *Mass Executions Follow Suspicious Prison Killings*, *Human Rights Watch*, Oct. 22, 2020. https://www.hrw.org/news/2020/10/22/egypt-49-executions-10-days ("that authorities ignored basic fair trial guarantees, including access to legal counsel and the need to establish individual criminal responsibility. [...] of "revenge" rather than law enforcement to justify executions . . ."). It should be noted that, statistics show – recently – that there are numerous individuals who have been punished to death. There is a unique bond between the unstable political situation and the sharp upsurge in courts' use of it following several mass trials stained by totally unfair procedures, with the number of death sentences jumping. *See generally* Sanaz Alasti and Eric Bronson, *Death Penalty in Sharia Law* in HANDBOOK ON CAPITAL PUNISHMENT (Routledge 2017) ("explores the question of what constitute the harshest punishment in sharia law. It reviews the story of death penalty in religious criminal justice systems of Islamic countries, focusing on the current practice of capital punishment and execution methods. It provides a background of the evolution of death penalty policy in the political and Islamic criminal justice systems and offer an analysis of the factors that may influence the future of capital punishment as a criminal sanction in the Middle East and other Islamic countries. The comparative study of the death penalty in Islamic countries is a relatively new discipline, and few of the existing studies focus on regional rather than global comparison of the death penalty.").

humanitarian and legal perspectives so that the public can be more knowledgeable about where the rest of the world stands on this sort of criminal sentence.[3]

A. THE LEGAL AND RELIGIOUS STATUS QUO

The 2014 Egyptian Constitution reads that the principles of Islamic (*Sharie'a*) law are the main source of all legislation. There are numerous statutory provisions that stipulate the death sentence as a punishment, including Egyptian Criminal Law, Military Law, Firearms Control Law, Anti-Drug Law, and the Anti-terrorism Law.[4] According to Article 2, the criminal acts that are punishable by the death penalty were mainly derived from the French legal system (the Napoleonic Code), prior to the adoption of the Constitution, and not from Islamic law. [5] Therefore, arguing that the death penalty should be maintained in Egyptian law, because the laws are founded on *Sharie'a* norms, is not adequate with the time when these legislation were enacted.[6]

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[3] *See Death Sentences and Execution 2014*, *Amnesty International*, Mar. 31, 2015, https://www.amnestyusa.org/reports/death-sentences-and-executions-2014/ ("An alarming number of countries used the death penalty to tackle real or perceived threats to state security linked to terrorism, crime or internal instability in 2014, [...]. The USA continued to be the only country to put people to death in the region, although executions dropped from 39 in 2013 to 35 in 2014 – reflecting a steady decline in the use of the death penalty in the country... Only seven states executed in 2014 (down from nine in 2013) with four – Texas, Missouri, Florida, and Oklahoma – responsible for 89 % of all executions. The state of Washington imposed a moratorium on executions...Methods of executions in 2014 included beheading, hanging, lethal injection and shooting. Public executions were carried out in Iran and Saudi Arabia. People faced the death penalty for a range of non-lethal crimes including robbery, drug-related crimes, and economic offences. People were even sentenced to death for acts such as "adultery," "blasphemy" or "sorcery," which should not be considered crimes at all. Many countries used vaguely worded political "crimes" to put real or perceived dissidents to death.").

[4] *See Constitution of Arab Republic of Egypt*, 18 Jan., 2014, art.2, http://www.sis.gov.eg/Newvr/Dustor-en001.pdf. *See* Law No.58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*; Military Law No.25 of 1966, Firearms Control Legislation No.394 of 1954, Anti-Drug Law No.182 of 1960, and Anti-terrorism Law No.95 of 2015.

[5] Mohamed 'Arafa, *Middle East Legislative Insight*: *Egyptian Antiterrorism Laws, Egypt Law No.22/2018, Egypt Law No.8/2015, Egypt Law No.94/2015*, LEXISNEXIS MIDDLE EAST COMMENTARY (2019) (on file with author). (attached)

[6] It should be noted that they have been issued before the 1971 amendment declared by president el-Sādāt. From the constitutional perspective, the 1971 Constitution initiated a new provision that – for the first time – expressly declared Islamic law principles as a source of legislation and, was subsequently amended in 1980 to provide that *Sharie'a* is the main source. So, Egyptian criminal code(s) that were codified before 1971 were not required to be pursuant to Islamic law sources. In other words, the constitutional duty that requires all laws to be in line with the *Sharie'a* norms began with the 1971 constitution, after most of the Egyptian codes had been enacted. *See generally* Massimo Campanini and Mohamed 'Arafa, *Islam and Democracy: Appreciating the Nuance and Complexity of Legal Systems with a Basis in Religion* 26 BARRY L. REV. 1, at 8-9 (2021) ("Much of the frustration with the traditional

Furthermore, arguing that these criminal activities should be penalized by capital punishment is an unequivocal violation of Article 2, as Islamic criminal law prefers leniency in cases that may permit for the death sentence as a feasible punishment.[7] This lenity principle is proven by the fact that Islamic criminal justice system only prescribes this sentence for heinous crimes such as, premeditated homicides, and provides for alternative penalties.[8] Further evidence that Egyptian death penalty statutes are not derived from Islamic criminal legislation is that Egyptian criminal law does not follow the rigorous criminal procedures – of more than beyond reasonable doubt standard – for implementing the death penalty which are required by Islamic penal system.[9] For instance, Egyptian criminal procedural law does not allow the victim's family the right to choose a reconciliation process such as blood money, even though this is considered an important procedural rule for the imposition of the death penalty under Islamic law.[10] Thus, Egyptian criminal law, as well as other codified laws that include the death penalty , were primarily derived from non-Islamic legal systems. Hence, the religious argument for the death penalty, that are claimed by proponents, is not compatible with the genuine origins of the Egyptian legal system.

interpretations of religious capital punishments is the lack of necessary understanding of the text...Many of the theories for the death penalty, such as retributive and deterrence effects, have been challenged by social scientists, who make the claim that the death penalty does not sufficiently accomplish these goals to justify continued executions. Therefore, when the casual reader finds quotes in the *Qur'an* or the *Hebrew* Bible, and they read it with the […] or literal interpretation with little to no context, they understandably grow concerned.").

[7] M. Cherif Bassiouni, *The Islamic Criminal Justice System* 63-65 (Ocena Publications 1982).

[8] Mohamed 'Arafa, *Corruption and Bribery in Islamic Law*: *Are Islamic Ideals Being Met in Practice*? 18 GOLDEN GATE ANN. SURVEY OF INT'L & COMP. L. 189-190 (2012) ("There are five *Quesas* crimes: murder, voluntary or intentional killing or manslaughter, involuntary killing, intentional physical injury or maiming, and unintentional physical injury or maiming. These criminal acts are defined both in the *Qur'an* and *Sunnah* and establish two kinds of sanctions: retaliation (the principle of "Talion") and *Diyya* ("legal compensation"). Therefore, crimes of blood are punished either by retribution or by compensation. Only victims and their representatives possess the right to prosecute the criminal; the public authorities have no power to intervene, unlike the Western legal system. This achieves the goal of realizing both general and specific deterrence as well as reparation to the victim to terminate the conflict between the criminal and the injured party.").

[9] Bassiouni, *supra* note 7, at 230-232.

[10] *Id.*

In fact, these divine claims should be used by opponents of the capital punishment to restrict its scope.

Under *Sharie*‘*a* penal system, the only criminal offense that may be penalized by the death sentence is the crime of premeditated murder.[11] Nevertheless, this sentence is commonly disfavored; it is mainly associated with the lenity norm, and is often set aside in favor of an alternative penalty such as *diyaa* (blood money).[12] The *Qur'an*, which is the first source of Islamic criminal law, uses the capital punishment as a means to attain the principle of retaliation; but, it also stated that forgiveness, mercy, and lenity are much preferred over such punishment.[13] Also, *Sunnah* (Prophet Mohammad's teachings) – as a second source – directed and urged the victim's family to forgive and forget (pardon) and accept blood money instead of seeking the death sentence in all cases that were presented before him.[14] Also, he said, "[a]void punishment in case of uncertainty or doubt[,]" and that is the key norm for the special procedural rules that must be pursued to impose such penalty in the Islamic criminal system.[15]

Muslim scholars developed on this *doubt maxim* principle to add many of the other complicated and highly standard procedural rules that make the application of death penalty as difficult as possible and inspire alternative punitive measure or pecuniary sanctions such as the blood money, to execute the principle of doubt in punishments.[16] Moreover, these scholars have worked on developing both substantive and procedural rules for the application of the death

[11] *See generally* Robert Weisberg, *The Death Penalty Meets Social Science*: *Deterrence and Jury Behavior under New Scrutiny*,151 ANN. REV. L. AND SOC. SCIENCES 1 (2005). *See generally*, *e.g*., Alasti & Bronso, *supra* note 2.
[12] *See generally* Muhammad Abu Zahra, *Crime and Punishment in Islamic Jurisprudence* (1974).
[13] *See generally* Nasser Al-Kholaify, *Mitigating and Aggravating Circumstances for Penalty of Ta*‘*azir in Islamic Jurisprudence* (1992).
[14] *Id.*
[15] Abu Zahra, *supra* note 12, at 92-98.
[16] Sanaz Alasti, *Comparative Study of Stoning Punishment in the Religions of Islam and Judaism*, 4 JUST. POL'Y J. 1, at 2-7(2007).

penalty. For instance, there are some categories that have been excluded from being subject to it, such as minors or the mentally incapacitated.[17] On the procedural level, several requirements prescribe for the cross examination (witnesses), the confession, the culpability (circumstances of time and place), among many others, to save individual lives. Islamic penal system places the decision of whether to seek the capital punishment in the hands of the victim's family, and the family may choose to either relinquish or wave the sentence and receive the *diyaa* (compensation).[18]

Therefore, Islamic criminal justice system aims to limit the scope of the capital punishment to very narrow criminal acts in which the wrongdoer indicated explicitly his *means rea* (full intention) for his actions that led to the victim's death. Islamic schools of jurisprudential thought understood the core philosophy of punishments and the *Sharie*'*a* essential *maqasid* (objectives). They worked on evolving criminal procedure theories to reach the goal of evading the capital punishment with alternative means based on the community's needs (common good). Against this succinct backdrop, this chapter will attempt to answer this question in Part II by briefly investigating the current *status quo* of this punishment in both the Egyptian, and French legal systems. Comparing them to the Islamic system in Part III, based on the concepts of human rights, justice, and *maslahaa*(*h*) (protected interests), which institute the basis of the criminal justice reform. Finally, it concludes that the axiomatic view of Islamic criminal justice system is fashioned by religious theories, laws, and divine practices. Also, it is more than appropriate to create a comprehensive reform of the death penalty to be entirely compatible with the constitutional and universal norms, but national statutes must meet its condescending criterions and lofty standards.

[17] *See generally* Rudolph Peter, *Crime and Punishment in Islamic Law*: *Theory and Practice from the Sixteenth to the Twenty-First Centuries* (Cambridge Univ. Press 2009).
[18] *Id. See e.g.*, *Roberts v. Louisiana*, 428 US 325 (1976); & *McGautha v. California*, 402 US 183 (1971).

II. DEATH PENALTY IN EGYPTIAN CRIMINAL SYSTEM YESTERDAY AND TODAY: DUTY OR DOOM?

The Egyptian legal system has included capital punishment as a criminal sanction from as early as the Pharaonic era to present day.[19] In the current positive jurisprudence, proponents of the death penalty must consider that punitive and therapeutic jurisprudence in the Egyptian criminal system is based on the idea that the purpose of punishment is not abuse, but rehabilitation and therapy to enable criminals to reintegrate into society.[20] Egyptian prisons have the motto, "*[p]rison is discipline, correction, and rehabilitation*," and hence, the legal penal system permits for the capital punishment to be used cautiously for cases in which judges see no hope of offenders reverting to society as decent citizens.[21] This is why appeals are automated in cases where the death penalty is decided, even if they are not filed by the defendants, indicating that mass executions are an obvious interruption of fair justice and punitive jurisprudence enshrined in Egyptian law.

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[19] Raouf 'Ibid, *Mabadiea Al-Qism Al'am min Al-tashrie' Al'Iqabi Al-Masry* [*The Egyptian Penal Legislation*: *The General Part*] (Nahdet Masr Press, Cairo1964) 32-39 (on file with author). Historically, it has been noted that the death penalty was abolished two times during the Pharaonic era. First during the era of King Actisanes, who banished it entirely and secondly at King Sacabos, who abolished it, and replaced it by hard labor, and used lenient executions to reduce it.

[20] Taha Sakr, *The Persistence of the Death Penalty in Egypt*: *Why Courts Insist on 'An Eye for an Eye*', Egypt Independent, July 7, 2017, https://www.egyptindependent.com/death-penalty-egypt/ ("[it]… a deterrent for criminals who threaten people's lives and state national security. Egyptian courts have executed…death sentences…of which were issued by criminal courts for murder crimes, while…verdicts were issued for political crimes such as espionage, assassination and establishing outlawed secret organizations. ["G]iven that the death penalty comes from *Sharia* law and *Quranic* verses, there is no one – no matter their position in the state – has the power to suspend it. Hence grants the victim's family the right to pardon the killer or receive financial compensation…that sentencing murderers to death is only "fair," claiming that," Islam dictates that anyone who kills an innocent person should also be killed.").

[21] *See, e.g.*, Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. (2008). *See, e.g.*, Hagar Hosny, *Egypt Hopes New Massive Prison Complex Will Improve Country's Image*, AL-MONITOR, Nov. 5, 2021, https://www.al-monitor.com/originals/2021/11/egypt-hopes-new-massive-prison-complex-will-improve-countrys-image#ixzz7P246KuOD ("Cairo has opened a rehabilitation center for prisoners designed according to American standards and big enough to serve a quarter of the country's inmates. While some citizens have hailed the move, other say it's meant to distract from the country's human rights record [. . .] "All the new prisons that have been recently built meet human rights requirements in terms of ventilation, space, food, and rehabilitation." […] that "Previously, the concept of a prison according to the law meant a place for discipline and reform, but it is now a place for rehabilitation and correction."").

Justice is fundamentally different from retaliation or revenge, and the death penalty is a relic of an outdated system based on retaliatory justice. Thus, if this system were applied to other criminal offenses, burglars would be robbed, torturers tortured, and rapists raped.[22] Justice has expanded this interpretation of punishment by implementing emblematic punishments, such as fines or imprisonment, in accordance with the crime's gravity, to preserve the dignity of both victims and criminals.[23] Also, the justice principle rests on freedom and dignity, requiring the punishment of criminals for violating the law as a result of their own free will, meaning that children and the mentally retarded should not be held accountable for criminal acts.[24] This shows that the concept of the death penalty is essentially ambiguous because it is irrevocable, blocking the healing and reintegration of offenders, and breaching the freedom and dignity norms.[25]

The possibility of error, particularly given the use of torture in some situations, makes the irrevocable nature of capital punishment very dangerous. The possibility for mistakes exists even in the most efficient, complicated, and competent legal systems, let alone those in which investigative and security bodies depend on seeking confessions through torture to close a case.[26] One of the most common explanations cited for this penalty is its apparent effectiveness in protecting society from its most perilous members and deterring prospective criminals.[27]

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[22] For further details on the history of capital punishment, *see* William W. Wilkins, *The Legal, Political, and Social Implications of the Death Penalty*, 41 RICH. L. REV. 793, 795 (2007). ("the number of crimes for which the death penalty may be given has been reduced significantly. The list of death-eligible crimes during the colonial era seems shockingly long to modern eras. […], in addition to murder, serious crimes like treason, rape, burglary, and arson were punishable by death…In Puritan New England, a sentence of death could be imposed for adultery, as well as blasphemy, at least until the late seventeenth century.").

[23] *See generally* Corinna Barrett Lain, *Deciding Death*, 57 DUKE L. J. 1, (2007). *See, e.g.*, (*comparing with the US legal system on death penalty*) *Baze v. Rees*, 128 S. Ct. 34 (Mem) (2007).

[24] *See generally* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007).

[25] *See generally* Thomas C. Castellano, *Limits of the Criminal Sanction in Controlling Crime*: *A Plea for Balanced Punishments* 23 S. ILL. L. J. 427, 433 (1999).

[26] *Id.* After learning that many individuals on death row were innocent, former Illinois governor George Ryan froze the use of this penalty and reduced the penalties of many convicts to life imprisonment. A commission assembled by Ryan prepared a report concludes "no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death."

[27] Lain, *supra* note 23. *See, e.g.*, *Gregg v. Georgia*, 428 US 153 (1976).

Nonetheless, the protection of society is by no way dependent on killing criminals, as nations that allow this sanction are no less susceptible to crime than those that do not, and other sentences, such as incarceration, have the same outcomes.[28] It should be noted that there seems to be a peculiar relationship between Islamic jurisprudence and Egyptian law. For instance, Egyptian law does not apply *Sharie*'*a* sanctions, yet all cases involving the death penalty must be presented to Egypt's grand *mufti* (religious leader), while simultaneously avoiding the *diyaa* (financial compensation) aspect of Islamic jurisprudence that is not administered to the death penalty.[29] The *diyaa* kind and amount depends on the crime (the allocation of a living person). Meaning that giving victims' families a choice of either insisting on sentence or take *diyaa*, which would be calculated as a monetary value according to modern norms. This could significantly diminish the use of capital punishment while contemplating the spiritual sensibilities of Egypt's Muslim majority.

[28] *See generally* Hugo A. Bedau & Paul G. Cassell, *Debating the Death Penalty*: *Should America Have Capital Punishment*? *The Experts on Both Sides Make Their Case* (Oxford Univ. Press 2005) ("[…] judges, lawyers, prosecutors, and philosophers to debate the death penalty in a spirit of open inquiry and civil discussion. They presented answers to questions like, is the death penalty a viable deterrent to future crimes? does the imposition of lesser penalties, such as life imprisonment, truly serve justice in cases of the worst offences? does the legal system discriminate against poor or minority defendants? Is the possibility of executing innocent persons sufficient grounds for abolition? Also, they explained why this sentence should be commuted for some prisoners and the phenomena of death row."). In this regard, the international data show that this punishment does not decline crime. In 1975, a year before the death penalty was eradicated in Canada, the murder rate hit a record of 3.09 per 100,000 people; by 1980, it had dropped to 2.41. In 2000, while the United States reported a murder rate of 5.5 per 100,000 people, Canada reported a rate of 1.8. Also, in 1988 (updated 2002), British criminology researcher Roger Hood at the request of the United Nations concluded that "the fact that statistics still show the same results convincingly proves that countries should not fear any sudden or drastic shifts in their crime rates should they decrease their reliance on the death penalty."

[29] However, religious representatives refused the eradication of this penalty in Egypt, as it is part of Islamic law and its scope is the application of God's justice, there is another possibility that should find favor with Egypt's religious community, which would permit the abolition of this sentence while upholding the imposition of divine justice.

A. CAPITAL PUNISHMENT STATUTES IN EGYPTIAN PENAL MODEL

There are five unique legislations that prescribe capital punishment as a sentence for their criminal acts: the Criminal Code, the Anti-Drug Law, the Military Code, the Firearms Control, and Anti-Terrorism laws.

1. Criminal Law No.58 of 1937

This act prescribes the death penalty for almost two dozen different criminal offenses.[30] The first category includes acts related to the state national (internal and homeland) security. This includes crimes such as establishing illegitimate groups or militias to destabilize the country's constitution or laws, prevent public institutions from doing their tasks, use terrorist means to harm national unity, and public order.[31] Further, capital punishment applies to the crime of gathering counterintelligence to engage in terrorist activity against the country, destabilize the political system of governance, and the use of force to damage public property.[32] Also, criminals will be punished to the fullest extent of the law by death, if they committed criminal acts that threaten the state's external security, such as attacking the state by acts of aggression, espionage, treason, and other activities against the state's security apparatuses (military, defense, intelligence community, and police).[33] Arson, premediated homicide, murder by using poison, along with intentional murder that is associated with other felony or misdemeanor, kidnapping, perjury, and rape are also subject to this punishment.

[30] *Egypt*: QANUN AL'UQUBAT [*Penal Code*] (Criminal Code No.58 of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya* August 1937 (*as amended by Laws* No. 95/2003 & 50/2014).
[31] *Id*., *e.g.*, art. 86, 86(a)(b)(c), 87, 90, 91, & 93.
[32] *Id*., *e.g.*, art. 77, 78, 80, 81, & 82.
[33] *Id*., *e.g.*, art. 230, 233, 234, 257, 290, & 294.

2. Anti-Drug Law No.182 of 1960

This law stipulates the capital punishment for various drug-related crimes. It includes the act of importing or exporting any drug substances, producing, cultivating, extracting drug items, possessing drugs for trafficking purposes or managing a place for drug addicts. It should be noted that none of these listed criminal activities, for which the death penalty is imposed, should result in the victim's death.[34]

3. Military Law No.25 of 1966 (*amended by Law No.136 of 2014*)

The Military Act describes the death penalty for numerous army capital criminal actions includes the intentional failure – by knowledge – of reporting that a crime has been committed (listed in the first chapter of this code). Other situations comprise sedition and disobedience, violating the military service duties, looting, robbery, destruction of property, abusive use of power, disobedience of commands, and abandonment of military service.[35] In this regard, this act has been amended in 2014 to extend the military jurisdiction to "crimes perpetrated against public facilities, utilities, and properties, referred to in Article 1 of this decree by law. The Attorney General shall refer cases related to such crimes to the competent military prosecutor."[36] None of these crimes necessarily results in the person's death and most of them include broad or ambiguous

[34] *Egypt*: QANUN MUKAFAHIT AL-MUKHADARAT [*Anti-Drug*] Law No.182, 1960, art. 33(a)(b)(c) & 34(c).
[35] Egypt: QANUN ALAHKAM AL'ASKARIYA [*Military* Law] No.25, 1966, art. 132, 138, 139, 140, 141, 148, 151,72, 69 & 154. All judgments that were decided by a military court were irrevocable. Law No.16 of 2007 added an amendment that created a new Supreme Military Court for appeals of military rulings. Article 43 reads "The Military Appellate Supreme Court […] has the competence of hearing the military appeals of the Military courts for all crimes either committed by the military personnel or civilians."
[36] *Id.*

language to interpret, such as disobedience, power abuse, and sedition among many others, which may lead to unfair application of the criminal sanction.[37]

4. Firearms Control Legislation No.394 of 1954 (*amended by Law No.6 of 2012*)

In 2012, Law No.6 amended article 26 of Law No.394 of 1954 to enrich the penalties for possessing and purchasing unlicensed firearms and ammunition. The amendment punishes individuals committing the crime of obtaining or possessing in public places non-permitted weapons (and related ammunition) or explosives with hard labor or life imprisonment, and a fine that may not exceed EGP 20,000 (about US $3,129).[38] The term "public places" comprises modes of public transportation and worship places, and if an individual intended to use those arms/ammunition in any act against national security, or to harm public order, or to undermine (threaten) the system of governance, the constitution, national unity and social harmony, must be penalized by death penalty.[39]

5. Anti-Terrorism Law No.94 of 2015

Unlike the 1992 law, which started by defining the crime of terrorism, Egypt Law No.94 of 2015 begins by outlining the crime of being a terrorist entity.[40] This act launches various

[37] Yussef Auf, *A Legal Analysis of Egypt's Military Judiciary*, THE ATLANTIC COUNCIL, (Apr. 6, 2015), https://www.atlanticcouncil.org/blogs/menasource/a-legal-analysis-of-egypt-s-military-judiciary/ ("As for the system of litigation, a second degree of litigation before military courts was added.").

[38] *Egypt*: QANUN AL'ASLEHA WA AL-ZAKHA'ER [*Firearms Control*] Law No. 394 of 1954 *Al-Jaridah Al-Rasmiyah* No. 53 *bis*, July 8, 1954 (*amended by* Law No.6 of 2012), art. 2 *Al-Jaridah al-Rasmiyah* 2012, Jan. 12, 2012. Presidential Decree 90-2012, 41 *Al-Jaridah al-Rasmiyah* 2012, Oct.14, 2012.

[39] *Id.*, art. 28. *See, e.g.*, art. 2, 3, 4, 5, 11, & 12.

[40] Penal Code, art. 86 (Egypt). Egypt implemented its first antiterrorism bill in 1992, and it starts with the meaning of terrorism as follows: "Terrorism in the application of the provisions of this law [Article 86 of the Penal Code] means any use of force, violence, threat, or intimidation, to which an offender resorts, pursuant to an individual or collective criminal enterprise, with the intent to disrupt public order or endanger the safety and security of society, if doing so would: (a) harm people, frighten them, or expose their lives, freedoms or security to danger; (b) damage, occupy, or seize the environment, communications, transportation, *al-amwāl* (assets), or public or private property; (c) prevent or obstruct the work of public authorities, houses of worship, or educational institutions; or (d) thwart the application of the Constitution, laws, or regulations."

substantial criminal penalties comprising death sentences for organizers (founders) and heads of terrorist organizations, along with a crime of spreading "ideas and beliefs calling for the use of violence" or inciting terrorism through social media, and heavy fines for broadcasting "false news" about terrorist acts or counter-terror acts.[41] Moreover, incitement to commit a terrorist crime shall be penalized with the same penalty as though the terrorist crime was carried out. Thus, punishments for terrorist activities include the death penalty.[42] Also, communication with foreign countries or associations with the purpose of committing or preparing a terrorist criminal activity in Egypt is punishable by life imprisonment and if the crime is committed, the death penalty will be implemented.[43] This law punishes a dozen different acts with the death penalty, making it the mandatory sanction for anyone convicted of funding a terrorist group or terrorist act.[44] Other criminal acts that can incur the death penalty if they result in death include manufacturing weapons; damaging a gas, water, or electricity network; or compelling another person to join or remain in a terrorist group.[45] The law does not require that the death be premeditated.

Article 2 of the law provides:

> [A] terrorist act encompasses any use of force or violence or threat or terrorizing that aims to: Disrupt general order or endanger the safety, interests or security of society; harm individual liberties or rights; harm national unity, peace, security, the environment or buildings or property; prevent or hinder public authorities, judicial bodies, government facilities, and others from carrying out all or part of their work and activity.[46]

[41] *Egypt*: QANUN MUKAFAHT AL-IRHAB [*Anti-Terrorism*] Law No.94/2015, art. 2, 7, 8, 11, & 12.
[42] *Id.* The Supreme State Security Courts have the right to hear/decide capital punishment cases. "The Supreme State Security Courts have the competence over the crimes committed in violation of the presidential executive orders."
[43] *Id.* art. 12, 13, & 14.
[44] *Id.*
[45] 'Arafa, *supra* note 5.
[46] *Id.* This definition is not compatible with the terrorism 2004 concept adopted by the United Nations Security Council, and that the UN Special Rapporteur on Counterterrorism and Human Rights hence endorsed.

Additionally, the law prescribes the death penalty for several crimes – including for example, the crimes of founding, regulating, managing, or being a leader of a terrorist group; financing terrorist groups; and collecting counterintelligence with the purpose of committing terrorist attacks.[47]

The new legislative changes covering anti-terrorism extended the definition of "terrorist entity" and imposed new measures against individuals, businesses, media platforms, and trade unions and provides life sentences and death punishment for funding terrorism.[48] The vague concept of terrorism under domestic criminal law explains that any act that disturbs public order with force will be treated as terrorist activity. It includes provisions to protect the security forces from accountability, establish death penalties, firmer prison sanctions for terror-related offenses, as well as heavy fines for those who publish "false/fake news" and a special judicial circuit for terrorism cases.[49] Egyptian criminal justice system prescribes capital punishment in various laws for several crimes in which these codes include many ambiguous definitions. This leads to various legal interpretations which may lead to the avoidance of achieving the legitimate and fair criminal justice purposes.

B. DEATH PENALTY IN CRIMINAL PROCEDURES

The Criminal Procedural Law No.150 of 1950 includes some significant procedural rules for administering the death penalty.[50] The cornerstone is the sitting judges' *ijma'a* (unanimous

[47] *Id.*, at 2-3.
[48] *Id.* ("For instance, trade unions could have assets seized and be added to the terrorism list.").
[49] *Id.* ("The law already gives heavy imprisonment sentences for criminal acts that include "promoting or encouraging any terrorist offense."").
[50] *See generally* Aimé Karimunda, *The Death Penalty in Africa*: *The Path Towards Abolition* (Ashgate 2014).

consensus by the majority) including the military judges as well.[51] In a landmark decision the highest court in Egypt, *mahkamat al-Naqd* (Supreme Court: the Court of Cassation) decided:

> Article 381 requires the court members' unanimous consensus, indicates that the legislature made an obligation upon the court to decide the death penalty within the agreement of all sitting judges, to maintain the legal guarantees of […] surrounding its nature, [and that is] contrary to other punishments which require only the majority opinion of the justices.[52]

Additionally, all cases involving the death penalty must be presented to Egypt's grand *mufti* (religious leader) before the issuance of the verdict. The Codes reads, "[T]he court is obliged to send the decision of death penalty to the Egyptian *mufti* (religious clerk) before the final decision. If the clerk does not respond within ten days, the court has the right to decide the final verdict."[53] In the same vein, and in terms of the due process guarantees, the Court of Cassation decided:

The legislature aims, through this condition, to confirm the orthodoxy of the court ruling to the Islamic law rules […]. The role of the *mufti* is to decide its compatibility with the *Sharie*'*a* norms. Furthermore, the opinion of the *mufti* gives the criminal the tranquility feeling of the divine aspect of this punishment considering the public opinion.[54]

It should be noted that the *Mufti*'*s* opinion is consultative and not mandatory, as his only task is exclusively to determine whether or not the punishment is compatible with the main principles of Islamic law.[55] In Egyptian criminal law, execution may be suspended by a request

[51] *Egypt*: QANUN AL'IJRAAT AL-JINAIY'AH [*Criminal Procedural*] Law No. 50 of 1950, art. 381. *Egypt Military Code,* art. 80.
[52] MAHKAMAT AL-NAQD MAJMUAT AL-AHKAM AL-SADIRAH MIN AL-HAYA' AL'AMMAH LIL-MAWAD AL-JINAIY'AH [*Court of Cassation*: *Criminal Circuit, Egyptian Judicial Review*] Appeal No. 63, April 1, 1991, Year 42, 557.
[53] *Crim. Pro. Code*, art. 381(2).
[54] MAHKAMAT AL-NAQD MAJMUAT AL-AHKAM AL-SADIRAH MIN AL-HAYA' AL'AMMAH LIL-MAWAD AL-JINAIY'AH [*Court of Cassation: Criminal Circuit, Egyptian Judicial Review*] Appeal No. 623, Oct.28, 1981, Year 32, 775 (*Revocation Session* Jan. 26 1942, C5, 607).
[55] Mohamed 'Arafa, *Transitional Justice*, *The Seeds of Change*: *Secular Law or Divine* (*Islamic*) *Law, Quo Vadis?* 9 CREIGHTON INT'L & COMP. L. J. 2, 32, 63 (2018) ("The Appellate Court should be done: [I]n three months of its being lodged and the court must give its decision within a maximum of two months after the appeal has been heard…the appeal process postpones the execution. If the appeal is accepted, the court may decide to set aside the verdict appealed

for retrial, as the right to request a retrial belongs to the prosecution or the defendant.[56] Even if the *mufti* responds with an opinion contrary to the court's decision, the court is not obligated to follow his/her decision. This opinion is due in ten (10) days, and if not received within the deadline, the court has the right to decide its final ruling.[57] Nevertheless, if the court decides the final verdict to execute the death penalty without consulting the *mufti*'*s* advisory opinion, its ruling shall be void.[58] On the other hand, the military law does not require that military courts should follow this rule.[59]

Moreover, the prosecution is obliged to appeal the criminal court's ruling to invoke the death penalty before the Court of Cassation, as it must be referred – *on renvoi* – to the Court of Cassation by the Office of the Attorney General, even if the condemned person refuses to appeal.[60] However, the appeals are very limited. The Attorney General must submit a memorandum to the Cassation Court justifying the imposition of this penalty.[61] Death sentences can be appealed before the Appellate Court if the verdict is legally invalid (based on misapplication or misinterpretation of the law) or the procedural irregularities (technicalities) had an impact on the verdict.[62] "The irrevocable decision of the death penalty shall be sent, through the Justice Department [Ministry], to be ratified by the President […] in which he/she has the right either to ratify the ruling, or to use his right of clemency; and if the President does not respond within 14 days, the penalty shall be

or submitted to it for its opinion by the prosecution and to send the case back to the court of first instance for a retrial and if the appeal rejected, the ruling becomes final and the death penalty activate.").

[56] *Id.* at 62.

[57] *Id.* The Court of Cassation decided "Article 381 enforces the court to get the clerk's opinion without obligation to follow his decision."

[58] *Id.* at 61-63.

[59] Ramsis Bahnam, *alNathariya Al'Aama lil Qanun AlJinae'i* [*The General Theory of Criminal Law*] (Cairo 1997).

[60] Crim. Pro. Code, (Egypt) art. 46.

[61] *Id.* art. 30.

[62] *Id.* In this regard, the death penalty decisions of the Supreme State Security (Special) Courts cannot be appealed, and once the president has signed the decision, the penalty is irrevocable. *See Egypt*: QANUN ALTAWARIEA [*Emergency*] Law No.162 of 1958, art. 12.

executed."[63] Also, before execution by hanging – as stipulated by law – the culprit may enjoy the right to practice religious rituals; to be visited by his family; to hear the court's ruling; to not have the execution in public (prison) along with the right to be represented by an attorney (defense council) appointed by the court if the convict does not have access to counsel.[64]

Law No.71 of 2009, amended Egyptian criminal law provisions by adding new rules related to psychogenic disorder.[65] The 2009 amendment reads:

> In case of the absence of free will [criminal intent] during the commission of the criminal act, because of insanity, mental disorder, unconsciousness [intoxication] voluntarily or involuntarily […] the culprit shall be accountable if the psychological or mental disorder affects his free will by diminishing it, and the court must consider all circumstances regarding the mental influence on the personal will . . . .[66] If the accused is incapable of defending himself due to a mental illness occurred after committing the crime, the trial shall be suspended until he is capable. If a mental disorder happens after the investigation has been concluded and before the adjournment of the case, the next procedures shall not be taken . . . .[67]

Additionally, the Juvenile Law No.12 of 1996 provides that children who are under the age of twelve at the time of the commission of the crime may not be held criminally liable, and should be subject to a juvenile tribunal.[68] This Act entirely forbids death penalties and life imprisonment

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[63] *Id.* art. 470. Although, some criminal law scholars argued that this procedural rule intends to diminish the imposition of the death penalty by giving the President the right to use his power to pardon the culprit or to replace it with another punishment.

[64] *Id.* art. 472, 59, 473, 274, 47, 366, 367, 395, 30, 12, & 475. Also, the pregnant woman has the right to avoid execution until she delivers, and this penalty should not be administered during holidays. Article 366 reads, "the Criminal Court (the Felonies circuit) is composed of three judges who have the right to decide the penalties and hear the counts." It should be noted that the judgment *in absentia* is directly appealed by the presence of the convict (*mere* presence of the accused) invalidate the ruling. The Cassation Court oversees resolving questions of law, not questions of fact; to confirm the validity and the compatibility of its verdict with the applicable law.

[65] Egypt Penal Code, art. 62. The old rules stated that there is no criminal liability in cases involving "the lack of free will during the time of commission of the crime, either by insanity (mental disorder), or by unconsciousness which results from taking addictive drugs either voluntarily or involuntarily."

[66] *Id.* The new amendment has distinguished between the entire and partial lack of the *mens rea* (intent or free will), in which the legal outcome will be that the accused will escape impunity and the investigation must be terminated, and the court shall decide the convict's exoneration.

[67] *Id.* art. 46 & 399.

[68] *Egypt*: QANUN AL TIFL [*Juvenile*] Law No.12 of 1996, art. 94. The law said that the juvenile court is the only tribunal have exclusive jurisdiction over children's criminal behavior. It governs the procedural rules that must be followed with children who are between the age of seven and twelve years old.

for children, and instead replaces them with preventive therapeutic measures.[69] One of the main philosophies of the Egyptian criminal justice system is to achieve social rehabilitation and discipline the offender, and prescription (time lapse) negates that goal. Egyptian law provides two cases – in which the state has no right to execute the criminal – for mitigating the death penalty, either by statute of limitations or by presidential pardon (clemency). The Procedural Code states "the statute of limitations for death penalty is 30 years and shall start once the verdict becomes final and irrevocable."[70] On the other hand, clemency means the non-execution or mitigation of the death penalty, to be replaced by another alternative (*e.g*., life imprisonment).[71]

It is worth noting that Islamic law did not play any role in the process of administering the death penalty in the Egyptian criminal justice system, as most of the acts punishable by this sentence – in positive law – are not based on the *Sharie*'*a* norms.[72] Under this law, the application of this punishment is more limited to specific crimes and was not overused like as today. Also, the Egyptian law prescribes this sentence for several crimes that are not categorized as "heinous" or "serious" under the International Covenant on Civil and Political Rights (ICCPR).[73] Making

[69] *Id.* art. 101.
[70] *Id.* art. 528, 529, 381(2), & 533. In other words, once the ruling is appealed before the Cassation Court, it becomes irrevocable, and hence, the statute of limitations begins. *See, e.g*., Egypt Penal Code, art. 62
[71] Amira Mahmoud Othman, *States of Wait*: *The Death Penalty in Contemporary Egypt*, 4 KOHL J. BODY & GENDER RES. 1 (2018), at 106-122, https://kohljournal.press/states-of-wait ("The Egyptian state discourse is clear about evading its responsibility of producing killable bodies. The arrest of criminals who had received death sentences in absentia features in news reports documenting the efforts of police officers to maintain security. Even then, fantasies about the criminality of such people are enacted […] The procedures potentially leading to a death sentence are also described in similar terms, with no emphasis on acts of killing. The diffusion of the state's murder responsibility is further enabled by the utter bureaucracy of the Egyptian state. The people on trial for a capital crime are reduced to "papers" that are juggled between the criminal court and the *Mufti* with a "shroud of secrecy" around the content of such document-exchanges."). It is a presidential decision either to cancel the sentence or to replace it even after the irrevocable.
[72] Leonard G. H. Wood, *Islamic Legal Revival*: *Reception of European Law and Transformations in Islamic Legal Thought in Egypt 1875-1952*, (Oxford Univ. Press 2016). Rudolph, *supra* note 17, at 8-52. Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan*: *Sharia in Practice* (Brill 2009).
[73] 'Arafa, *supra* note 55. The argument made in favor of the rule is that it gives the offender the feeling of compatibility with his faith; however, this assumes that the accused is Muslim. So, why should a non-Muslim criminal wait for a decision from the *mufti* to confirm that the death penalty is compatible with Islam?

irrevocable judicial rulings on death penalty is deeply concerning, especially to accomplish the goals of respecting human rights, dignity, and criminal justice reform. Although, the Pharaonic legal system – as one of the very ancient legal systems – has been applied in Egypt, it has been reported historically that the application of the death penalty during that era was more fair and just than at the current moment.[74]

III. DEATH PENALTY IN ISLAMIC CRIMINAL JUSTICE SYSTEM: THE DIVINE JUSTICE

The *Qur'anic* texts prescribes the death penalty for specific criminal acts such as, armed robbery and armed rebellion that leads to death, and also gives the victim's family the right to choose whether to pursue the death penalty in cases of premeditated murder.[75]

A. ARMED (HIGHWAY) ROBBERY

Muslim scholars defined this crime as "waiting by the way to steal travelers' property by the use of force, to block or obstruct travel on the road which leads to the victim's fatality."[76] Armed robbery is one of the *Hudud* (fixed) crimes, related to God's rights and the whole community's rights.[77] Islamic law mandates this punishment because this crime represents an attack on the nation's national security and damages the community's public welfare.[78] Additionally, this crime is principally aimed at the *militant* terrorist groups that assault individuals, threatening their lives, killing them, and robbing their properties. Hence, the penalty is severe, but proportionate with the crime's gravity.[79] To implement this punishment the criminal must be sane

[74] *See generally* Van A. J. Loon, *Law and Order in Ancient Egypt*: *The Development of Criminal Justice from The Pharaonic New Kingdom Until the Roman Dominate* (Leiden Univ. 2014).
[75] Bassiouni, *supra* note 7, at 204-209.
[76] Abu Zahra, *supra* note 12, at 133.
[77] *See generally* Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge Univ. Press 2006); Sherman A. Jackson, *Domestic Terrorism in the Islamic Legal Tradition*, 91 THE MUSLIM WORLD (2001), at 3-4 295; Frank E. Vogel, *The Trial of Terrorists under Classical Islamic Law*, 43 HARVARD INT'L L. J. (2002), at 58.
[78] Abu Zahra, at 77.
[79] *See generally* Abu Zahra, *supra* note 12.

and of age (legal capacity), and must commit a crime that leads to death.[80] If the culprit renounces the crime before he got arrested, the death penalty shall not be imposed, however, this abandonment will move this crime into *Ta*'*azir* offences, which are more lenient and subject to the judge's discretion.[81]

B. ARMED REBELLION

Armed rebellion is defined as an armed uprising against the legitimate authority, as a *Hudud* crime, related to the nation's public interests.[82] To impose the death penalty the offenders must rebel and intentionally rise against the legitimate authority and participate in committing that act by using violence or military force.[83] Consequently, if an individual engages in peaceful uprisings and non-armed rebellions, then legitimate authority does not have the right to enact any penalties against him.[84] Prisoners of war are excluded from the scope of this crime and since the motive of this crime is political, and the armed rebellions are trying to change or overthrow the legitimate regime by using force, Islamic law obliges the legitimate government to try to convince them peacefully via dialogue to stop their criminal practices before punishing them.[85]

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[80] Vogel, *supra* note 77. *See generally* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes*: *Historical Perspectives and Contemporary Practice*, 42 VA J. INT'L L. 1 (2001–2002) 156. *See generally*, *e.g.*, Mohammad Fadel, *Islamic Law and American Law*: *Between Concordance and Dissonance*, 57 N.Y. L. REV. (2012–2013) 238.

[81] *Id.* The accused will be liable only to the victim for the personal harm that he committed.

[82] 'Abd al-Qadir 'Auda, '*al-Tashri*'*al-Jina*'*i al-Islami muqarnan Bi*'*l-qanun al-Wad*'*i* [*Islamic Criminal Law*: *A Comparative Analysis with Secular Law*] 638 (Dar al-Katib al-Arabi vol. 2, 1969). *See generally* Ahmed Al-Dawoody, *The Islamic Law of War*: *Justifications and Regulations* (Palgrave Macmillan, 2011).

[83] *Id. See also* 'Auda, *supra* note 82, at 673.

[84] Bassiouni, *supra* note 7, at 134.

[85] *Id.* at 95. It should be noted that for adultery, stoning-to-death is a controversial punishment in Islamic criminal law, leading most of the contemporary scholars to propose flogging rather than stoning. Also, the required criminal procedural rules (beyond reasonable doubt) make it difficult to be applied, as the *Qur*'*an*, does not prescribe death for adultery, and instead only prescribes lasing for both married and unmarried individuals. Muslim scholars are in dispute over the concept of apostasy. The *Qur*'*an* does not stipulate any specific punishment for apostasy. Also, there were various folks who declared their apostasy at Prophet Mohammad's time, and he chose not to inflict any penalty on them. However, there is a prophetic *hadith* narrated stating that the prophet said, "The one who changes his religion, must be killed." Scholars have interpreted that in numerous ways, leading some jurists to recognize the death penalty for apostasy and other moderates see it as a contradiction to the principle of freedom of religion in Islam. The *Qur*'*an*

C. PREMEDITATED HOMICIDE

Intentional murder is a *Qisas* crime which justifies the use of the death penalty based on retaliation "eye-for-an eye" meaning that harming the offender in the same way that he harmed the victim.[86] In this respect, the *Hanafi* jurisprudence has divided homicides into five categories: deliberate, *quasi*-deliberate, accidental, equivalent to accidental, and indirect. However, all Muslim scholars agree on the death penalty as a punishment for premeditated murder.[87] Muslim scholars define that act explicitly as "homicide committed with full, actual, and clear intention to kill," directly caused the killing; as omission or indirect act is insufficient.[88] Also, to apply this sentence the wrongdoer must be of age, sound mind, and not be under duress at the time of the commission of the crime.[89] Although, it is a *Qisas* (equivalence) crime, *Sharie*'*a* gives the victim's family the right to choose either the death penalty, or the alternative *diyaa* (blood money).[90] Muslim scholars argue that governments have the right to ask the victim's family – by enacting a law – to accept blood money from offenders including the poor, and waive the death penalty.[91] The reason behind that the rule that permits the whole society to replace the death penalty with

says, "Say: "The truth is from your Lord." So, whoever wills – let him believe; and whoever wills – let him disbelieve" and "There shall be no compulsion in religion." *Qur'an* 2:256 & 18:29.

[86] Bassiouni, *supra* note 7, at 205-207.

[87] J. Norman D. Anderson, 13 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, Univ. of London (4) 811–828 (1951), *reprinted in Homicide in Islamic Law* (Cambridge Univ. Press 2009).

[88] *Id.* Thus, the victim's death must be caused by an act that is attributable to the accused, with no discontinuity between the criminal act (act of commission) and the criminal result (causation nexus requisite). The *Hanafi* jurisprudence argued that killing by poisoning or through the intentional prisoning of the victim till death is not intentional homicide, and the accused shall not be executed.

[89] Bassiouni, *supra* note 7. So, minors, mentally ill, and coerced persons (under duress) are excluded from death penalty's scope of application.

[90] *Id.* Some scholars justify the use of capital punishment for these crimes by categorizing them as *Ta* '*azir* acts, as a way of vesting the authority with the discretionary power to prescribe it.

[91] Bassiouni, *supra* note 7, at 206. It should be noted that the accused have the right to withdraw his confession at any moment of the criminal motion to save himself from death penalty or any other criminal sanctions.

blood money is that the accused is not only harming the victim's family but also damaging the whole nation and its welfare.[92]

I. DOES ISLAMIC CRIMINAL LAW SUPPORT THE DEATH PENALTY? THE SHARIE'A TENDENCY

The primary and supplementary sources of Islamic criminal law constantly urge leniency when determining whether to inflict the death penalty. Commands of forgiveness and lenity are derived from the *Qur'an*, and although the *Qur'an* prescribes the death penalty as a retaliation for intentional murder and other limited acts to be accepted by the victim's family, it maintains that forgiveness, remission, and lenity are preferable to the death penalty.[93] However, the death penalty is a path of reaching justice and preserving the victim's right against the criminal. Islamic law offers blood money as an optional sanction of a moral retribution on the accused – that achieves justice – while finding a way to save his life.[94] The jurisprudential classical schools of thought have developed many maxims, doctrines, and theories of Islamic criminal law to limit the scope of execution, thus saving human lives.[95] Scholars extended the reach of the maxims of uncertainty/doubt to avert the nuisance of the death penalty.[96]

The doubt notion is derived from the prophetic *hadiths* "[a]void imposing criminal sanctions in cases of doubt" and "[a]void *hudud* punishments to the possible extent; if there is any way out, then release [the convict], as it is better that the judge make a mistake in pardoning than

[92] Susan C. Hascall, *Shari'ah and Choice*: *What the United States Should Learn from Islamic Law about the Role of Victims' Families in Death Penalty Cases*, 44 JOHN MARSHALL L. REV.1, 5-68 (2010).
[93] Bassiouni, *supra* note 7, at 211-226.
[94] Abu Zahra, *supra* note 12, at 498. Prophet Mohammad encouraged individuals to accept blood money by promising several rewards in life and in the hereafter. This inspires the forgiveness values and limiting the scope of execution.
[95] Anas Ibn Malik narrated that "I never saw the prophet in a dispute, which involved retaliation, and brought to him and he ordered for its remission" and "No case requiring retaliation reached the prophet, he orders pardoning." *Sunan Abi Dawud* 4497, Book 41, *Hadith* 4, *Sunan an-Nasa'i*, 4784, Book 45, *Hadith* 79. For instance, Muslim scholars require many procedural requirements for the eyewitnesses, and a detailed explicit illustration in premeditated murder.
[96] *See generally* Intisar Rabb, *The Islamic Rule of Lenity*, 44 VAND. J. OF TRANSNAT'L L. 5 (2011).

in punishing."[97] This divine norm was the key tool, in the hands of Muslim scholars, to verify the criminal procedure of Islamic law that constrains the scope of severe sentences including the death penalty.[98] This idea was the reason behind the Islamic *fiqh* (jurisprudence) to adopt strict terms on who may be a witness in criminal matters.[99] Furthermore, Muslim jurists agreed unanimously that a judge cannot enforce the death penalty as a punishment for controversial crimes (no jurisprudential consensus), such as stoning to death for adultery or death for apostasy.[100] The reconciliation and forgiveness of the victim or his family does not mean releasing the accused of all penalties and *Sharie*'*a* does not require that each member of the victim's family must agree to waive the death penalty, so approval of one relative to waive it is sufficient to avoid execution. The key policy role of *dyaa* is to be paid by the offender, and if indigent, his family is obliged to pay it and the government is obliged to do so if neither the accused nor his family can pay.[101]

Exclusionary Rule: Islamic criminal law recognizes some groups who are excluded from the death penalty, even if they commit the crimes that normally call for this sanction. However, that does not avert the state from enforcing other measures. Thus, Islamic law excludes these groups as a way of accomplishing the common criminal justice policy of sentencing and preventing

[97] Intisar Rabb, *Reasonable Doubt in Islamic Law*, 40 YALE J. INT'L L. 1 (2015), 41-94; *See generally* Tarek Badawy, *Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses*, 23 ARAB L. Q. 3 (2009). *See also* ABU AL-HASAN AL-MAWARDI, KITAB AL-HUDUD MIN AL-HAWI AL-KABIR, 206 n.1 (Ibrahim b. ʿAlī Sanduqji ed., 1995) (listing other major *ḥadīth* sources, including ʿAbd al-Razzāq, Aḥmad b. Ḥanbal, Dārimī, Abū Dāwūd, Tirmidhī, Ibn Mājah, Ibn al-Mundhir, Ṭaḥāwī, Ṭabarānī, alḤākim al-Naysābūrī, and Bayhaqī).

[98] *See generally* Matthew Lippman, *Islamic Criminal Law and Procedure*: *Religious Fundamentalism v. Modern Law* 12 BOS. COLL. INT'L & COMP. L. REV. 1 (1989), 29-62.

[99] Intisar Rabb, *Doubt*'*s Benefit*: *Legal Maxims in Islamic Law*, *7th-16th Centuries* (Princeton University 2009). It should be noted that witnesses must see the criminal act during its commission and not just hear about it; have integrity (not committed any crimes); and must be away from any conflict of interest(s) that may disqualify the testimony.

[100] *See generally* Rabb, *supra* note 97, at 90-94. The doubt principle in the history of Islamic criminal law confirms that the main purpose is to reduce or avoid the use of the death penalty and therefore Islamic schools of interpretations added several procedural rules to increase the circle of doubt and oblige judges to impose any sentence other than death.

[101] Hascall, *supra* note 90, at 55-62. Indeed, the victim or the family that will be compensated in lieu of seeking this penalty will necessarily give careful deliberation to the outcome of hanging the accused and the interest they will gain. The accused cannot escape paying the blood money because of insanity, minority, or death. M. Cherif Bassiouni, *Crimes and the Criminal Process*, 12 ARAB L. Q. 3, 269–286 (1997).

capital punishment. Parents and grandparents who kill their children, grandchildren or their spouses, or family members (close relatives) are excluded.[102]

IV. OFF WITH THEIR HANDS! FRANCE AND THE CAPITAL PUNISHMENT

The first great legislative debate on capital punishment took place during the discussion of a draft penal code in May-June 1791.[103] Le Peletier de Saint Fargeau, Duport and Robespierre argued in favor of eliminating the death penalty as it was unjust, that there was a risk of judicial error, and that it was not a deterrent.[104] After the election of François Mitterrand, who had always expressed his abolitionist stance, as President of France in 1981 a bill to abolish the death penalty was passed before the National Assembly on August 29, 1981.[105]

Is it possible for *Le Conseil Constitutionnél* (the Constitutional Council) in France to declare the unconstitutionality of the death penalty? The answer is, maybe, considering the law of October 9, 1981 *di question prioritaire de constitutionnalité* (QPC) in the French legal system (the constitutionality question).[106] The abolition of the death penalty is celebrating its thirty-fifth

[102] The exclusion is derived from the *sunnah* tradition which says, "The Prophet said to the man who complained to him about his father who took possession of his property: 'You and your property belong to your father'" and "parents are not punished by death for killing their children." *Sunan Abi Dawud* 3530, *Book* 24, *Hadith* 115 & *Jami` at-Tirmidhi* 1401, *Book* 16, *Hadith* 17. Bassiouni, *supra* note 7, at 171-194. It has been argued that this exclusion based on the right of the victim's family to decide whether to seek the death penalty or not; as it will be in the children's hands, who lost one or both parents if the punishment were imposed. Also, this sentence will never apply in case of self-lawful defense (e.g., killing a rapist).

[103] *See generally* James M. Donovan, *Public Opinion and the French Capital Punishment Debate of 1908*, 32 L. & HISTORY REV. 3 (2014), 575-609.

[104] At this time, the Constituent Assembly denied eradicating the capital penalty but abolished torture. After the executions during the Reign of Terror, the Convention eliminated the death penalty by the Act of October 26, 1795 as of "publication of the general peace," but death penalty was reintroduced in the 1810 Penal Code. The abolitionist movement reemerged after the Empire, including Victor Hugo and Lamartine among its zealous advocates: the provisional government of 1848 abolished death penalty, only for crimes of a political nature.

[105] Donovan, *supra* note 103. *See generally* Robert Nye, *Two Capital Punishment Debates in France*: *1908 and 1981*, 29 HISTORICAL REFLECTIONS/RÉFLEXIONS HISTORIQUES 2 (2003), at 211–28.

[106] Philippe Testard-Vaillant, *The End of the Death Penalty Marked a Sharp Turn in French History*, CNRS NEWS, May, 20, 2021, https://news.cnrs.fr/articles/the-end-of-the-death-penalty-marked-a-sharp-turn-in-french-history (last visited Apr. 1, 2022) ("Later, under the impetus of François Guizot, one of the leading ministers of the July Monarchy, "the law of April 1832 eliminated capital punishment for nine types of offences, including the burning of buildings, ships, boats, stores, etc.", Dubois recounts. "Inspired by the doctrine that one should punish 'neither more than is fair, nor more than is necessary', the same law limited the death penalty to crimes against persons (homicides) and

anniversary, noting that constitutional law has played a minimal role in this matter, but the eviction of this punishment from the French penal system is derived from the constitutional criminal law. In this regard, the situation has been debatable among European countries.[107] Indeed, several Eastern European constitutional jurisdictions argued for the abolition of the death penalty in peacetime based on the notion of dignity and the right to life as a fundamental right.[108] In France in 1981, through the political will, and the internationalization of criminal law, the death penalty was abolished. Since 2007, article 66-1 of the French Constitution reads "No one may be sentenced to the death penalty."[109]

A. ABOLITION OF THE DEATH PENALTY AND THE CONSTITUTION

The current question is as to whether the principles of modern criminal law *per se* can abolish the death penalty. It has been argued that the principle of necessity of punishment require the abolition of the death penalty. The Déclaration des Droits de l'Homme et du Citoyen (Declaration of the Rights of Man and of the Citizen of 1789) reads "[t]he law ought to impose no other penalties, but such as are absolutely and evidently necessary; and no one ought to be punished, but in virtue of a law promulgated before the offence, and legally applied."[110] Beccaria

introduced the concept of mitigating circumstances, which considerably reduced the number of death sentences and thus of executions.").

[107] Robert Badinter, *discours à l'assemblée nationale*. Sur le long combat qui a abouti à ce résultat, on se reportera au récit de l'un de ses principaux acteurs: L'abolition, (Paris, Fayard 2000).

[108] Testard-Vaillant, *supra* note 106. For instance, in November 2009, the Russian Constitutional Court, prohibited the application of death penalty and declared its unconstitutionality.

[109] Elsa Devienne, *Comparing Exceptionalism in France and the USA*: *A Transatlantic Approach to the Death Penalty Abolition Debate* (*1972-1977*), 5 EU. J. AMER. STUDIES 1 (2010) ("[It argues] challenges on the history of the death penalty and its abolition by adopting a transatlantic framework and debunking the popular contemporary conception of the "Barbaric Americans" against the "civilised" anti-death penalty French. It focuses on the short period in the 1970s during which American executions were halted by the Supreme Court, while France was still putting prisoners to death in cases that were widely debated in public opinion. By observing the French media's reactions to the two major decisions taken by the Supreme Court in the 1970s and their direct consequences, it analyzes not only the French gaze on American practices but also how these American decisions were manipulated by the journalists to stoke the French debate about abolition.").

[110] Loi du 26 août 1789 Déclaration des droits de l'homme et du Citoyen [Law of August 26, 1789 *The Declaration of the Rights of Man and of the Citizen*] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [FRANCE OFFICIAL GAZETTE], Aug. 26, 1789 art. 8.

argued "so the punishment should not be violent against the offender [public citizen], it must be effectively swift, deterrent, necessary, considering the circumstances around the case [Case-by-Case basis], and proportionate to the gravity of the criminal offence, and the written laws."[111] He further considers the death penalty unjust and unnecessary in times of stability, public peace, and security, however, he considers it "necessary [and deterrent but disputed it] when the Nation is in the process of transition towards its democratic principles, civil rights and public liberties."[112] It has been argued that the necessity of punishment requires the lawmakers [or policymakers] to "[n]o longer intervene in the criminalization or penalization process but only to check on the punishment's necessity, personality, proportionality, and to reach the balance required, which is complicated . . . ." French scholars argued that "the risk of the quantitative [amount] nature of punishment is deeply concerning but not shocking as of its qualitative nature."[113]

B. THE BALANCE: ABOLITION IS NOT VERSUS THE CONSTITUTIONAL NORMS

Protocol 6 to the European Convention on Human Rights requires parties to restrict the application of death penalty to times of war or "imminent threat of war."[114] The first article of this protocol explicitly reads "[t]he death penalty shall be abolished. No one shall be condemned to

[111] Cesare Beccaria, *Des délits et des peines*, Guillaumin et cie, 1870. ("Capital punishment is not useful because of the example of cruelty which it gives to men. If the passions or the necessity of war have taught people to shed human blood, the laws that moderate men's conduct ought not to augment the cruel example. . .").

[112] William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797 (1998) ("[…] the European Convention, it already shows the remarkable and rapid evolution of international law regarding the death penalty. Article 6 of the International Covenant also includes the death penalty as an exception to the right to life, but it lists detailed safeguards and restrictions on its implementation. "The death penalty may only be imposed for the "most serious crimes," it cannot be pronounced unless rigorous procedural rules are respected, and it may not be applied to pregnant women or to individuals for crimes committed while under the age of eighteen. "Furthermore, article 6 of the International Covenant clearly points to abolition of the death penalty as a human rights objective and implies that states that have already abolished the death penalty may not reintroduce it . . .").

[113] *Id.* Beccaria, *supra* note 111, at 115. ("In order to be just, a penalty should have only the degree of intensity needed to deter other men from crime. Now there is no one who, on reflection, would choose the total and permanent loss of his own liberty, no matter how advantageous a crime might be. Therefore, the intensity of a sentence of servitude for life, substituted for the death penalty, has everything needed to deter the most determined spirit.").

[114] *See* COUNCIL OF EUROPE, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, *as amended by Protocols* Nos. 11 and 14, Nov. 4, 1950, ETS 5, https://www.refworld.org/docid/3ae6b3b04.html.

such penalty or executed."[115] This requirement does not violate Articles 61 or 54 of the French Constitution which reads:

> If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period…[116]

Accordingly, the Constitutional Council have an obligation to make sure that any international document does not include "any clause contrary to the Constitution" and to safeguard the State's sovereignty.[117] To assure the same norm, the same Constitution reads:

> Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances […] The measures shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted regarding such measures . . . the exercise of such emergency powers . . .[118]

On the international level, France has worked – and still does – for abolition of the death penalty in close consultation with its European allies. Especially through ratifying the Additional Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for eradication of this punishment in peacetime.[119] It has been argued that Protocol

[115] *See* COUNCIL OF EUROPE, PROTOCOL 14 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AMENDING THE CONTROL SYSTEM OF THE CONVENTION, May 13, 2004, CETS 194, https://www.refworld.org/docid/42ef8d0b4.html.

[116] 1958 Const. art. 61(1)(2), & 54. Article 54 reads: If the Constitutional Council, on a referral from the President of the Republic, the Prime Minister, the President of one or the other Houses, or [. . .], has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.

[117] Schabas, *supra* note 112.

[118] *Id.* art.16.

[119] *See generally* André Castaldo, *Introduction Historique au Droit* (Paris, Dalloz 2000); Robert Muchembled, *Le Temps des Supplices* (Paris, Armand Colin, 1992). *See, e.g.*, *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

6 is compatible with the duty of the State to ensure that public institutions are functioning, and operating consistent with respecting and guaranteeing citizens' rights. In doing so, the Council implicitly recognizes that the President could reinstate – without violating the Constitution – the death penalty if the nation faces imminent danger or act of aggression by war, and not just a *mere* terrorist activity.[120] In such circumstances, the Constitutional Council confirmed that the international texts require the ratifying States to abolish capital punishment at all times and in all exceptional circumstances, including "war times or imminent danger" in which there is no violation to the constitutional principles on public rights and civil liberties.[121] The reason behind this ruling was the case law of the European Court of Human Rights on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[122] Article 4 of this Convention says:

> Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. [...] State Party shall make these offences punishable by appropriate penalties which consider their grave nature.[123]

On October 8, 2010, the State Council referred a controversial question to decide the constitutionality of the National Court of Asylum that had denied the request to invalidate the decision of the Office Français de Protection des Réfugiés et Apatrides (OFPRA) director refusing to grant asylum to a foreigner, citing the question of the compatibility of Article L.712-2 of the Code de l'entrée et du séjour des étrangers (entry, residence and asylum right) with the

[120] *See*, *e.g*., Michel Vovelle, *L'heure du grand passage*, chronique de la mort, Paris, Gallimard, 1993, 88. Jean Imbert, *La peine de mort*, Paris, P.U.F., Que sais-je?, 1993, 124.
[121] *Id*. *See also* Cesare Beccaria, *On Crimes and Punishment* 48-51 (Aaron Thomas & Jeremy Parzen trans., Hackett Pub. Company, Inc. 1986).
[122] G.A Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).
[123] *Id*. art. 4. Thus, following the decision of the Constitutional Council, the legal debate on the relationship between the death penalty and the Constitution was over.

Constitution.[124] This Act anticipated to provide and grant protection to individuals who cannot claim refugee status when they are exposed in their country to the risk of suffering the death penalty or inhuman treatment.[125] The law may exclude a person from such protection, if "there are serious reasons [reasonable grounds] to believe [...] that he/she has committed a *serious* crime under domestic law; and that act may represent a serious threat to public order, country's national security interests or its citizen's safety."[126] On February 19, 2007, Jacques Chirac's signed an executive order adding to the Constitution a provision that reads, "[n]o-one shall be sentenced to death," making France the 17th country to involve a ban on death penalty in its Constitution. The recent amendment to the French Constitution will allow France to ratify the Second Optional Protocol of the International Covenant on Civil and Political Rights of the New York Convention of October 15, 1989 abolishing the death penalty.

It should be noted that abolition in France came a few years after the British and the Spanish experiences. In 1981, a Leftist government came into office and put an abolition bill before the French parliament.[127] It set out a cycle of justifications. The conclusiveness and irrevocability of the death penalty was one, which stated, "[a] freedom-loving country cannot in its laws preserve the death penalty. It is an imperative for freedom not to give anyone an absolute power so that the consequences of a decision are irremediable."[128] Another motivation was that capital sentence reflects badly on a society, indicating that it cannot settle issues of violence by other means. "The

[124] *See generally* Hugo Bedau and Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. (1987).
[125] *Id.* at 57-60.
[126] *Id.* at 72-74. *See* G.A. Res. A/RES/44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (Dec. 15, 1989).
[127] Michel Forst, *The Abolition of the Death Penalty in France*, *reprinted in The Death Penalty*: *Abolition in Europe* 105, 113 (Council of Europe Pub., 1999).
[128] Robert Badinter, French Keeper of the Seals, French Minister of Justice, Speech Before the French National Assembly; Explanation of Reasons Given on Behalf of Mr. Pierre Mauroy (August 29, 1981).

death penalty confirms a weakness in society; its abolition responds to an ethical principle."[129] Still another was the influence of abolition elsewhere in Europe. "The time has come for France, which so often has been in the forefront of freedom and of progress in the law, to rectify the delay it has shown in this regard in relation to the countries of Europe."[130] And yet another was public opinion, which stated, "[t]he French people have several times gone for candidates who advocated abolition. It is necessary to draw conclusions from this and to translate into our laws a choice to which the voters have implicitly given approval."[131]

Lastly, the French government argued against deterrence as a reasoning. "There is no correlation between trends in violent crime and the absence or presence of the death penalty."[132] It called capital punishment "inhuman, degrading, and cruel."[133] Capital punishment was "a remnant of another age."[134] In this regard, a legislative commission reviewed the bill and reported back as it put abolition in "the humanist tradition" of France.[135] The commission's rapporteur said that "studies that have been done have not established scientifically whether criminality is affected by maintenance of the death penalty at the top of the scale of punishments."[136] Robert Badinter,

[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *See* Christina M. Cema, *Universality of Human Rights*: *The Case of the Death Penalty*, 3 ILSAJ. INT'L & COMP. L. 465,472 (1997).
[134] *Id.*
[135] *See generally* John Andrews & Ann Sherlock, *Extradition, Death Row and the Convention*, 15 EUR. L. REV. 87 (1990) (discussing Soering); Henri Labayle, *Droits de l 'homme, traitement inhumain etpeine capitale*: *Reflexions sur i 'ddification d'un ordre public europden en matire d'extradition par la Cour europienne des droits de l 'homme*, 64 SEMAINE JURDIQUE 3452-57 (1990) (same); Richard B. Lillich, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991) (same). *See, e.g.*, *The State v. Makwanyane and Mchunu*, 1995 (3) SA 391, 36 (CC) (Chaskalson, President). According to President Chaskalson, "[c]apital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of section 11(2) [of the interim constitution of South Africa]."
[136] No. 316, National Assembly, Constitution of October 4, 1958, Seventh Legislature, Second Special Session of 1980–1981, Annex to the transcript of the session of September 10, 1981, Report given on behalf of the Commission of the Republic on Constitutional Law, Legislation and General Administration on Draft Law No. 310 on abolition of the death penalty, by Mr. Raymond Forni, Deputy.

Justice Secretary [Minister] and a long-time opponent of death penalty, spoke to the National Assembly to promote implementation of the Government's abolition bill.[137] He put this penalty in the context of other misuses of rights noting that France had been the first country in the European Union to abolish torture and slavery.[138] He underscored that abolition had long been needed by the forces of the political Left in France. The draft law was approved by the National Assembly, affirming plainly and simply, "*The death penalty is abolished*."[139]

V. "SOUL FOR SOUL" OR EYE -FOR- AN EYE": WHAT SHOULD THE EGYPTIAN CRIMINAL JUSTICE SYSTEM LEARN FROM ISLAMIC CRIMINAL LAW ON DEATH PENALTY?

The Egyptian criminal justice system needs to consider the reform of the death penalty based on Islamic criminal law norms, and because of its constitutional and cultural duties on the Egyptian lawmaker. Furthermore, Islamic legal – substantive and procedural – rules governing the death penalty are consistent with contemporary international human rights standards, as well as the global obligations of the death penalty reform's campaigns.

A. CONSTITUTIONAL SUPREMACY DUTY: FOLLOWING ISLAMIC SHARIE'A LAW

Article 2 of the Egyptian Constitution states, "[t]he principles of Islamic *Sharie'a* are the principal source of legislation," meaning that the Egyptian laws (written codes) must be in

[137] Forst, *supra* note 117, at 114. See also Robert Badinter, Minister of Justice and Minister of Justice of the Government of Pierre Mauroy, Presentation of the Bill Abolishing the Death Penalty to the National Assembly (Sept.17, 1981).
[138] Robert Badinter, *Abolition*: *One Man's Battle Against the Death Penalty* 198–199 (2008).
[139] *Id.* As he finished his speech, he recalled, a strong praise and applause from National Assembly members on the political Left than those on the political Right; the prior group voted overwhelmingly for abolition, while in the latter the outcome was mixed.

accordance with the general principles of Islamic law; otherwise, it will be unconstitutional."[140] In this context, the Egyptian Supreme Constitutional Court (SCC) stated:

Article 2 of the Egyptian Constitution is a constitutional duty imposed on the Egyptian legislature to [not] to enact any law that contradicts the definite [conclusive] rules of Islamic law or its interpretation(s) by the classical schools of jurisprudential thought. This Court have jurisdiction over the constitutionality of the Egyptian statues.[141]

Consequently, the SCC has authority to exercise judicial review to ensure that all laws and rules conform to the Egyptian Constitution, and to interpret acts to remove any misinterpretation or vagueness regarding their meaning.[142] However, despite hearing several cases arguing that specific laws were clashing with the principles of Islamic *Sharie*'*a* cited in Article 2 of the Egyptian Constitution, the SCC did not find it necessary to define what 'the Islamic *Sharie*'*a* principles' meant.[143] The SCC came up with a complicated solution: first, if the legal texts are clear after careful examination, the plain meaning will be applied, but if they remain equivocal or vague, the Court *per se* will try to clarify the texts without contradicting the doctrines of the *Sharie*'*a*.[144] Second, the review level is to inspect whether the challenged legislation is compatible

[140] Loi 81–908 du 9 Octobre 1981 portant abolition de la peine de mort [Law 81-908 of October 9, 1981 for Abolishing the Death Penalty], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [FRANCE OFFICIAL GAZETTE], Oct.10, 1981, 2759.

[141] *Constitution of Arab Republic of Egypt*, 18 Jan. 2014, art.2. Cases No. 67, 68, & 34, AL-MAHKAMA AL-DUSTORIYA AL'ULIYA [Supreme Constitutional Court] (Sep.7, 1996, Jan.4, 1997) [Egyptian Judicial Review] no. 8, 133-209.

[142] Mohamed 'Arafa, *Case 8/1996* (*Egypt*), *reprinted in Max Planck Encyclopedia of Comparative Constitutional Law* 4-5 (Rüdiger Wolfrum, Frauke Lachenmann, and Rainer Grote eds., Oxford Univ. Press 2019).

[143] *Id.* at 5-6. ("The tension that the Court places on the need for legislative consistency with the welfare-oriented purposes of *Sharie*'*a* characterizes the Court as an institution with a liberal constitutional jurisprudence. Nevertheless, it would be wrong to believe that the Court is trying to secularize the Egyptian legal system to the extent of divorcing it from Islamic law. The approach is rather to reinterpret Islamic norms in a way that fits the needs of modern society. Several well-known Western intellectuals have acknowledged the Court's approach as a bold attempt to introduce *Sharie*'*a* as both a complete corpus of law and a concept of life that can persist in the modern era with its liberal and secular challenges.").

[144] Frank Vogel, *Conformity with Islamic Shari'a and Constitutionality under Article 2*: *Some Issues of Theory, Practice, and Comparison reprinted in, Democracy, the Rule of Law, and Islam* 535 (Coltran, E, and Sherif, AO, eds. Kluwer 1999).

with the *Sharie'a* values to promote and protect religion, life, reason, honour, and property. The development of these essential *maqasid* (objectives) was the product of Islamic scholars' interpretation and *ijtihād* (analogical deduction) with a view to enriching social welfare and justice, and to render Islamic law as a complete concept of life, not just a set of rules.[145] Thus, the Court held that a law that undermines justice and the common good would be unconstitutional.[146]

1. Cultural and Customary (Social) Obligation: Adhering to Islamic Law

There are cultural and social aspects that play a crucial role in motivating Egyptian law to follow Islamic law rules. The modern history of the Egyptian legal system retains that individuals have no chance to choose their law(s) based on their cultures, beliefs, or social life, however, by recurrent accepted customs.[147] Since capital punishment is codified, the cultural nature of the Egyptian society requires the law and policymakers to reform this penalty according to Islamic law. Given the mandatory influence of Islamic law on the legislature, along with the United Nations pressure on its members to reform the death penalty or to abolish it – theoretically or practically – the response of the Egyptian legislator to reform this penalty will be more practical and effective if based on the cultural, moderate religious, traditional, and social nature of the Egyptian community.[148]

[145] *Id.*
[146] *Awad-Allah v. Abd-El-Al* (SCC) (4 May 1985) Decision No.28, Judicial Year No.1 (Egypt); *Rector of the Azhar University v. President of the Republic* (SCC) (1985) Case No.20, Judicial Year No.1, translated in (1986). Case No. 8, SCC Judicial Year 17 (on Islamic Law, Veiling and Civil Rights) (18 May 1996). *Wassel v. Minister of Education* (SCC) (18 May 1996) Decision No.8, Judicial Year No.17 (*Niq'ab* [Veil] Case).
[147] Schabas, *supra* note 112. Egyptian codes are based on Western laws because of the European colonialism. For instance, the contemporary Egyptian criminal code finds its origins in the French, Italian, English, and Indian legal systems.
[148] Turkey is an obvious example. As a result of the EU pressure on Turkey, the death penalty has been abolished, however, the government currently considering reinstating it again. *See Turkey and EU Row*: *Erdogan Threatens to Back Death Penalty, Open Borders to Migrants*, MIDDLE EAST EYE, (Nov. 25, 2016). https://www.middleeasteye.net/news/turkey-and-eu-row-erdogan-threatens-back-death-penalty-open-borders-migrants ("in response to cheering crowds' chants of "we want the death penalty"… EU officials have repeatedly made clear that bringing back the death penalty would end Turkey's bid for membership, which sets abolishing capital punishment as

2. *The Contemporary Need*: *Following Sharie'a Model on Capital Punishment*

The United Nations international campaigns against the death penalty, is currently playing a fundamental role in abolishing or reforming it globally. Muslim countries have resisted this campaign, arguing that their legal systems must not contradict Islamic law rules, which expressly recognizes the death penalty.[149] Thus, the Egyptian legislator should invoke the Islamic norms governing capital punishment to be more consistent with the international campaign reform. Middle Eastern countries should not deny the global reform campaign, nor the UN resolutions on the death penalty, by asserting their religious aspects and those countries must follow those rules.[150] Egyptian criminal law has numerous punishments, such as life imprisonment, that are sufficient at deterring heinous acts, such as terrorism, drug trafficking, and military crimes among many others. Such punishments are more preferable than capital punishment especially if they do not lead to the victim's mortality. The substantial argument for keeping the death penalty in the Egyptian criminal jurisprudence – and in most Muslim nations – is based on religious claims. Even though Islamic law retains the death penalty only for premeditated homicide crimes, and not for many other capital crimes that are stated in these codes.[151] Islamic law narrowed the scope of

a condition. In 2004, Ankara abolished the death penalty as part of its accession process."). Kursat Akyol, *Will Turkey Reinstate Death Penalty*? *Turkey Risks Sliding Further away from the West if it Reinstates the Death Penalty after the Failed Coup Attempt*, AL-MONITOR, (July 29, 2016), https://www.al-monitor.com/originals/2016/07/turkey-coup-attempt-death-penalty.html#ixzz6rHosofDE.

[149] William Schabas, *Islam and the Death Penalty*, 9 WILLIAM & MARY BILL RIGHTS J. 1 223, 231 (2000) (explaining that Islamic states correctly argue that capital punishment is an element of Islamic law, [but] Islamic states do not recognize the more limited role of the death penalty articulated by the Islamic religion).

[150] *See*, *e.g.*, Human Rights Watch, *World Report 2017*, https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf. *Amnesty International Global Report*, *Death Sentences and Executions*, (2016). https://www.amnesty.org/en/what-we-do/death-penalty/ ("Amnesty monitors its use by all states to expose and hold to account governments that continue to use the ultimate cruel, inhuman and degrading punishment. The use of the death penalty for crimes committed by people younger than 18 is prohibited under international human rights law, yet some countries still sentence to death and execute juvenile defendants…However, their significance goes beyond their number and calls into question the commitment of the executing states to respect international law.").

[151] In other words, these severe acts do not involve deliberately taking the victim's life should be outside the scope of the death penalty.

capital punishment to only deliberate murder, and thus, Egyptian law at least must be consistent constitutionally with the Islamic law principles and limit its the scope to intentional killings. In the same vein, Article 18(a) of Law No.150 of 1950 reads:

> The victim, his agent, or successors [victim's family] may process reconciliation procedures before the Attorney General for involuntarily manslaughter, assault, and battery. This reconciliation will suspend and terminate the investigations [criminal motion] and elapsing the punishment. The Attorney General have the right to drop the penalty and release the accused based on the settlement between the offender and the victim's family.[152]

Although this provision gives the victim or their family the right to waive the punishment and process reconciliation, its scope is limited to crimes – not premeditated murder – that do not punish by the death penalty. The philosophy of the lawmaker aligns with the prospect of moving these categories of crimes from the public realm to be a personal right (state's right to victim's right). Therefore, the Egyptian legislator has the option to extend reconciliation/amicable settlement to include deliberate homicide.[153] It should be noted that modern Egyptian history highlights that until recently, the reconciliation traditions in murder cases were mainly solved among the victim's family and the offender's family without any governmental intervention.[154] This does not mean that the government does not have the right to punish those who commit deliberate homicide. However, the Egyptian legislature should consider the Egyptian community's philosophy in pardoning and making reconciliation as a possibility for crimes against the public.[155]

[152] *Crim. Pro. Code*, art.18(a).
[153] *See generally* Charles Brower and Jeremy Sharpe, *International Arbitration and the Islamic World*: *The Third Phase*, 97 AM. J. INT'L L.3, 643–656 (2003).
[154] *Id*. *See generally* J. Norman D. Anderson, *Law Reform in the Muslim World* (Athlone Press 1976).
[155] *See generally* Cherine Foty, *The Evolution of Arbitration in the Arab World*, Kluwer Arbitration Blog, (July 1, 2015, http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/.

Some Muslim nations adopted this policy (consent of the victim's family) without distinction between permitted murder and manslaughter.[156] In other words, the legislature should give the judge the authority to allow for reconciliation between the disputant parties (accused and the victim's family), so that will drop the administration of death penalty. Most of the Muslim nations have a legal provision for blood money as a penalty, so that the accused can pay compensation with consent (approve to waive the death sentence) from the victim's family. The Egyptian criminal law does allow for some monetary compensation to the victim's family even if no blood money right is established by filing a civil lawsuit.[157] One of the most crucial lessons that the Egyptian legislature should learn from Islamic law is the endless evolution of its rules, based on the community needs and public welfare (common good). Although *Sharie*'*a* law specifies capital punishment is exclusively for murders – as in some states in America – under the philosophy of revenge and retaliation that obligated societies back then to kill the accused only when he killed the victim, i.e. a *soul for soul*.[158] Moderate Muslim scholars understood the *Sharie*'*a maqasid*, its punishment's policy and hence, they began to develop legal theories responding to

[156] *See* UAE Criminal Procedural Code Law No.35 of 1992, art. 20, Saudi Arabia Criminal Procedural Law [Royal Decree No. M/39], art. 23, (2); Sudanese Code of Criminal Procedure of 2003, art. 264, 276; Kuwait Criminal Procedural Law No. 17 of 1960, art. 240, 241 (discussing the opinion of the victim's family in deliberate murder).

[157] Bassiouni, *supra* note 7. It should be noted that modern Muslim scholars argued that the literal concept of "family" should be interpreted to mean "the state." If the accused or his family are unable to pay the blood money to the victim's family, the government is obliged to do so. If the Egyptian law consider a bill on blood money rules, it should include responses to quires as, what amount (directly or by installments)? when is the family or the government enforced to pay? Shall the state oblige the accused to work to pay back the amount and that his family to accept it and waive the death penalty? *See generally*, *e.g.*, John F. Manning, *Second-Generation Textualism*, 98 CALI. L. REV. 1287 (2010) (outlining the tenets of old and new, or second-generation, textualism); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420-21 (2005) (same).

[158] During this time, the victim's tribe used to kill tens of people to retaliate for killing one of its members, then the other tribe countered this revenge with another, that led to endless wars among tribes for decades. The *Qur*'*an* obliges individuals to adopt retaliation policy, enforcing the sanction only against the accused not to anybody else (punishment personality), considering that pre-Islamic societies did not recognize the principle of equality of punishment. The *Qur*'*an* says "O you who have believed, prescribed for you is legal retribution for those murdered – the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct" and "And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him." Qur'an, 1:178 & 5:45.

the society's evolving needs.[159] Comparing the Egyptian criminal rules *status quo* on the death penalty with the situation a hundred years ago demonstrates that the current state is more harsh and this sentence should be restored to be coherent with the current changes of the international human rights law.[160]

VI. CONCLUSION: GRADUAL REFORM AND MOVING FORWARD

The contemporary catastrophic application of the death penalty in the Egyptian criminal justice system entirely contradicts and misuse both the origins of the codified legal system, the modern evolution of the Constitution, and Islamic law in sentencing. Capital punishment is irreversible and irrevocable; errors occur, execution is the worst, and the risk of executing an innocent person can never be eliminated. Since 1973, for instance, more than 160 prisoners sent to death row in the United States have shortly been exonerated or freed from death row on innocence grounds.[161] Others have been executed despite grave suspicions about their guilt.

It does not deter crime. Nations – with skewed justice systems – who implement the death penalty frequently cite that the death penalty deters individuals from committing criminal acts. This argument has been constantly disputed, and there is no evidence that this sentence is any more efficient in reducing criminality than life imprisonment. In several situations, individuals were executed after being convicted in utterly unfair trials, based on torture-tainted evidence and with

[159] Jasser Auda, *Maqasid Al-shariah as Philosophy of Islamic Law*: *A Systems Approach*, (London: International Institute of Islamic Thought, 2008). For instance, in Islamic criminal context, the victim's consent; witnesses' terms; the offender's confession; the blood money right; judicial independence; the doubt maxim just to name, has evolved.
[160] Rabb, *supra* note 97, at 41-60, *supra*, note 98, at 1299-1351. Bassiouni, *supra* note 7, at 109-123. *See*, *e.g.*, Wael Hallaq, *An Introduction to Islamic Law* (Cambridge 2009); Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton 2008). Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge 2005).
[161] *See generally* John Quigley & S. Adele Shank, *Death Row as a Violation of Human Rights*: *Is it Illegal to Extradite to Virginia*? 30 VA. J. INT'L L. 241 (1989); Christine Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition*: *Opening Pandora's Box*? 39 INT'L & COMP. L. Q. 757 (1990); Colin Warbrick, *Coherence and the European Court of Human Rights*: *The Adjudicative Background to the Soering Case*, 11 MICH. J. INT'L L. 1073 (1990).

improper legal representation.[162] In some countries, death penalties are inflicted as the mandatory punishment for certain crimes, meaning that judges are not able to consider the crime's circumstances or of the defendant before sentencing. Capital punishment is discriminatory. Its weight is disproportionally carried by those with less advantaged socio-economic backgrounds or belonging to a racial, ethnic, or religious minority. This involves, for instance, having limited access to legal representation, or being at more disadvantage in their familiarity of the criminal justice system. It is used as a political tool by some countries to punish political opponents.

The evolution of international and criminal law(s) is moving toward abolishing the death penalty. Global movements have recently intended to limit or suspend the use of the death penalty, and decline the number of crimes punishable by it. UN Security Council Resolutions along with the Rome Statute of the International Criminal Court (ICC) that established international criminal tribunals did not cite the death penalty in sentencing, despite the seriousness of the crimes in many cases (*e.g.*, Former Yugoslavia or Rwanda).[163] In June 1998, a European Union policy – along with universal and regional protocols – was adopted in conformity with the E.U.'s ambitions to abolish the death penalty worldwide and require that countries in which it is still applied gradually decline its cruel use, as it violates the right to life as a fundamental right. Vague legal provisions on the death penalty are deeply concerning and represent a serious threat for reform. History has

[162] For further details, *see*, *e.g.*, *Report of the Human Rights Committee*, *Kindler v. Canada* (No. 470/1991), § 15.2; *UN Human Rights Committee* (UN-HRCee), *Geneva & New York, Extradition to the United States to Face the Possible Imposition of the Death Penalty Not Considered to Violate the* CCPR/*Cox v. Canada*, 15 HUM. RTS. L. J. 410 (1994). *See*, *e.g.*, (*in the United States*) *Gomez v. U.S.- Dist. Ct. for the N. Dist. of Cal*., 503 U.S. 653, 654-59 (1992) (Stevens, J., dissenting) (discussing view of United States courts on this question).

[163] *See generally* Edward F. Sherman, Jr., *Comment, The US. Death Penalty Reservation to the International Covenant on Civil and Political Rights*: *Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 69-93 (1994); David P. Stewart, *US. Ratification of the Covenant on Civil and Political Rights*: *The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L. J. 77, 77-83 (1993). *Extrajudicial, Summary or Arbitrary Executions*: *Report of the Special Rapporteur*, U.N. ESCOR, Comm'n on Hum. Rts., 53d Sess., Agenda Item 10, § 79, at 22, U.N. Doc. E/CN.4/1997/60 (1996). John M. Goshko, *Helms Calls Death Row Probe* "Absurd U.N. Charade"; *Senate Foreign Affairs Chief Demands Explanation of Rights Investigation from U.S. Envoy*, THE WASH. POST, Oct. 8, 1997, at A07.

proven this often does not last very long. The extreme use of this penalty encourages more violence, and hence, it is highly recommended that government policy and its lawmakers should investigate other legal and jurisprudential alternatives that would allow for the death penalty's very narrow use, and perhaps leading to its entire abolition. As well as maintaining the criminal's human dignity, giving them a chance to prove innocence or to change their conduct, and become a productive community member.

Due to certain Muslim government's position on the death penalty, the global campaign claims that *Sharie*'*a* law is an obstacle to reform the death penalty. Indeed, using the death penalty improperly in these nations – with the alleged religious claims – led many to believe that Islamic law is the major hurdle to reform this sentence. The international call for the abolition or restriction of the death penalty in Muslim nations is neither an easy call to be tolerated, nor welcomed, due to cultural, historical, and religious factors associated with these communities. However, if the call for reform is based on accurate divine messages and moderate interpretations, it will be more successful. Islamic law neither calls for absolute abolition nor absolute retention, it takes a middle ground between both. In other words, before urging the victim's family to pardon, forgive, and waive the death penalty, Islamic law consider first the victim's right of life that would be deprived by the conviction, and then offer them (or their family) either to keep it or approve (waive) it. Blocking individuals from the right to decide whether to forgive or not would result in reform failure. This philosophy seems to be consistent with both the Egyptian Constitution and the forgiveness environment, thus, enough to support the reform movement.

Human rights organizations must consider that moderate Muslim scholars must take the first step in the reform process. They should engage with Islamic law scholars and religious institutions, because they have the power to convince the Egyptian – legal – community, of the

necessity for reforming the death penalty. It is a great shared responsibility among legal professionals (scholars, activists, judges, practitioners, law professors); however, the Egyptian legislature bears the biggest share of that duty; to raise legal awareness about the death penalty. Middle Eastern communities needs to understand that the current *status quo* of capital punishment is in contradiction with the general principles of Islamic law, especially of the due process in sentencing, and that reform is a religious duty. The history of Islamic philosophies of doubt discloses how fundamental social political and institutional frameworks were to Muslim scholars' structures of Islamic law in this ostensibly *textualist* legal tradition. Muslim jurists established a textual doctrine of doubt in response to the eleventh-century political context of extreme state violence that convoyed the breakup of the empire and weakening of institutional constructions for which they sought to systematize the law. These *Fuqaha*'(scholars) managed to convert a judicial practice articulating a preference for recognizing doubt to evade dubious punishments into an initial text requiring it. The growth of the Islamic policy of doubt, and its alteration from a practice-based canon into a textual rule of extensive scope, reveals the close link between textual interpretation, social context, and institutional legitimacy in old-fashioned classical Islamic law and society. In the end, Islamic criminal law and penal policy was less about what the "text" said, and more about how Muslim scholars assumed institutional authority to dynamically construct Islamic law when challenging innumerable contexts about which the text did not say much. Eastern and Western communities should understand that Islamic *Sharie*'*a* law plays no role within the abusive use of capital punishment, but by those in power, as they must be aware of "*[a]nd whoever saves one – it is as if he had saved mankind entirely*." *Qur'an* [5:32].

WHOSE SEA IS IT ANYWAY?: AN ANALYSIS OF THE PERMANENT COURT OF ARBITRATION'S SOUTH CHINA SEA ARBITRATION DECISION

James Drawz*

Beginning in 2014 the People's Republic of China ("China") began to convert several features in the South China Sea into artificial islands. Two years later the Philippines and China engaged in a standoff near the Second Scarborough Shoal resulting in the Philippines withdrawing from the shoal. However, the Philippines did not take this withdrawal lying down. Instead they invoked the arbitration proceedings under the United Nations Convention on the Law of the Sea ("UNCLOS") and took China to arbitration. This arbitration would lead to the creation of persuasive case law which elaborated the distinction between and island and a rock under Article 121 of the UNCLOS and find that China was in violation of the UNCLOS. However, China remains undeterred in its mission to expand its influence in the South China Sea. This article will propose one novel solution to this problem, the resurrection of the Southeast Asia Treaty Organization.

I. INTRODUCTION

On April 8th, 2012 a group of Chinese fishermen anchored off the Second Scarborough Shoal were spotted by the Philippines' aircraft.[164] The Philippines' government responded by sending its own vessel, the BRP *Gregorio del Pilar*, to detain the Chinese fishermen.[165] China, in turn, dispatched two unarmed China Marine Surveillance ships to assist the Chinese fishermen, resulting in a standoff at the Second Scarborough Shoal's mouth.[166] Neither party was willing to be the first to withdraw from the shoal after initial negotiations in April 2012 to deescalate the situation failed.[167]

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[164] Michael Green, et al., *Counter-Coercion Series: Scarborough Shoal Standoff*, ASIA MARITIME TRANSPARENCY INSTITUTE (May 22, 2017), https://amti.csis.org/counter-co-scarborough-standoff/.

[165] *Id*.

[166] *Id.*

[167] *Id*.

With this lack of movement, the Philippines called on both the Association of Southeast Asian Nations ("ASEAN") and the United States. ASEAN was for the first time unable to issue a joint statement on confrontation.[168] The United States made vague reassurances of its mutual defense treaty with the Philippines.[169] In response, China threatened escalation, harassed the Philippines fishing vessels, and placed an import ban on the Philippines' fruit.[170] After nearly two months of tense confrontation, backchannel negotiations, and pressure from the United States, the Philippines withdrew its remaining two vessels from the shoal.[171] China, on the other hand, maintained its presence on the shoal and denied that any negotiations took place.[172] The nearly three-month long confrontation resulted in the Philippines initiating arbitration proceedings under the UNCLOS.[173]

Section II of this paper will discuss the background of the dispute in the South China Sea.[174] Section III will discuss the arguments raised and the conclusion of the Permanent Court of Arbitration ("PCA") on its Award of Jurisdiction and Admissibility.[175] Section IV will discuss the arguments raised and the PCA's Award, concluding with the argument that the PCA ruled correctly and in doing so added significant persuasive case law to the law of the sea.[176] Section V. will discuss how Southeast Asian States can protect themselves from further encroachment from China by resurrecting the Southeast Asia Treaty Organization.[177]

[168] *Asean Nations fail to reach agreement on South China Sea*, British Broadcasting Corporation, BBC, (July 13, 2012) https://www.bbc.com/news/world-asia-18825148.
[169] Green, *supra* note 1.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] See *Infra* Section II
[175] See *Infra* Section III
[176] See *Infra* Section IV.
[177] See *Infra* Section V.

II. THE BACKGROUND OF THE DISPUTE IN THE SOUTH CHINA SEA

China bases its claims to nearly 90 percent of the South China Sea on the nine-dash line.[178] At the turn of the 20th century, nationalist groups began to form in southeastern China, one of which was the Guangdong Self-Government Society.[179] The Self-Government Society collected travelers' testimony and oral history in an effort to prove that Pratas Shoal was "historically Chinese."[180] Under the Self-Government Society's pressure, the Qing Dynasty bought out a Japanese guano mining operation on Pratas Shoal, marking as one author put it "a key turning point in China's awaking interests over the South China Sea."[181] In this vein of rising nationalism, the nine-dash line first appeared on Hu Jinje's private map; Hu Jinje was a private cartographer.[182] The next time the nine-dash line appeared was in 1935 on the Republic of China's Land and Water Maps Inspection Committee of 1935, although this version of the nine-dash line only included the Pratas and Paracel Islands.[183] Based on Hu's map, Bai Meichu, the founder of the China Geographical Society, created the U-shaped line which formed the basis for the nine-dash line.[184] This version of the U-shaped line was the one that was published by the Republic of China in 1948, although this version contained eleven dashes.[185] Two dashes were removed from the Gulf of Tonkin based on an agreement between China and Vietnam, which was reached in 2000.[186] Thus, when viewing the nine-dash line, the specter of the "Century of

[178] Hannah Beech, Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?, TIME (July 19, 2016), https://time.com/4412191/nine-dash-line-9-south-china-sea/.
[179] Christopher Rossi, *Treaty of Tordesillas Syndrome: Sovereignty ad Absurdum and the South China Sea*, 50 CORNELL INT'L L.J. 231, 256 (2017).
[180] *Id*.
[181] *Id*.
[182] Rossi at 256.
[183] *Id*.
[184] *Id*. at 257.
[185] *Id*.
[186] *Id*.

Humiliation" cannot be overlooked.[187] It is through this lens that China has sought to assert itself after over a century of colonialization by seeking to establish its claim to historic rights in the South China Sea.

To justify its use of the nine-dash line, China has used a historical narrative. China cites various explorations carried out during a myriad of dynasties, including the Zhou (770-256 BCE), Qin (221-206 BCE), Han (206 BCE-220 CE), Tang (618-907 CE), and Song (960-1279 CE) dynasties.[188] China further uses the legendary seven voyages of Admiral Zheng He, which all took place in the South China Sea.[189] During these voyages, Zheng He charted the South China Sea, including the Spratly Islands, and indeed passed through them.[190] China claims the nine-dash line was not an attempt to generate new claims to nearly the entire South China Sea and rather the nine-dash line codified pre-existing rights.[191] In an effort to bolster their claim, China also insists that much of the Spratly Islands constitute a traditional fishing grounds for Chinese fishermen.[192] By looking to its past own historic exploration and exploitation, China cloaked its use of the nine-dash line under a historical narrative.

Over recent years, China aggressively converted many features in the South China Sea into artificial islands. In the Paracel Islands, China has established 20 outposts while in the Spratly Islands; China established seven.[193] The Asia Maritime Transparency Initiative noted

[187] *Id*. at 239.
[188] *Id.* at 259-60.
[189] *Id*. at 260.
[190] *Id*. at 260-61.
[191] Xu Hong, Director General, Department of Treaty and Law, Briefing by Xu Hong at the International Press Center of the Ministry of Foreign Affairs (May 12, 2016), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201605/t20160519_678521.html.
[192] Government of the People's Republic of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* Pt. 11 (4) (Dec. 7, 2014). [hereinafter Position Paper].
[193] China Island Tracker, https://amti.csis.org/island-tracker/china/ (last visited May 6, 2021).

"[s]ince 2013, China has engaged in unprecedented dredging and artificial island-building in the Spratlys, creating 3,200 acres of new land, along with a substantial expansion of its presence in the Paracels."[194]

One of the reasons for China's intense building campaign is its increased blue water naval capabilities. Their campaign is in line with China's new focus on the South China Sea.[195] China's is emerging as a growing maritime power, sporting today the largest navy with 360 battle force ships.[196] Many of these 360 battle force ships are designed to excel in the South China Sea's shallow waters.[197] One magazine, owned by the China State Shipbuilding Corporation, a supplier of the People's Liberation Army Navy, stated that "[i]slands and reefs in South China Sea have unique advantages in safeguarding national sovereignty and maintaining a military presence in the open sea[.]"[198] This shows that China's actions in the South China Sea, particularly its artificial island buildup, are part of China's strategic plan to increase its ability to project its power on the high seas, specifically in the South China Sea. China has sought to legitimize its claim to the South China Sea by using the nine-dash line in an effort to increase its control over the South China Sea, a control that China seeks because of China's increased naval capacity.

III. THE PERMANENT COURT OF ARBITRATION'S DECISION ON JURISDICTION

[194] *Id.*
[195] H.I. Sutton, Chinese Navy Expanding Bases Near South China Sea, UNITED STATES NAVAL INSTITUTE NEWS, (Dec. 29, 2020), https://news.usni.org/2020/12/29/chinese-navy-expanding-bases-near-south-china-sea.
[196] Brad Lendon, *China has built the world's largest navy. Now what's Beijing going to do with it?*, CNN (last updated Mar. 5, 2021). https://www.cnn.com/2021/03/05/china/china-world-biggest-navy-intl-hnk-ml-dst/index.html.
[197] *Id.*
[198] Brad Lendon, *China has built the world's largest navy. Now what's Beijing going to do with it?*, CNN (last updated Mar. 5, 2021). https://www.cnn.com/2021/03/05/china/china-world-biggest-navy-intl-hnk-ml-dst/index.html.

One of the cardinal rules of customary international law when determining maritime rights is *la terre domine la mer*, meaning the land dominates the sea.[199] And what happens when there is a disagreement over the nature of the dispute? This matter was the exact situation facing the Permanent Court of Arbitration Tribunal ("Tribunal") when it rendered its decision on jurisdiction. On the one hand, China disputed over the sovereignty of maritime features in the South China Sea.[200] On the other hand, the Philippines argued that disputes over sovereignty of maritime features had no bearing on the Tribunal's jurisdiction because "[o]ne of [the Philippines'] submissions require the tribunal to express any view at all as to the extent of China's sovereignty over land territory, or that of any other state."[201] Weighing these two conflicting narratives, the Tribunal correctly determined that it had jurisdiction over seven of the Philippines' submissions to the Tribunal.[202]

A. CHINA'S ATTEMPT TO AVOID JURISDICTION

China's refusal to participate in the arbitration proceedings stems from its assertion that the dispute concerns sovereignty over the features of the South China Sea, and, in the alternative, the dispute falls within the scope of China's Article 298 reservation. Article 298 of the UNCLOS permits States to declare reservations from section two of the UNCLOS, which governs dispute resolutions.[203] Article 298(1)(a)(i) limits the reservations to disputes relating to sea boundary's

[199] Bing Bing Jiaa, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 6-7 (2016), https://iilj.org/wp-content/uploads/2016/09/JiaIILJColloq2015.pdf.
[200] Position Paper, *supra* note 22, at ¶ 3.
[201] *The Republic of Philippines v. The People's Republic of China*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶. 141 (Oct. 29, 2015). https://pcacases.com/web/sendAttach/2579 [hereinafter Award on Jurisdiction].
[202] *The Republic of Philippines v. The People's Republic of China* at ¶ 413.
[203] United Nations Convention on the Law of the Sea art. 298, Dec. 10, 1982, 1833 U.N.T.S. pg. 3 [hereinafter UNCLOS].

delimitations, historic bays, or titles.[204] China deposited one such reservation, opting out of the UNCLOS dispute resolution.[205] Based on both its reservation and internal laws, China asserted three reasons why the dispute fell outside the jurisdiction of the Tribunal.

China's first argument was that it is impossible to determine maritime claims without first determining sovereignty over the maritime feature.[206] China further argued that:

> [O]nly after a State's sovereignty over a maritime feature has been determined and the State has made maritime claims in respect thereof, could there arise a dispute concerning the interpretation or application of the Convention, if another State questions the compatibility of those claims with the Convention or makes overlapping claims.[207]

China then went further, stating if the maritime sovereignty of the feature was undecided, then there could not be a "concrete and real dispute for arbitration."[208] China went so far as to state that ". . . the Philippines is putting the cart before the horse," regarding the Philippines' arguments that maritime entitlements may be dictated without first determining the issue of sovereignty.[209] In short, China argued that there must first be a determination of sovereignty over the features in the South China Sea before determining maritime rights.

China next argued that determining whether low tide elevations can be appropriated is a question of sovereignty, not one of treaty interpretation.[210] China based this argument on two International Court of Justice (ICJ) cases, *Qatar v Bahrain* and *Nicaragua v. Columbia.*[211] China claimed that *Qatar v. Bahrain* supported its position based on the following statement:

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[204] *Id.*
[205] UNCLOS, China's Declaration under article 298. https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.
[206] Position Paper, *supra* note 22, at ¶ 16.
[207] *Id.* at ¶ 17.
[208] Position Paper, *supra* note 22, at ¶ 17.
[209] *Id.* at ¶ 18.
[210] *Id.* at ¶ 25.
[211] *Id.*

"[i]nternational treaty law is silent on the question whether low-tide elevations can be considered to be 'territory'. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations."[212] At the same time, China criticized the *Nicaragua v. Columbia* decision because it stated that "low-tide elevations cannot be appropriated."[213] China criticized the latter as having no basis in international law while asserting that the former supported its position that low tide's elevations may be appropriated on the basis that "International treaty law" included the UNCLOS.[214] In short, China argued that, in addition to requiring a determination of sovereignty over features, determining whether appropriation of low tide features was valid is also a question of sovereignty.

And finally, responding to actions by Chinese vessels in the disputed waters, China claimed that the legality of such actions "rests both on the sovereignty over relevant maritime features and the maritime rights derived therefrom."[215] China insisted that the Philippines' claims "must be that the spatial extent of the Philippines' maritime jurisdiction is defined and undisputed, and that China's actions have encroached upon such defined areas."[216] China further argued that the delimitation of maritime rights had not been settled. As such, until China and the Philippines had settled the issue of sovereignty over the disputed area, the Philippines' claim concerning the actions of Chinese vessels could not be entertained.[217]

[212] *Id.*
[213] *Id.* at ¶ 25.
[214] *Id.*
[215] Position Paper, *supra* note 22, at ¶ 26.
[216] *Id.* at ¶ 27.
[217] *Id.*

In the alternative, China also argued that even if the subject matter fell within the UNCLOS dispute resolution mechanisms, the Philippines' claims were an integral part of maritime delimitation between two States.[218] As such, the Philippines' claims are subject to China's Article 298 reservation made in 2006.[219] China argued that the legal issues presented by the Philippines were "part and parcel of maritime delimitation."[220] China further claimed that if the Philippines were allowed to split maritime delimitation from the dispute it would lead to the eventual destruction of the integrity, indivisibility of maritime delimitation, and "all relevant factors must be taken into account."[221] Accordingly, China argued the dispute was over maritime delimitation, thus, falling within its Article 298 reservation.

B. THE PHILIPPINE'S ARGUMENT IN SUPPORT OF JURISDICTION

On the other hand, the Philippines made a plethora of arguments in favor of establishing the jurisdiction of the Tribunal. The Philippines argued that the arbitration fell under the jurisdiction of the Tribunal because the Philippines was not asking the Tribunal to make any determination about China's, or for that matter any States', sovereignty over land.[222] More importantly, the Philippines argued "a dispute may have different elements," which does not "preclude some elements from falling within jurisdiction."[223] In support of that argument, the Philippines cited multiple cases that led to the conclusion an international tribunal may consider disputes even when other parts of the dispute may lay outside the tribunal's jurisdiction.[224] As such, the Philippines sought to detangle the issue of sovereignty from maritime rights.

[218] *Id.* at ¶ 75.
[219] *Id.* at ¶ 74-75.
[220] *Id.* at ¶ 66.
[221] *Id.* at ¶ 68. (Quoting art. 38 of the Statute of the International Court of Justice).
[222] Award on Jurisdiction, *supra* note 38, at ¶ 141.
[223] *Id.* at ¶ 142. (Quoting Jurisdictional Hearing Tr. (Day 1), pg. 69).
[224] *Id.*

The Philippines put forth the argument that there is no need to determine sovereignty over a feature before determining whether that feature generates any maritime rights.[225] The Philippines, in effect, argued that under the UNCLOS, a rock under Article 121 is a rock not just for one state, but for every state.[226] That is, one State's rock cannot be another state's island under Article 121. Thus, the Tribunal need only address the issue of sovereignty if the feature is, in fact, an island under Article 121; and thereby, capable of generating maritime rights under the UNCLOS. The Philippines further asserted that it was not attempting to cherry-pick features that would be more likely be classified as rocks rather than islands under Article 121.[227] To demonstrate, if the largest feature in the South China Sea was a rock, and thus, incapable of generating any claims under UNCLOS, then the rest of the nearly 750 features would likewise be incapable of generating any claims.[228] The final argument, in support of this, targeted China's assertion that low tide elevations is wholly within the Tribunal's jurisdiction as low tide elevations, are governed by Article 13 of the UNCLOS.[229] The Philippines sought to detangle the issue of sovereignty from the issue of whether features generated any maritime rights. However, the Philippines went further, arguing that the Philippines' claims were premised on China's maximum entitlements under the UNCLOS.

Additionally, the Philippines rejected China's characterization of the dispute as a maritime delimitation.[230] Consistent with its claim that maritime rights can be determined without determining the sovereignty of the features, the Philippines claimed that maritime delimitation "does not arise unless and until it is determined that there are overlapping maritime

[225] *Id.* at ¶ 144.
[226] *See Id.*
[227] *Id*. ¶144.
[228] Award on Jurisdiction, *supra* note 38, at ¶ 144. (Quoting Jurisdictional Hearing Tr. (Day 1) pg. 89).
[229] *Id.* (Quoting Jurisdictional Hearing Tr. (Day 1) pg. 95).
[230] *Id.* ¶ 146.

entitlements."[231] In making this argument, the Philippines relied on *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* and *Territorial and Maritime Dispute (Nicaragua v. Colombia),* where the courts first determined the existence of overlapping claims before turning towards the issue of delimitation.[232] In conclusion, the Philippines stated "[t]he fact that resolution of delimitation issues may require the prior resolution of entitlement issues does not mean that entitlement issues are an integral part of the delimitation process itself."[233] The Philippines' numerous arguments sought to detangle the issue of maritime entitlements from the issue of maritime delimitation, thereby, passing China's Article 298 reservation—arguments the Tribunal found favorable.

The Philippines cited *U.S. v Iran,* in which Iran attempted to claim that the ICJ could not consider the issue concerning Iran's taking of internationally protected personnel.[234] Yet, the ICJ rejected their proposition stating "[t]he Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[235] The ICJ came to a similar conclusion in *Military and Paramilitary Activities in and against Nicaragua*. There the ICJ in part citing *United States Diplomatic and Consular Staff in Tehran,* rejected the United States' argument that Nicaragua must first seek settlement of its dispute with the United States through the Contrado Process.[236] The ICJ found "the existence of active negotiations in which both parties might be involved should not prevent . . . the Court from exercising their separate

[231] *Id.* (Quoting Jurisdictional Hearing Tr. (Day 2) pg. 44).
[232] *Id.*
[233] *Id.* (Quoting Jurisdictional Hearing Tr. (Day 2) pg. 46).
[234] United States Diplomatic and Consular Staff in Iran, (U.S. v. Iran), Judgment, 1980 I.C.J. 64 ¶¶ 35-36 (May 24).
[235] *Id.* at ¶ 36.
[236] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 70, ¶¶ 105-106 (Nov. 26).

functions under . . . the Statute of the Court."[237] Given these two decisions by the ICJ, the Tribunal properly determined that international tribunals are capable of addressing disputes, that are part of other disputes or that have other aspects, which cannot be addressed by the court.

In the second prong of their argument, the Philippines correctly asserted that maritime delimitation "does not arise unless and until it is determined that there are overlapping maritime entitlements."[238] In *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, the court stated, "the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries."[239] It further stated "[t]here is nothing in the Convention or in the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf constitutes an impediment to the performance by the Commission of its functions."[240] In other words, the Tribunal may first establish whether there are previous overlapping claims addressing the issue of maritime delimitation. The ICJ came to a similar conclusion in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, where the ICJ initially declined to follow Nicaragua's proposal concerning an island grouping before determining whether those islands were first subject to overlapping claims.[241]

Therefore, when there is a dispute over maritime claims, the first issue to decide is the extent of the claims by the relevant parties. Only after the extent of the claims are established can

[237] *Id*.
[238] Award on Jurisdiction, *supra* note 38, at ¶ 146. (Quoting Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 70, ¶¶ 105-106 (Nov. 26).)
[239] Delimitation of the Maritime Boundary Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Judgment, 2012 I.T.L.O.S 16, ¶ 376 (Mar. 14).
[240] *Id.* at ¶ 377.
[241] Territorial and Maritime Dispute (Nicar. v. Colum.) Judgment, 2012 I.C.J. 124, ¶ 169 (Nov. 19).

there be a determination of whether or not those claims overlap. Thus, under the UNCLOS, the Tribunal was correct determining that it held jurisdiction over the Philippines' submissions because the Philippines was not asking the Tribunal to make a maritime delimitation decision. Rather, it requested the Tribunal to first determine whether there were in fact any overlapping claims. As such, the Tribunal correctly limited its jurisdiction to a decision based on the premise that parts of the South China Sea are part of the Philippines' exclusive economic zone ("EEZ") or continental shelf only if first, the Tribunal finds that China does not have any overlapping claims.[242]

C. THE TRIBUNAL'S DECISION

Fortunately for the Philippines, the Tribunal determined that the dispute was not over sovereignty. The Tribunal based its conclusion on the limited claims the Philippines submitted to the Tribunal.[243] The Tribunal concluded that its exercise of jurisdiction would have no bearing on China's claim to sovereignty over the Spratly Islands.[244]Although sovereignty over the features may be an issue between China and the Philippines, it does not follow that the present arbitration was a dispute over the sovereignty of the features.[245]

The Tribunal stated only two arguments could persuade it that the Philippine's claims related to sovereignty. The first argument is "the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly."[246] The Tribunal found this was not the case because the Philippines' claims were based on the

[242] Award on Jurisdiction, *supra* note 38, at ¶ 157.
[243] Award on Jurisdiction, *supra* note 38, at ¶ 153.
[244] *Id.*
[245] *Id.* at ¶ 152.
[246] *Id*. at ¶ 153.

assumption that China's claims to sovereignty over the features was entirely correct.[247] The second argument was that the Philippines was attempting to use the arbitration as a means to extend its own claims to sovereignty over the features.[248] The Tribunal correctly determined that this was not the case, since any decision would not assist in the Philippines claims to sovereignty, and the Philippines had repeatedly requested a narrow scope when reviewing its submissions.[249] The Tribunal correctly determined that the Philippines submissions did not implicate sovereignty over the features in the South China Sea, but this is not the only hurdle the Philippines was required to overcome.

The next issue the Philippines faced in establishing jurisdiction was distinguishing two disputes from one another regarding maritime delimitation and of the other about maritime entitlements. The Tribunal also agreed with the Philippines that disputes over the existence of maritime entitlements were distinct from disputes over delimitation of zones that were subject to overlapping entitlements.[250] The Tribunal distinguished the conflict between these two types of disputes by stating:

> A maritime boundary may be delimited only between States with opposite or adjacent coasts and overlapping entitlements. In contrast, a dispute over claimed entitlements may exist even without overlap, where—for instance—a State claims maritime zones in an area understood by other States to form part of the high seas or the Area for the purposes of the Convention.[251]

This was the correct characterization of the dispute. China's claims stem from the nine–dash line, which make claims far outside the 200-mile EEZ or continental shelf claims permitted

[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] Award on Jurisdiction, *supra* note 38, at ¶ 156.
[251] *Id.*

by the UNCLOS. Thus, it was a dispute over maritime entitlements rather than maritime boundaries.

The final two obstacles to exercise jurisdiction were Articles 281 and 282 of the UNCLOS. Beginning with Article 281, under the UNCLOS, if there is a dispute as to whether the UNCLOS should be applied or when the parties have agreed to seek settlement of the dispute by other peaceful means, then the Tribunal must look to Article 281.[252] There were a number of statements that could be seen as agreements to seek settlement for the disputes. These include the Declaration of Conduct ("DOC") in the South China Sea,[253] a series of joint statements between China and the Philippines,[254] the Treaty of Amity and Co-operation in Southeast Asia ("Treaty of Amity"),[255] and the Convention on Biological Diversity("CBD").[256] The Tribunal determined, correctly, that none of those statements or agreements precluded the Tribunal's exercise of jurisdiction.[257]

The second final obstacle to jurisdiction is Article 282, which states:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.[258]

[252] UNCLOS, *supra* note 36, at Art. 281.
[253] Award on Jurisdiction, *supra* note 38, at ¶ 198.
[254]Award on Jurisdiction, *supra* note 38, at ¶¶ 231-32.
[255] *Id* at ¶ 252.
[256] *Id* at ¶ 270.
[257] Id. at ¶¶ 229, 251, 269, and 289.
[258] UNCLOS, *supra* note 36, at Art. 282.

The Tribunal found that Article 282, like Article 281, did not apply to the DOC,[259] the Treaty of Amity,[260] nor the CBD.[261] Because the Philippines had limited its claims to maritime entitlements and did not call for an implicit or explicit determination of sovereignty, the Tribunal, correctly, found that it held jurisdiction over the dispute because it did not concern sovereignty and did not fall within China's Article 298 reservation.

IV. THE PERMANENT COURT OF ARBITRATION FINAL AWARD

On July 12, 2016, the Tribunal issued its final award.[262] The award decision contributed significantly to the UNCLOS's interpretation. The most important among these contributions was the distinction that the Tribunal made between historic rights and title.[263] In making this distinction, the Tribunal detangled China's repeated claims to historic title of the South China Sea.[264] In turn, it prevented China from raising its Article 298 reservation that permits reservations concerning historic bays and titles. Another major contribution was the in-depth analysis concerning the Regime of Islands under Article 121.[265] In its award, the Tribunal correctly determined that China's claims to historic rights do not amount to a claim to historic title and that the features in the South China Sea do not constitute islands under Article 121.[266] Therefore, China was unable to generate any claims to territorial waters or an EEZ under the UNCLOS.

[259] Award on Jurisdiction, *supra* note 38, at ¶ 299.
[260] *Id*. at ¶ 307.
[261] *Id*. at ¶¶ 320-21.
[262] The Philippines v. Peoples Republic of China, PCA Case No. 2013-19, Award, at ¶ 1 (July, 12, 2016). [hereinafter Award]
[263] *See*, *infra* Section IV B.
[264] *Id*.
[265] *See infra* Section IV C.
[266] *See infra* Section IV D.

A. CHINA'S POSITION REGARDING THE SOUTH CHINA SEA

One of the major side-effects of China refusing to participate in the arbitration proceedings was that the Tribunal was forced to make determinations on China's stance, which was often ambiguous. In 2009, China sent a verbal note to the UN Secretary General, accompanied by the following map and message:

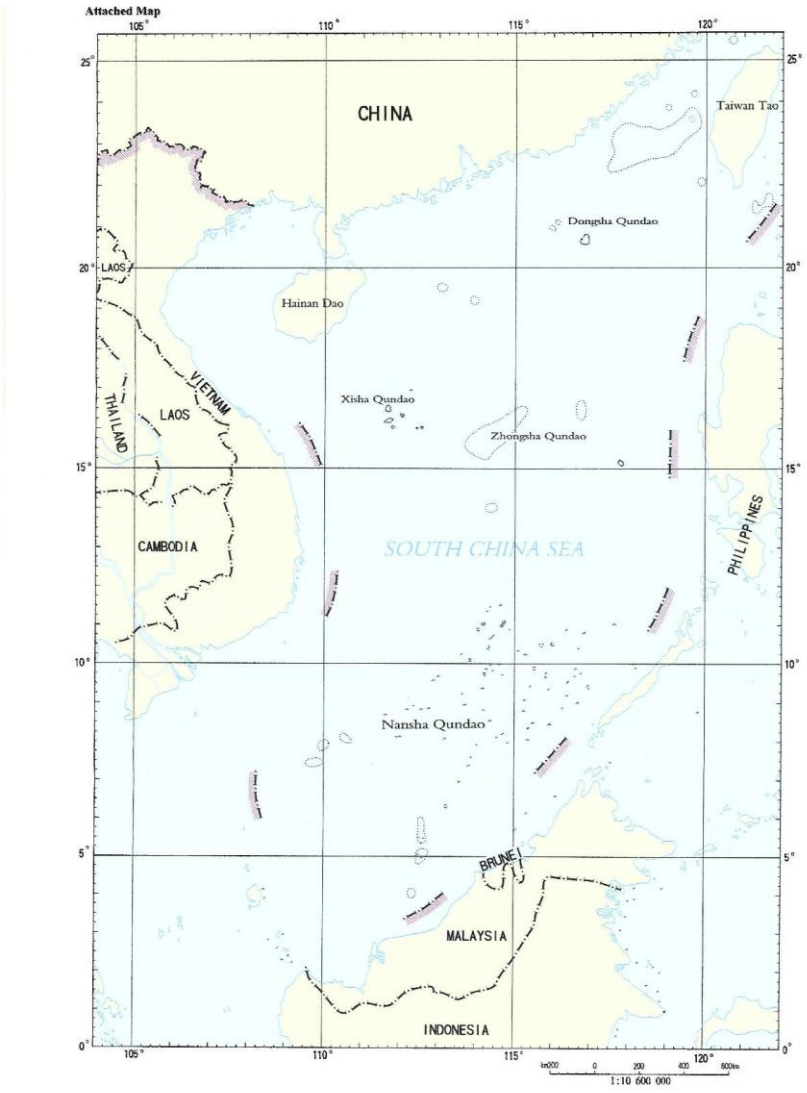
> China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map below). The above position is consistently held by the Chinese Government and is widely known by the international community.[267]

China based that claim on historic rights extensively on a historic narrative.[268]

[267] Permanent Mission of the People's Republic of China, Note Verbale dated May 7, 2009. https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf

[268] *See supra* Section II

Map attached to China's May 7, 2009, Note Verbale



[269]

The natural consequence of claiming rights, which have been formed over the course of history, is that people might ask what those rights are. The basis for China's expansive claims to the South China Sea, which on their face expand past those claims permitted by the UNCLOS,

[269] *See supra* note 100.

led the Tribunal to determine that those claims arose independently of the UNCLOS.[270] The Tribunal was forced to determine the nature of these rights.

The Tribunal listed three instances in which it had determined that China claimed rights that fell outside of the UNCLOS with regards to the South China Sea, and more importantly, were based on the nine-dash line. The first instance was an award of petroleum blocks that were actioned off by the Chinese National Offshore Oil Corporation, parts of which fell outside of the EEZ and continental shelf claims permitted by the UNCLOS.[271] The second instance was China's objection to the Philippines auctioning off petroleum blocks, and it made the following statement "[s]ince ancient times, China has indisputable sovereignty over the Nansha islands and its adjacent waters. The [petroleum block] area is situated in the adjacent waters of the Nansha Islands (Spratlys)."[272] The third instance was China additionally protesting in a Note Verbale regarding the auctioning off of a separate lot of petroleum blocks stating:

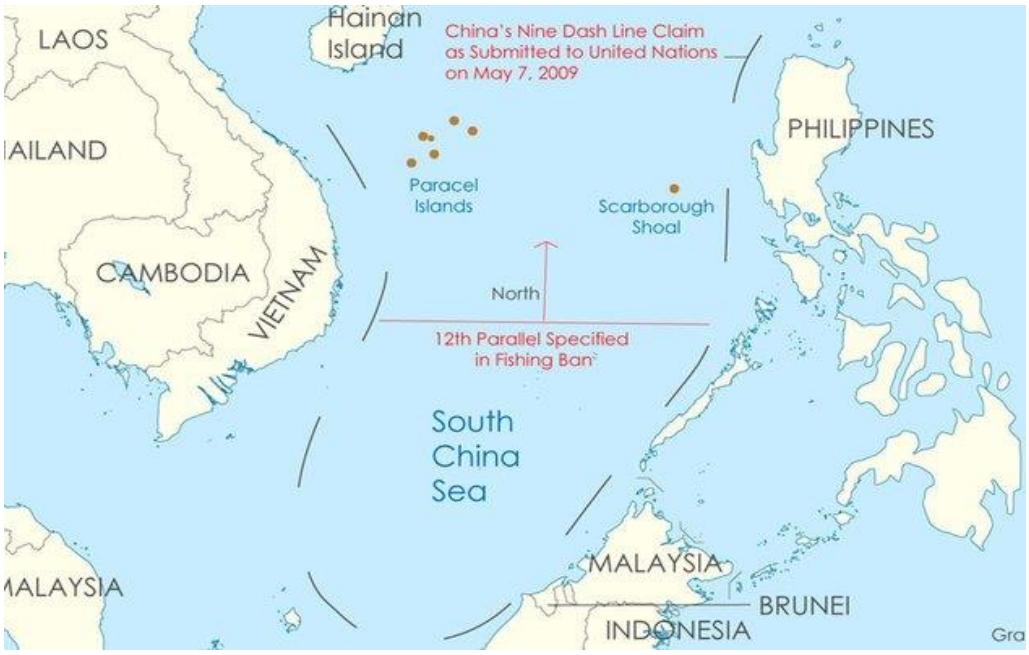
> On 30 June 20l1 at the launching of Fourth Philippine Energy Contracting Round (PECR4), the Department of Energy of the Philippines offered 15 petroleum blocks to local and international companies for exploration and development. Among the aforesaid blocks, AREA 3 and AREA 4 are situated in the waters of which China has historic titles including sovereign rights and jurisdiction.[273]

China's claims were not limited to energy exploration. However, they also included claims to fisheries within the nine-dash line and outside the claims permitted by the UNCLOS. In May 2012, China placed a moratorium on fishing with the following announcement: "All

[270] Award, *supra* note 99, at ¶ 207.
[271] *Id.* at ¶ 208.
[272] *Id.* at ¶ 209. (Quoting Memorandum from the Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (30 July 2010)).
[273] *Id.* (Quoting Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (11) PG-202 (6 July 2011)).

productive activity types, …, shall be prohibited from .... in the South China Sea areas from 12º north latitude up to the 'Common Boundary Line of Fujian-Guangdong Sea Areas' (including the Gulf of Tonkin) under the jurisdiction of the People's Republic of China."[274] China further clarified this by stating that the fishing ban applied "in most parts of the South China Sea . . . including Huangyan Island [Scarborough Shoal]."[275] Further, upon an examination of the 12-degree north latitude, the Tribunal correctly determined that it covered nearly the entire South China Sea.[276]

12th Parallel Fishing Ban in the South China Sea[277]



[274] Fishery Bureau of Nanhai District, Ministry of Agriculture, People's Republic of China, Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space (10 May 2012).
[275] Award, *supra* note 99, at ¶ 211.
[276] *Id.*
[277] *Vietnamese, Philippine Fishermen Protest China's Fishing Ban in the SCS*, VIETNAM NEWS. NET (May 5, 2020). https://www.vietnamnews.net/news/264943059/vietnamese-philippine-fishermen-protest-chinas-fishing-ban-in-scs.

Based on those claims the Tribunal came to the correct determination. That is, the rights China claimed in the South China Sea were those over petroleum resources and fisheries that existed within the nine-dash line and therefore outside the scope of the UNCLOS.[278]

Those claims aside, there was another larger nail-in-the-coffin that defeated China's claim to the South China Sea as a territorial sea. That nail was the freedoms of overflight and navigation. China stated that "[t]he Chinese side respects and safeguards the freedom of navigation and over-flight in the South China Sea to which all countries are entitled under international law . . . . There has been and will be no obstruction to navigation and over-flight freedom in the South China Sea."[279] One of the central tenants surrounding territorial waters is the freedom of navigation and overflight is only allowed under the right of innocent passage, which is codified in the UNCLOS under Article 17.[280] As such, the Tribunal correctly determined that China did not recognize the area within the nine-dash line as a territorial sea by permitting the freedom of navigation and overflight.[281] China cannot, on the one hand, say that the South China Sea is a territorial sea, while, on the other hand, treat it as the high seas.[282] Thus, given China's repeated claims to natural resources within the South China Sea and China's treatment of the South China Sea as an area of the high seas rather than territorial or internal waters, the Tribunal correctly determined that China's claims amounted to claims of historic rights to resources.[283] Because China's claims amounted to historic rights, the Tribunal had to

[278] Award, *supra* note 99, at ¶ 211.
[279] Award, *supra* note 99, at ¶ 212. (Quoting Ministry of Foreign Affairs, People's Republic of China, Vice Foreign Minister Zhang Yesui Makes Stern Representations to US over US Naval Vessel's Entry into Waters near Relevant Islands and Reefs of China's Nansha Islands (27 October 2015)).
[280] UNCLOS, *supra* note 36, at Art. 17.
[281] Award, *supra* note 99, at ¶ 213.
[282] *Id*.
[283] *Id*. at ¶ 214.

decide whether those rights had been signed away by China upon its accession to the UNCLOS.[284]

B. HISTORIC RIGHTS VS. HISTORIC TITLES

To make that determination, the Tribunal had to first determine the significance of the difference between historic rights and titles. The Tribunal correctly determined that "'historic titles' in Article 298(1)(a)(i) of the Convention is accordingly a reference to claims of sovereignty over maritime areas derived from historical circumstances."[285] In reaching that conclusion, the Tribunal relied on the three-factor test first introduced in a memorandum.[286] The three factors are:

> (i) The authority exercised over the area by the State claiming it as "historic waters";
> (ii) The continuity of such exercise of authority; and
> (iii) The attitude of foreign States.[287]

Regarding the first factor, China has only recently attempted to exercise control over the Spratly and Paracel Islands.[288] And while China has only recently begun to exercise control over the Spratly and Paracel Islands, China has consistently done so since it began to exercise its control.[289] However, foreign States surrounding the South China Sea have continued to challenge China's exercise of control, most notably the Philippines, Vietnam, Indonesia, and the United States.[290] Therefore, under this three-factor test it is apparent that China failed to exercise its authority over the contested waters in a consistent manner. Neighboring States, as well as those

[284] Award, *supra* note 99, at ¶ 214.
[285] *Id.* at ¶ 226.
[286] *Juridical Regime of Historic Waters including Historic Bays*, 1962, 2 Y.B. Int'l L. Comm'n 185, U.N. Doc A/CN..4/143 [hereinafter Juridical Regime of Historic Waters].
[287] Award, *supra* note 99 at¶ 222. *See also* Juridical Regime of Historic Waters.
[288] *See supra* Section I.
[289] Award, *supra* note 99 at ¶ 208-13.
[290] Nguen Hing Thao, *South China Sea: US Joins the Battle of Diplomatic Notes*, THE DIPLOMAT (June 10, 2020). https://thediplomat.com/2020/06/south-china-sea-us-joins-the-battle-of-diplomatic-notes/.

far removed from the area, have consistently objected to China's claimed historic title.[291] The fact that China has been consistent with its exercise of authority over the disputed waters does not weigh enough in finding China created a historic title. China has only recently attempted to exercise control, and objections by both near and far States are dispositive to China's claim to historic title.

The detangling of historic rights from historic title has also found support in international case law, most notably the ICJ's opinions in *Qatar v. Bahrain* and *Continental Shelf*.[292] In *Qatar v. Bahrain*, the ICJ noted that historic pearl fishing "seems in any event never to have led to the recognition of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters."[293] While the Court in *Continental Shelf* never addressed the merits of Tunisia and Libya's claims to historic fishing rights, it did treat those rights as separate from the continental shelf regime.[294] As the Tribunal put it "[t]he term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances."[295] Further, historic rights can include sovereignty; however, historic title explicitly refers to "historic sovereignty to land or maritime areas."[296] Thus, under international case law, while not binding, there is ample persuasive evidence that historic rights are not synonymous with historic title.

Reading that distinction between historic rights and title is also consistent with the UNCLOS because historic rights are mentioned nowhere in the UNCLOS; whereas historic title

[291] Nguen Hing Thao, *South China Sea: US Joins the Battle of Diplomatic Notes*, THE DIPLOMAT (June 10, 2020). https://thediplomat.com/2020/06/south-china-sea-us-joins-the-battle-of-diplomatic-notes/.
[292] *See* Award, *supra* note 99, at ¶ 224.
[293] *Id.* (Quoting Qatar v. Bahrain, p. 40 at pp. 112-13, ¶ 236).
[294] *Id.*
[295] *Id.* at ¶ 225.
[296] *Id.*

is mentioned only in Articles 15 and 298.[297] A reading of Article 298 under the Vienna Convention on the Law of Treaties ("VCLT") Article 31[298] calls for a limited reading of historic title. This is because Article 31 of the VCLT states that treaties are to be interpreted according to their context and in light of their object and purpose.[299] The preamble of the UNCLOS states that the object and purpose of the UNCLOS was to create a legal regime to "[. . .] promote peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, [. . .] Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order[. . . .]"[300]

To put historic rights into Article 298 would blow open a hole in the limited reservations allowed under the UNCLOS and permit States to escape their obligations by claiming historic rights. The drafters of the UNCLOS intended for the UNCLOS to have limited reservations with regards to the dispute resolution section.[301] The drafters evidenced the limited number of reservations permitted under Articles 298 and 309, which prohibits any reservations or exceptions unless expressly permitted under the UNCLOS.[302] Further, China specifically protested that exact situation during the drafting of the UNCLOS.[303] During the drafting of the UNCLOS, both the Soviet Union and Japan wished to keep the historic rights to fishing in other States' EEZs, while China "resolutely opposed to any suggestion that coastal States could be obliged to share the resources of the exclusive economic zone with other powers that had

[297] *See* Award, *supra* note 99, at ¶ 226.
[298] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (1969).
[299] *Id*.
[300] UNCLOS, *supra* note 36, at Preamble.
[301] See *Id*. at Arts. 298, 309.
[302] *Id*.
[303] Award, *supra* note 99, at ¶ 251.

historically fished in those waters."[304] As such, the Tribunal correctly decided that historic rights are distinct from historic title under Article 298.

Turning to the application of China's claims, the Tribunal correctly ruled their claims amounted to claims to historic rights rather than historic title. China repeatedly stated it had historic rights within the nine-dash line.[305] While some communications by China have referred to its claims to historic title, the majority of China's communications refer to historic rights.[306] Had China excluded the disputes concerning its actions in the South China Sea, it should have consistently referred to its claims as historic title rather than historic rights. And in referring to its claims as historic rights, the majority of the time, China thwarted its claim to Article 298's reservations. Further, under the three-factor analysis concerning the establishment of historic title discussed previously, China has not met the burden of establishing its claims to historic title rather than historic rights. As such, China's actions and words show that China's claims amount to, "[. . .] a constellation of historic rights short of title[.]"[307] China's actions and repeated statements show that it too had treated its claims as historic rights as opposed to historic title; therefore, the Tribunal correctly determined that China had merely claimed "[. . .] a constellation of historic rights short of title[.]"[308]

Because China only claimed historic rights to the South China Sea, the next issue is whether those historic rights China claims, which include rights in other State's EEZs, survived China's accession to the UNCLOS. In short, they did not, in accord with customary international law and case law on the matter. The most on point decision concerning one State's claimed

[304] Award, *supra* note 99, at ¶ 251
[305] *See Id*. at ¶ 227.
[306] *Id.*
[307] *Id.* at ¶ 229.
[308] *Id.*

maritime rights in another State's EEZ was the *Gulf of Maine* decision.[309] While that case dealt with maritime delimitation, that court rejected the United States' argument that the court should take into account the longstanding use of Georges Bank by American fishermen, when making the delimitation decision.[310] The *Gulf of Maine* decision showed that one State's historic rights do not survive if those historic rights fall within another State's EEZ, as was customary international law at the time.[311] Because China claims an amalgamation of rights to the natural resources within the nine-dash line, those claims were surely abandoned when China acceded to the UNCLOS.

The contradictory caselaw in international law can be properly distinguished from the facts of the arbitration. In *Fisheries Jurisdiction Cases*, Iceland declared a 50-mile exclusive fishing zone.[312] However, the *Fisheries Jurisdiction Cases* were decided in 1974, prior to the ratification of the UNCLOS and reflected the customary international law at that time.[313] Unlike China's current dispute, in the *Fisheries Jurisdiction Cases*, the parties claimed right of access within the 50-mile exclusive fishing zone.[314] However, in this arbitration, China claimed rights to the living and non-living resources in another State's EEZ to the effect of negating the Philippines' rights within their EEZ.[315] A contradictory case is *Eritrea v. Yemen*, which permitted the "t]he traditional fishing regime is not limited to the territorial waters of specified islands' but extended also through the exclusive economic zone of Eritrea and Yemen."[316]

[309] Award, *supra* note 99, at ¶ 256, *see also* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgement, 1984 I.C.J. 246, ¶ 235.
[310] *Id.* at ¶ 256.
[311] *Id.*
[312] *See* Fisheries Jurisdiction (U.K. v. Ice.), Merits, Judgment, ICJ Reports 1974, p. 3 at pp 27-28, ¶ 62.
[313] Award, *supra* note 99, at ¶ 258.
[314] *Id*.
[315] *Id*.
[316] Award, *supra* note 99, at ¶ 259. (Quoting Eritrea v. Yemen, Award of 17 December 1999, 335 RIAA Vol. XXII 361, ¶ 109).

However, that case is easily distinguished as it was not an arbitration conducted under the regime of the UNCLOS. Thus, the applicable law included law contradictory to the UNCLOS.[317] China's claimed rights were signed away by China upon its accession to the UNCLOS because they amounted to claims to historic rights to living and nonliving resources within the nine-dash line.

C. BETWEEN A ROCK AND AN ISLAND

The other important takeaways from the Tribunal's award were the distinction between islands and rocks under Article 121.[318] Article 121 states:

> i. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
> ii. Except as provided in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other and territory.
> iii. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.[319]

It is important to clarify what constitutes an island and what constitutes a rock. because islands are capable of generating territorial seas, contiguous zones, EEZs, and continental shelfs, and there is a plethora of features in the South China Sea. In coming to a definition of a "rock," the Tribunal split Article 121(3) into five subsections.[320] Those subsections are "rocks," "cannot," "sustain," "human habitation," "or," and "economic life of their own."[321] In starting this interpretation, the Tribunal contributed to the distinction between claim generating islands and mere rocks.

[317] *Id.*
[318] See UNCLOS, *supra* note 36, at Art. 121,.
[319] *Id*.
[320] *Id*.
[321] Award*, supra* note 99, at ¶ 478.

The first term the Tribunal attempted to define was "rock." Here, the Tribunal relied on both the dictionary definition of "rock" and the application of that definition in international case law. The Tribunal stated "[t]he dictionary meaning of 'rock' does not confine the term so strictly, and rocks may 'consist of aggregates of minerals . . . and occasionally also organic matter . . . . They vary in hardness, and include soft materials such as clays.'"[322] International case law supports that definition, as the ICJ stated in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, "[i]nternational law defines an island by reference to whether it is 'naturally formed' and whether it is above water at high tide, not by reference to its geological composition . . . The fact that the feature is composed of coral is irrelevant."[323] Further, under the VCLT, Article 32 permits the use of supplementary means of interpretation when that interpretation "leads to a result which is manifestly absurd or unreasonable."[324] If a limited definition of a "rock" were applied to the UNCLOS, it would lead to absurd results because it would eliminate all non-mineral elevations throughout the world's oceans from classification of "rock(s)" under the UNCLOS.[325] In relation to this matter's arbitration, it would eliminate the vast number of reefs in the South China Sea, many are used to build the artificial islands, which are, in part, the cause of this dispute. By using international case law, as well as supplementary definitions, the Tribunal was correct to determine that a "rock" under Article 121(3) refers to any natural, forming formation that lies above water at high or low tide.[326]

The second subsection the Tribunal defined was "cannot." The Tribunal determined that "cannot" was an objective test as to whether the feature "apt, able to, or lends itself to human

[322] Award*, supra* note 99, at ¶ 480.
[323] *Id.* (Quoting Territorial and Maritime Dispute, (Nic. v. Colom.) Merits Judgment 2012 I.C.J. 624 at 645 at ¶ 37).
[324] See VCLT *supra* note 128, at art. 32(b).
[325] Award, *supra* note 99, at ¶ 481.
[326] Id. at ¶ 482.

habitation or economic life."[327] Because "cannot" refers to whether or not the feature is capable of sustaining human habitation or economic life of its own, historical evidence of human habitation or economic life may be used to show that the feature is capable of sustaining human habitation or economic life, or conversely incapable of sustaining human habitation or an economic life.[328]

The third subsection defined by the Tribunal was "sustain." Applying the dictionary definition to "sustain" in connection with a piece of land, the Court found that "to support or maintain (life) by providing food, drink, and other necessities."[329] Based on that definition, the Tribunal concluded that "sustain" contained three components.[330] The first component required providing essentials to support life.[331] The second component required the first component to continue over a period of time because it cannot intermittently provide support.[332] The third component contained a qualitative factor.[333] As such, when applying that definition of "sustain," to human habitation or economic life of their own, the feature must provide essentials over a period of time that satisfy the minimum standards required for human habitation or economic life.[334]

Once again, the Tribunal was correct to use supplementary means of interpretation under the definition of "sustain." "Sustain," in relation to human habitation and economic life of its own, is ambiguous as it does not provide a definition; thus, by using supplementary means of

[327] Award, *supra* note 99, at ¶ 483.
[328] *Id.* at ¶ 484.
[329] *Id.* at ¶ 486. (Quoting "Sustain," Oxford English Dictionary 3rd ed. 2013).
[330] *Id*. at ¶ 487.
[331] *Id*.
[332] *Id*.
[333] *Id.*
[334] *Id*.

interpretation, the Tribunal clarified "sustain" in regard to the regime of islands.[335] By requiring the rocks be capable of providing essentials to support life over a period of time and adding a qualitative factor, the Tribunal defined "sustain" with regard to the object and purpose of the UNCLOS.[336] One benefit of the definition is that it provides order to UNCLOS regime. By listing the three factors the Tribunal has made it far more difficult to show that a rock may actually sustain human habitation or economic life. This definition will prevent States from attempting to claim rocks, which on their own are incapable of sustaining human habitation or economic life. It also ensures that a rock, which may only sustain itself for a short period of time, will not be considered an island.[337] If a rock is only capable of sustaining itself for a short period, then it cannot be considered to sustain itself long enough to sustain a stable human population or economic life. In short, by formulating the three-factor test, the Tribunal raised the bar in order to prove a rock is capable of sustaining human habitation or economic life. And in doing so, the Tribunal made it much more difficult for States to attempt to claim rocks as islands.

The fourth subsection the Tribunal defined was "human habitation." The Tribunal added a qualitative factor to "human habitation," stating "the term habitation implies a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner."[338] Because human habitation requires settlement, this combined with the definition of "sustain" requires features to provide for persons' food, drink, shelter, and other necessities required by a permanent human settlement.[339] As such, the settlement would need to be permanent or semi-permanent in cases of nomadic peoples.[340] That reading is consistent with the object and purpose

[335] Award, *supra* note 99, at ¶¶ 481-87.
[336] *Id*.
[337] Id. at ¶¶ 486-87.
[338] *Id.* at ¶ 489.
[339] Award, *supra* note 99, at ¶ 489.
[340] *Id.* at ¶ 542.

of the treaty under Article 31 of the VCLT because by merely sending one person, a state could claim that a feature was capable of sustaining "human habitation." A contradictory reading, which incentivizes States to lay claim to features that have long been recognized as incapable of sustaining human habitation, would lead to a scramble to expand their maritime claims., In turn, a scramble would frustrate the object and purpose of the UNCLOS in connection to the regime of islands.[341] Moreover, the language of Article 121(3) states "human habitation or economic life."[342] So, a state need only show that the feature supports human habitation or an economic life of its own, not both.

One of the novel arguments made in this arbitration was that "or" within the context of Article 121(3) should be read negatively, in the "absence of either [human habitation or economic life of its own] is sufficient to deprive [the feature] of such maritime zones.[343] The Tribunal explained that negatively Article 121(3) reads "[r]ocks which cannot sustain (human habitation or economic life of their own)' is equal to '[r]ocks which cannot sustain human habitation [and which cannot sustain] economic life of their own.'"[344] The Tribunal concludes that a feature that is capable of sustaining either human habitation or an economic life of its own, qualifies as an island under Article 121(3).[345]

Some might fear that this decision will make it easier for States to claim features as islands. This fear is not unwarranted. As argued above, the requirement under human habitation already requires that the feature be capable of sustaining the population for a period of time and

[341] *Id.* at ¶ 509.
[342] *See* UNCLOS *supra* note 36, at Art. 121,
[343] UMBERTO LEANZA AND MARIA CRISTINA CARACCIOLO, THE EXCLUSIVE ECONOMIC ZONE, IN THE IMLI MANUEL ON MARITIME LAW: THE LAW OF THE SEA, pg. 117.
[344] Award, *supra* note 99, at ¶ 494.
[345] Award, *supra* note 99, at ¶ 494.

requiring that the feature on its own provide the basic necessities for prolonged habitation. And as will be discussed below, economic life of its own similarly prevents States from participating in territory grabs by placing stringent requirements on what constitutes economic life. In short, "or" in the context of Article 121(3) means "or," and cannot be negatively read to require both "human habitation" and an "economic life of their own" because Article 121(3) concludes that "or" means "or," not "and."

Finally, the fifth subsection the Tribunal defined was "economic life of their own." In doing so, the Tribunal split "economic life of their own" into "economic life" and "of their own."[346] First the Tribunal defined "economic" as "relating to the development and regulation of the material resources of a community[.]"[347] Second, "life" refers to the human activity required to exploit the resources, the mere presence of resources is not enough to bring about economic life because there can be no life if the resources are not exploited.[348] On the one hand, "economic life" together with "sustain" requires a showing that the "economic life" is ongoing; neither a transaction nor exploitation of the feature can constitute an economic life of their own.[349] On the other hand, the Tribunal determined that "of their own" referred to the ability of the feature to sustain its economic life without "relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities, without the involvement of a local population."[350]

The previous interpretation is correct for two reasons. First, an "economic life" that was predominately dependent on outside resources is dispositive of sustaining the "economic life" of

[346] Id. at ¶ 498
[347] *Id.* at ¶ 499. (Quoting "Economic" Shorter Oxford English Dictionary 5th ed. 2002).
[348] *Id.*
[349] *Id.*
[350] Award, *supra* note 99, at ¶ 500.

a feature on its own.[351] If the feature relies on the influx of external resources, it fails to have independent economic life. Second, purely extractive activities, which do not benefit the feature nor the people living on it, cannot support an economic life of its own.[352] If the features' entire economic life is centered on the extraction of resources, and the resources are not used to assist it, the feature would be incapable of sustaining its own economic life because the extraction of those resources do not support the feature.

The final issue is the ability of the feature to support a "life of its own" from the surrounding waters. On one hand, With regards to EEZs and continental shelfs, the Tribunal found that "[i]t would be circular and absurd if the mere presence of economic activity in the area of the possible exclusive economic zone or continental shelf were sufficient to endow a feature with those very zones."[353] On the other hand, "economic life" can be related to territorial seas, so long as the economic activity in the territorial seas was related to the feature.[354] That being said, the Tribunal was of the opinion that a cluster of features may satisfy both the "human habitation" requirement or the "economic life of their own" requirement so long as there was evidence that the human habitation or economic life was connected to the group of features.[355]

The Tribunal added much clarity to the confusion surrounding Article 121. The fear of States participating in territorial gains is assuaged by the high burdens of establishing an economic life on the feature. Thus, a high burden has been placed on States that wish to claim features as islands. First, the State must prove the feature is not dependent on the import of external resources. Secondly, the State must prove the feature's economic life is not solely

[351] *Id.*
[352] *Id.*
[353] *Id.* at ¶ 502.
[354] *Id.* at ¶ 503.
[355] Award, *supra* note 99, at ¶ 544.

dependent on the extraction of its resources that do not benefit the feature. In this way, the Tribunal has placed a significant hurdle on States who wish to set up temporary shop on a feature in order to bolster its claims. In order for a State to establish an economic life on a feature that qualifies as an economic life of its own will require significant investment by the State. Additionally, by attempting to establish such economic life, the State may turn the feature into an artificial island; thus, disqualifying the State from claiming any maritime rights outside of the 500 meter protection zone permitted in Article 60.[356] The Tribunal recognized the chaos that would ensue if a state were able convert a rock into an island "[. . .]by the introduction of technology and extraneous materials[. . . .]"[357] By placing significant hurdles in establishing either human habitation or economic life, the Tribunal added persuasive case law that will, in part, act as a deterrence to States looking to expand their maritime claims by establishing temporary outposts.

D. ARTIFICIAL ISLANDS AND THE SOUTH CHINA SEA

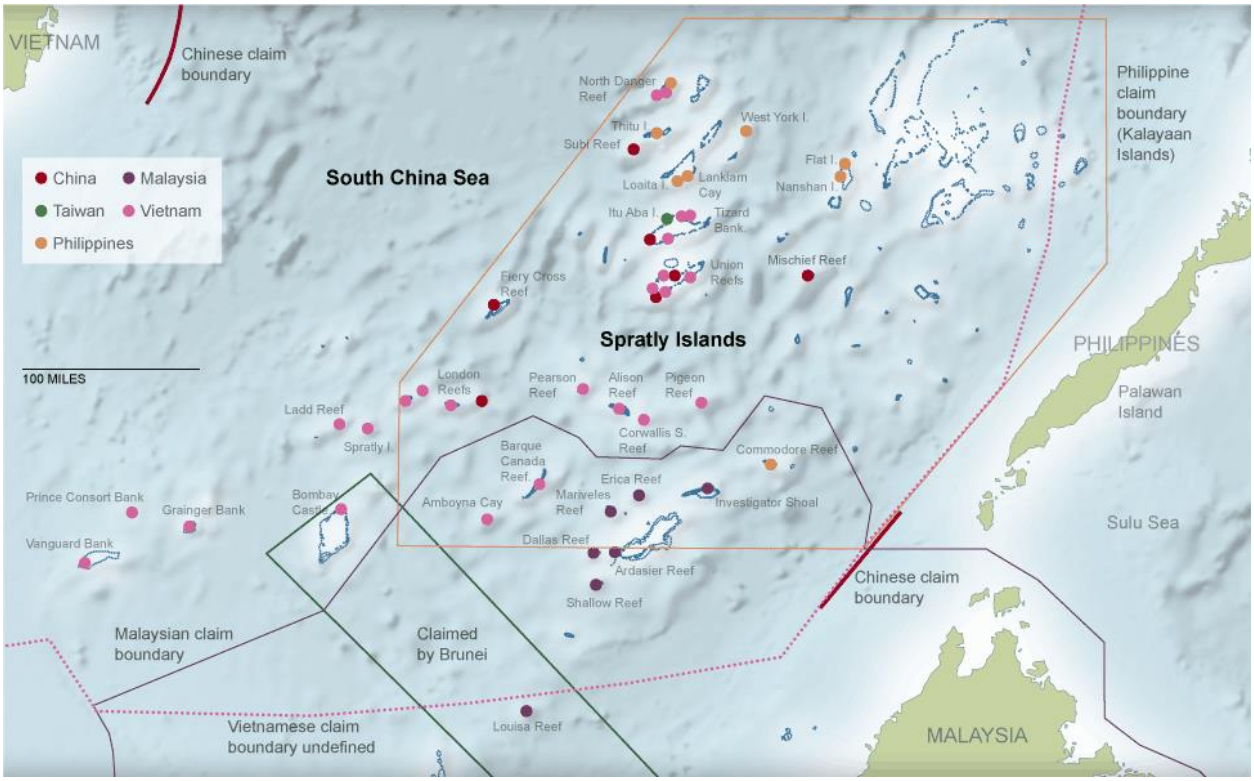
Considering that the dispute in the South China Sea stems from the building of artificial islands, it is important to note their status under the UNCLOS.[358] Artificial islands are governed by Articles 60 and 80 of the UNCLOS. Article 60(1) provides for the building of artificial islands within a States' EEZ.[359] Most notably, however, Article 60(8) states emphatically "artificial islands [. . .] do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone, or the continental shelf."[360] Article 80 applies Article 60 to artificial islands built

[356] *See* UNCLOS, *supra* note 36, at Art. 60,.
[357] Award, *supra* note 99, at ¶ 509.
[358] *See* UNCLOS, *supra* note 36, at Arts. 60 and 81.
[359] UNCLOS, *supra* note 36, at Art. 60(1).
[360] *Id.* at 60(8).

on the continental shelf.[361] In any event, application of these articles is straightforward in the present arbitration. That is because the Tribunal has correctly determined that China had signed over any claims it might have had under the nine-dash line upon its ratification of the UNCLOS.[362] As such, the artificial islands and installations that China had been building in some of the Spratly Islands, in particular at Mischief Reef, fall inside the Philippine's EEZ rather than China's EEZ as permitted by the UNCLOS and are therefore in violation of Article 60.[363] In fact, the only State permitted to build an artificial island at Mischief Reef is the Philippines as it lies within the Philippines' EEZ.[364]

[361] UNCLOS, *supra* note 36, at Art. 80.
[362] Award on Jurisdiction, supra note 38 at ¶ 229.
[363] Award, *supra* note 99, at ¶ 1036-38.
[364] *Id.*

Spratly Islands Occupied Status Map



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The regime of islands in Article 121, places a high burden on States to show that a feature is island rather than a rock. At the same time, Articles 60 and 80 prevent States from establishing artificial islands to expand their claims. Therefore, Articles 121, 60, and 80 are legally sufficient to prevent States from engaging in territory grabs by building artificial islands. However, compliance in international law is often more difficult. One way to ensure China's compliance is to establish a new regional power bloc compromised of Southeast Asian States.

[365] *Territorial Claims in the South China Sea*, N.Y. TIMES (May 2012), http://archive.nytimes.com/www.nytimes.com/interactive/2012/05/31/world/asia/Territorial-Claims-in-South-China-Sea.html?_r=0.

V. SOUTHEAST ASIAN STATES SHOULD RESURRECT THE SOUTHEAST ASIA TREATY ORGANIZATION

One such route to ensure China's compliance in the South China Sea is to bolster the capacity of Southeast Asian States to defend themselves against China's continuous salami slicing. Salami-slicing is "the slow accumulation of small actions, none of which is a casus belli, but which add up over time to a major strategic change."[366] This can be accomplished by reviving the Southeast Asian Treaty Organization ("SEATO").[367] As one author aptly put it "because China is fundamental to Asia, its …. power must be hedged against to preserve the independence of smaller States in Asia that are U.S. allies."[368] By implementing both economic and collective security measures, Southeast Asian States could band together and act as an important check on China in their own neighborhood, and in doing so, will ensure China's compliance with international tribunals as well as stability in one of the world's most important seas.

On the other hand, China's use of salami-slicing tactics often makes it easier for it to expand, particularly, when it encounters smaller, less-powerful States. China wishes to use salami-slicing to bolster its claims to the natural resources there, a claim that as discussed above has been thoroughly and rightly rejected by the Tribunal. However, China may yet use salami-slicing to enter into negotiations with less powerful States in Southeast Asia. To prevent China's salami-slicing, Southeast Asian States must come together to form a collective security pact.

[366] Robert Haddock, Salami Slicing in the South China Sea, FOREIGN POL., (Aug. 3, 2012) https://foreignpolicy.com/2012/08/03/salami-slicing-in-the-south-china-sea/.
[367] *See* Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 UST 81-86, TIAS 3170.
[368] ROBERT D. KAPLAN, ASIA'S CAULDRON: THE SOUTH CHINA SEA AND THE END OF A STABLE PACIFIC 166-67 (2014).

Therefore, SEATO ought to be given new life to address the new security problems that face Southeast Asia today.

When making a collective security agreement for Southeast Asia, it is hard to forget the failure of the Manilla Pact and SEATO.[369] As one author noted, one of the most significant failures of SEATO was the fact that it only included three Asian States.[370] Further, SEATO, unlike NATO, did not call for a unified command structure or military force.[371] The ultimate undoing of SEATO was the Vietnam War, just five months after the fall of Saigon, the member States of SEATO agreed to dissolve it in 1977.[372] However, the situation facing Southeast Asia today is a far different conflict that faced Southeast Asia during SEATO's lifetime. Today, the threat is not the spread of communism, rather is it against an increasingly expansive China. As such, the antipathy that a few Asian member States of the original SEATO expressed will not be repeated because the State parties will have more skin-in-the-game than they had in the fight against communism.

The South China Sea is one of the world's most important sea lanes. It also contains vast untapped mineral reserves. Because of this Southeast Asian States have a vested interest in ensuring that the South China Sea remains stable. The importance of the South China Sea regarding shipping cannot be understated because nearly one-third of the world's trade passes through the South China Sea.[373] To further ensure the success of any collective defense treaty in

[369] See, David Brennan, *Could Pompeo's Anti-China alliance Work? SEATO-Asian NATO- Failed Before*, Newsweek (July 31, 2020), https://www.newsweek.com/mike-pompeo-anti-china-alliance-work-seato-asian-nato-failed-before-1521977

[370] Michael Kelly & Sean Watts, *Rethinking the Security Architecture of North East Asia*, 41 VICTORIA UNIV. WELLINGTON L. REV. 273, 279 (2010).

[371] *Id.* at 278.

[372] *Id.* at 279.

[373] Drake Long, *Data Shows Commercial Shipping Avoids Hotspots in South China Sea*, RADIO FREE ASIA (Sept. 28, 2020) https://www.rfa.org/english/news/china/southchinasea-shipping-09282020155242.html.

Southeast Asia, it is important that the overwhelming majority of the State parties to it are actually Southeast Asian States. However, a resurrected SEATO should include a limited number of non-Southeast Asian States like the United States, due to its maritime power. By resurrecting SEATO while amending it to address the shortfalls of the original version and address the modern issues facing Southeast Asia, Southeast Asian states will be able to create a power bloc to counter the expansionist policies of China and ensure stability in the region as well as protect their own independence.

China's claim to the nine-dash line has raised significant issues in the South China Sea and with the overall problem of non-enforceability of international law. The Tribunal correctly found that it had jurisdiction over the dispute and that China's actions in the South China Sea were in violation of the UNCLOS. Further, the Tribunal significantly added to international case law by distinguishing historic rights from historic titles, as well as its in-depth analysis of the regime of islands within Article 121 of the UNCLOS. However, China's refusal to recognize or cooperate with the Tribunal created an opportunity for Southeast Asian States to contribute to the enforceability of international law. The creation of a new collective defense organization, created by and ran by Southeast Asian States, will help to enforce recognition of the Tribunal's findings as well as ensure stability in the South China Sea.

ADMINISTERING POST-COVID INOCULATIONS TO PREVENT PANDEMIC

*Christopher F. Melling**

In December 2019, a novel coronavirus appeared in Wuhan, China. While it remains disputed whether the virus began in a wet market or a laboratory, it is undisputed that it spread rapidly. COVID-19 has now infected over 500 million people worldwide. China and the World Health Organization ("WHO") should have been better prepared for this virus after past outbreaks, particularly Severe Acute Respiratory Syndrome ("SARS") in 2002. Three years after SARS, the WHO revised its International Health Regulations ("IHR") to demand more accountability from member states. However, these improvements did not prevent China's delayed reporting or lead to better health standards in its wet markets. In short, China breached Articles 6 and 7 of the IHR and violated the right to health under customary international law. As a result, states could theoretically hold China accountable. But legal mechanisms like settlement, an International Court of Justice decision, or countermeasures will not help prevent another pandemic. Instead, states must encourage changes to the WHO's informational and financial structure, demand a WHO compliance and accountability committee, amend the IHR to include a settlement provision, and improve state internal health laws. These changes will reinforce global health jurisprudence, which will help prevent or mitigate the next pandemic.

I. INTRODUCTION

Fortune, goodnight, Smile once more, turn thy wheel.[374]

As Fortune turned her wheel over the past eighteen years, the world faced numerous pandemics. Severe Acute Respiratory Syndrome ("SARS") emerged in Guangdong, China to reach over two dozen nations[375] and infect 8,098 persons[376]. The H1N1 virus infected 60.8 million people

* J. Reuben Clark Law School, J.D. candidate 2022. United States Naval Academy, B.S. 2006. United States Marine Corps, 2006–2019. Infinite thanks to the Creighton International & Comparative Law Review.

[374] WILLIAM SHAKESPEARE, THE TRAGEDY OF KING LEAR act 2, sc. 2, ll. 155–56 (Jay L. Halio ed., 1992).
[375] Swargodeep Sarkar, *The Liability of China and International Adjudication of the COVID-19 Pandemic*, JURIST (Apr. 10, 2020, 10:39 AM), https://bit.ly/2GOAUDQ.
[376] *SARS Basics Fact Sheet*, CENTERS FOR DISEASE CONTROL AND PREVENTION [CDC], https://bit.ly/3kjFuHM (last updated Dec. 6, 2017).

worldwide.[377] Middle East Respiratory Syndrome led to 858 deaths across 27 nations.[378] And Ebola, "affect[ing] humans somewhat like nuclear radiation,"[379] impacted 28,652 people over 10 countries.[380]

The global community responded. In 2005, the World Health Organization ("WHO") adopted the International Health Regulations ("IHR"),[381] the first binding regulations for disease reporting and prevention.[382] The IHR's mission was to "prevent, protect against, control and provide a public health response to the international spread of disease . . . ."[383] Yet the regulations did not prevent COVID-19. As of April 18, 2022, there have been 500,186,525 confirmed cases and 6,190,349 deaths reported to the WHO.[384]

COVID-19 has shown that the current international framework is insufficient to deal with global pandemics.[385] While there are ways to hold China accountable for breaching obligations under IHR and the right to health, blame will not prevent pandemics. Instead, nations should work together to improve global health rather than punishing China.

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[377] *The Burden of the Influenza A H1N1pdm09 Virus Since the 2009 Pandemic*, CDC, https://www.cdc.gov/flu/pandemic-resources/burden-of-h1n1.html (last updated June 10, 2019) (estimating 60.8 million cases, 274,304 hospitalizations, and 12,467 deaths in the United States).

[378] *Middle East Respiratory Syndrome Coronavirus (MERS-CoV)*, WHO, https://bit.ly/3n9AuHK (last visited Mar. 22, 2022).

[379] RICHARD PRESTON, THE HOT ZONE 23 (1994).

[380] *2014–2016 Ebola Outbreak in West Africa*, CDC, https://bit.ly/38y21P3 (last reviewed March 8, 2019) (the 28,652 number includes suspected, probable, and confirmed cases).

[381] Sarkar, *supra* note 375.

[382] Stefania Negri, *Communicable Disease Control* 265, 268, *in* RESEARCH HANDBOOK ON GLOBAL HEALTH LAW (Gian Luca Burci & Brigit Toebes eds., 2018).

[383] WHO, International Health Regulations art. 2 (3d ed. 2005), https://www.who.int/publications/i/item/9789241580496 [hereinafter IHR].

[384] *WHO Coronavirus Disease (COVID-19) Dashboard*, WHO, https://covid19.who.int/ (last visited Apr. 22, 2022) [hereinafter *Dashboard*].

[385] *See, e.g.*, David Gregosz, Thomas Köster, Oliver Morwinsky & Martin Schebesta, *Coronavirus Infects the Global Economy: The Economic Impact of an Unforeseeable Pandemic*, 384 KONRAD ADENAUER STIFTUNG 1 (2020) ("The economic impact of COVID-19 is far worse than that of the 2008 financial crisis. The shockwave has hit almost every industry, sector and region in Germany, as well as its major trading partners.").

This Note outlines a clear path to prevention. Part I gives background on COVID-19, the international health framework, and customary international law.[386] Part II reviews China's breach under IHR Articles 6 and 7,[387] violation of Chinese citizens' right to health,[388] and possible faults under the Draft Articles for Internationally Wrongful Acts.[389] Part III evaluates accountability mechanisms against China: settlement,[390] recourse from the International Court of Justice ("ICJ"),[391] and countermeasures.[392] Finally, Part IV urges the strengthening of WHO,[393] amending the IHR with settlement and ICJ provisions,[394] and invigorating global health jurisprudence domestically and internationally.[395]

II. BACKGROUND

A. BRIEF HISTORY OF COVID-19

COVID-19 is a novel strain of coronavirus commonly traced to animals.[396] When the virus transmits to humans, its effects range from cold symptoms to death.[397] The virus's origins can be

[386] *See infra* Part I.
[387] *See infra* Section II.A
[388] *See infra* Section II.B.
[389] *See infra* Section II.C.
[390] *See infra* Section III.A.
[391] *See infra* Section III.B.
[392] *See infra* Section III.C.
[393] *See infra* Section IV.A.
[394] *See infra* Section IV.B.
[395] *See infra* Section IV.C.
[396] Lauren M. Sauer, *What is Coronavirus?*, JOHNS HOPKINS MED., https://bit.ly/3lhHUI7 (last updated Feb. 24, 2022).
[397] *Id*.

traced to China's Wuhan province between November and December 2019.[398] It spread rapidly, reaching the United States[399] and Europe a few weeks later.[400]

There are two theories for the virus's emergence. Either it started in a Wuhan wet market or it came from an infectious disease laboratory.[401] Most support the wet market theory,[402] because as researchers explain, "the presence of a large reservoir of SARS-CoV-like viruses in horseshoe bats, together with the culture of eating exotic mammals in southern China, is a time bomb."[403] Experts speculate that COVID-19 originated in bats, spread to pangolins, and then humans.[404] This is not the first time that an animal-to-human transmission occurred in a Chinese wet market.[405] As one virologist states, with a "vast diversity of wild and domestic animals living in close proximity

[398] *E.g.*, Helen Davidson, *First COVID-19 Case Happened in November, China Government Records Show*, GUARDIAN (Mar. 13, 2020, 2:39 AM), https://bit.ly/36iLBXP; SCMP Graphics, *Coronavirus: The Disease COVID-19 Explained*, S. CHINA MORNING POST, https://bit.ly/32r8fMM (last visited Mar. 22, 2022; updated daily); *see* Valerio de Oliveira Mazzuoli, *Responsabilidade internacional dos Estados por epidemias e pandemias transnacionais: o caso da Covid-19 provinda da República Popular da China*, 23 REVISTA DE DIREITO CIVIL CONTEMPORÂNEO 2 (2020) (Br.), https://bit.ly/3D8pZgV; Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (March. 17, 2021), https://nyti.ms/3o3BM7j.

[399] Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, NEW ENG. J. MED. (Jan. 31, 2020), https://bit.ly/32sxwpL (describing how a man returning from Wuhan complained of a fever).

[400] Gianfranco Spiteri et al., *First Cases of Coronavirus Disease 2019 (COVID-19) in the WHO European Region, 24 January to 21 February 2020*, 25 EUROSURVEILLANCE (2020), https://bit.ly/3lxIfa2.

[401] *See, e.g.*, Mark Mazzetti, Julian E. Barnes, Edward Wong, & Adam Goldman, *Trump Officials are Said to Press Spies to Link Virus and Wuhan Labs*, N.Y. TIMES (May 14, 2020), https://nyti.ms/3n94jIl.

[402] Dina Fine Maron, *"Wet Markets" Likely Launched the Coronavirus. Here's What you Need to Know*, NAT'L GEOGRAPHIC (Apr. 15, 2020), https://on.natgeo.com/3n6LyFo.

[403] A. Alonso Aguirre et al., *Illicit Wildlife Trade, Wet Markets, and COVID-19: Preventing Future Pandemics*, World Med. & Health Pol'y (July 5, 2020), https://bit.ly/2LnowMY (citation omitted).

[404] Kristian G. Andersen et al., *The Proximal Origin of SARS-CoV-2*, 26 NATURE MED., 450, 450–51 (2020), https://go.nature.com/2JKMD3W. It is disputed, however, whether COVID-19 originated in a wet market or if the market only accelerated the virus's spread. *See* Chaolin Huang et al., *Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China*, 395 LANCET 497 (2020), https://bit.ly/3eKknxd.

[405] *See* Patrick C. Y. Woo et al., *Infectious Diseases Emerging from Chinese Wet-Markets: Zoonotic Origins of Severe Respiratory Viral Infections*, 19 CURRENT OP. INFECTIOUS DISEASES 401, 401 (2006), https://bit.ly/32u3n9q.

to humans, it is likely that China has the greatest potential for . . . infectious diseases worldwide."[406]

Starting on December 8, 2019, China experienced "pneumonia of unknown [cause]" centered on the Huanan Seafood Wholesale Market in Wuhan.[407] However, China did not report these cases of "viral pneumonia" to external health agencies until December 31.[408] On January 1, 2020, the WHO requested information from authorities as it activated an Incident Management Support Team.[409] Chinese health officials then provided detailed information seventy-two hours after the first internal reports.[410] Using this information, the WHO reported on the IHR Event Information System and issued a Disease Outbreak News report.[411] Finally, the WHO reported that Chinese authorities "determined that the outbreak [was] caused by a novel coronavirus" ten days after the initial notification.[412]

Over the next few weeks, the virus spread worldwide. On January 22, 2020, the WHO Emergency Committee convened to discuss the outbreak.[413] However, the committee decided not to issue a warning.[414] A week later, the committee reconvened and declared a Public Health Emergency of International Concern ("PHEIC").[415] The WHO Director-General, Tedros

[406] Heinz Feldmann, *Truly Emerging – A New Disease Caused by a Novel Virus*, 365 NEW ENG. J. MED. 1561, 1562 (2011), https://bit.ly/2UNrpJm.
[407] Nanshan Chan et al., *Epidemiological and Clinical Characteristics of 99 Cases of 2019 Novel Coronavirus Pneumonia in Wuhan, China: A Descriptive Study*, LANCET 1 (Jan. 30, 2020), https://pubmed.ncbi.nlm.nih.gov/32007143/.
[408] *Timeline: WHO's COVID-19 Response*, WHO, https://bit.ly/36i2Usd (last visited Apr. 20, 2022) [hereinafter *Timeline*]; Huang et al., *supra* note 404.
[409] *Timeline*, *supra* note 408.
[410] *Id.*
[411] *Id.*
[412] *Id.* China first publicly reported a COVID-19 death on January 11, 2020. *Id.*
[413] *Id.*
[414] *Id.*
[415] *Id.* A PHEIC is defined as "an extraordinary event which is determined . . . (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a

Adhanom Ghebreyesus, exhorted the international community to "work together in a spirit of solidarity and cooperation."[416] COVID-19 then spread exponentially.[417]

As the WHO stirred, Chinese officials took some measures to combat the virus. On January 1, 2020, they closed Wuhan wet markets,[418] canceled New Year's events, and locked down Wuhan.[419] Nevertheless, international travel remained open until March 28, 2020,[420] and state authorities purportedly silenced a vocal critic of the government's response.[421] Leaked documents also reveal "numerous inconsistencies in what [Chinese] authorities believed to be happening and what was revealed to the public."[422]

B. INTERNATIONAL HEALTH FRAMEWORK

Global health threats have shaped history: typhoid fever in 430 BC, bubonic plague in 1350 AD, and influenza in 1918 AD.[423] Despite the WHO's efforts over the last fifteen years,

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coordinated international response[.]" IHR, *supra* note 383, at 9 (art. 1). *See id.* at 43–46 (annex 2) (PHEIC decision matrix).

[416] Press Release, WHO, *WHO Director-General's Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)* (Jan. 30, 2020), https://bit.ly/3eIA8Vf.

[417] *See Dashboard*, *supra* note 384 (COVID-19 cases since Dec. 30, 2019: Feb 1, 2020; 23,014: Mar. 2, 2020: 21,138; Apr. 6, 2020: 559,344; July 6, 2020: 1,429,526).

[418] Huang et al., *supra* note 404.

[419] *China Cancels Lunar New Year Events Over Deadly Virus Fears*, DW (Jan. 23, 2020), https://bit.ly/3eJq7XX.

[420] *See, e.g.*, *id.* ("One passenger at Beijing international airport traveling for the Lunar New Year said she felt uneasy about boarding a plane, but wouldn't cancel her travel plans.").

[421] *See* Stephanie Hegarty, *The Chinese Doctor Who Tried to Warn Others About Coronavirus*, BBC (Feb. 6, 2020), https://bbc.in/36konAz ("[Dr. Li Wenliang] was summoned to the Public Security Bureau where he was told to sign a letter. In the letter he was accused of 'making false comments' that had 'severely disturbed the social order' . . . . 'We solemnly warn you: If you keep being stubborn, with such impertinence, and continue this illegal activity, you will be brought to justice—is that understood?' . . . He was one of eight people who police said were being investigated for 'spreading rumours.'").

[422] Nick Paton Walsh, *The Wuhan Files: Leaked Documents Reveal China's Mishandling of the Early Stages of COVID-19)*, CNN (Dec. 1, 2020), https://cnn.it/2LfxTOB (last updated Dec. 1, 2020, 3:39 AM). CNN identifies four key findings from the leaked document: (1) Chinese officials reported overly optimistic data in February; (2) it took on average twenty-three days to diagnose COVID-19 patients in late December and January; (3) audits showed "underfunding, understaffing, poor morale and bureaucratic models of governance"; and (4) in early December, there was an influenza outbreak in Yichang and Xianning. *Id.*

[423] *Pandemics that Changed History*, HISTORY (Apr. 1, 2020), https://bit.ly/3pcNIoG.

communicable diseases are among the top ten causes of death.[424] Yet there is hope. The WHO and IHR represent 170 years of progress in global health.[425] This section now delves into the history of that progress, the WHO Constitution, and the 2005 IHR.

1. General History

Health threats prompted European nations in the nineteenth century to convene sanitary conferences.[426] The goal was to fight cholera epidemics, strengthen border security against disease, and balance quarantines with trade.[427] While narrowly focused, these conferences sparked a slow "shift from domestic jurisdiction and exclusive sovereignty over health issues to inter-State cooperation."[428]

A major milestone in global health law was the WHO's birth on April 7, 1948.[429] The body "took upon itself the responsibility for the management of the international regime of disease control" and "engaged in an onerous work of revision and consolidation of the existing sanitary conventions."[430] Similar to the approach of the first health conferences,[431] the WHO focuses on cooperative health among States.[432]

[424] Negri, *supra* note 382, at 266 (citing *The Top 10 Causes of Death*, WHO (May 24, 2018), https://bit.ly/35jxsut).
[425] *See infra* Section I.B.1.
[426] Negri, *supra* note 382, at 269 (citing *The Top 10 Causes of Death*, WHO (May 24, 2018), https://bit.ly/35jxsut).
[427] *Id.*
[428] Negri, *supra* note 382, at 269 (citing *The Top 10 Causes of Death*, WHO (May 24, 2018), https://bit.ly/35jxsut).
[429] *History of WHO*, WHO, https://bit.ly/3kSt3D9 (last visited Nov. 21, 2020).
[430] Negri, *supra* note 382, at 270.
[431] *See supra* notes 426–428 and accompanying text.
[432] *See generally Milestones for Health over 70 Years*, WHO, https://bit.ly/3ndq4qx (last visited Mar. 25, 2022).

The WHO consists of 194 member States[433] who convene annually at the World Health Assembly ("WHA").[434] The organization has over 8,000 personnel in more than 150 locations.[435] And it has diverse responsibilities: to fight communicable diseases such as malaria, tuberculosis, and Ebola; alleviate noncommunicable diseases; promote nutrition, food security and healthy eating; improve health; and minimize substance abuse.[436]

However, the WHO faces criticism. Some disparage the organization for its response to the recent Ebola pandemic.[437] Critics also decry the fact that non-WHO health organizations detract from the WHO's importance.[438] Despite these criticisms, the WHO is at the forefront of combatting global pandemics.[439]

2. WHO Constitution

The WHO Constitution's objective is "the attainment by all peoples of the highest possible level of health."[440] Articles 19 through 22 allow the WHO to adopt agreements on sanitary and

[433] *Countries*, WHO, https://www.who.int/countries (last visited Mar. 24, 2022).
[434] Nadja Meisterhans, *The World Health Organization in Crisis – Lessons to be Learned Beyond the Ebola Outbreak*, 2 CHINESE J. GLOB. GOVERNANCE 1, 4–5 (2016).
[435] *Who We Are*, WHO, https://www.who.int/about/who-we-are (last visited Apr. 18, 2022). "[D]ue to this decentralized governance structure, the WHO offers a strong voice to the differing needs of the regions . . . ." Meisterhans, *supra* note 434, at 5.
[436] *Id.* "[T]he WHO monitors global health trends, conducts research, sets standards, and provides technical support. The agency's work ranges from noncommunicable diseases, nutrition and obesity, to mental health, road safety, and antimicrobial resistance." Lawrence O. Gostin, *COVID-19 Reveals Urgent Need to Strengthen the World Health Organization*, JAMA NETWORK (Apr. 30, 2020), https://bit.ly/38Fc0SL.
[437] Meisterhans, *supra* note 434, at 2.
[438] *See id.* at 8–12 (discussing how "global public private partnerships in health" like the Bill and Melinda Gates Foundation or the Joint United Nations Programme on HIV and Aids).
[439] *See* Sarah Wetter & Eric A. Friedman, *U.S. Withdrawal from the World Health Organization: Unconstitutional and Unhealthy*, *in* ASSESSING LEGAL RESPONSES TO COVID-19 83, 84 (Scott Burris, Sarah de Guia, Lance Gable, Donna E. Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2020) ("WHO is working worldwide to achieve its triple billion goal: to ensure that a billion more people have universal health coverage, that a billion more people are protected from health emergencies, and that a billion more people enjoy better health and well-being.").
[440] Constitution of the World Health Organization, Apr. 7, 1948, 14 U.N.T.S. 185, at 187 (art. 1) [hereinafter WHO Constitution].

quarantine requirements, outlines standards, and calls on States to accept these standards.[441] Each state "shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly."[442] Within each state, the WHO enjoys "such legal capacity as may be necessary. . . ."[443] Notably, the WHO can evolve.[444]

Further, the WHO relies on state reporting. States must report "action[s] taken with respect to recommendations" and "conventions, agreements, and regulations"; report national health laws, epidemiological reports; and provide "such additional information pertaining to health as may be practicable."[445] Article 75 requires that if a question or dispute cannot be negotiated or settled by the Health Assembly, then the matter "shall be referred to the International Court of Justice . . . unless the parties concerned agree on another mode of settlement."[446] The WHO can further request an advisory opinion from the ICJ on "any legal question arising within the competence of the Organization."[447]

3. International Health Regulations

International health regulations began with the 1851 European conferences to "curb the spread of infectious diseases."[448] Specific diseases remained the focus for the next hundred

[441] *Id.* at 192–93 (art. 19–21).
[442] *Id.* at 200 (art. 64).
[443] *Id.* at 200–01 (art. 66).
[444] *Id.* at 202 (art. 73).
[445] *Id.* at 200 (art. 62–65); *see* Mazzuoli, *supra* note 398, at 16 ("There is no doubt, therefore, that Member States must obey recommendations from the Organization in cases of transnational epidemics or pandemics.").
[446] WHO Consitution at 202 (art. 75).
[447] *Id.* (art. 76).
[448] Lawrence O. Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94 MILBANK Q. 264 (2016), https://bit.ly/3lyks9W.

years.[449] By 1969, the goal shifted to "self-protection against external threats."[450] The WHA adopted the IHR as an update to the 1951 International Sanitary Regulations.[451]

By the late twentieth-century, global health outbreaks (e.g., HIV/AIDS) made it "clear that the IHR were insufficiently flexible to respond to new infectious disease threats."[452] For example, during the SARS outbreak, China delayed WHO notification for three months.[453] The postponement showed an "imperative for global health governance" and "catalyz[ed] a major political shift toward a global norm of transparency and prompt reporting[.]"[454] And so the WHA revised the IHR.[455]

IHR now has greater depth so that "the Regulations w[ould] maintain their relevancy and applicability for many years to come . . . ."[456] Today, the IHR has an "all-hazards strategy"[457] to "prevent, protect against, control and provide a public health response to the international spread of disease . . . ."[458]

For the purposes of this Note, Articles 6 and 7 are the most relevant IHR provisions.

Article 6 Notification

[449] *See id.* (describing the 1892 International Sanitary Convention that "focused on quarantine for cholera," and the emphasis on cholera, yellow fever, and plague by 1926).
[450] *Id.*
[451] IHR, *supra* note 383, at 1. Still, the regulations focused only on certain diseases. *Id.* (listing the diseases covered by the regulations as yellow fever, plague, and cholera) (citations omitted).
[452] Gostin & Katz, *supra* note 448.
[453] *Id.*
[454] *Id.*
[455] *Id.*
[456] IHR, *supra* note 383, at 2.
[457] Gostin & Katz, *supra* note 448.
[458] IHR, *supra* note 383, at 1, 10 (art. 2). IHR are permissive. Per Article 43, a state may enact any health measures deemed necessary to combat or prevent health risks." *Id.* at 28 (art. 43). The only requirement is that measures "achieve the same or greater level of health protection than WHO recommendations." *Id.*

1. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA.[459]

Article 7 Information-Sharing During Unexpected or Unusual Public Health Events

If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.[460]

IHR Article 12 also gives the Director-General the sole power to declare a PHEIC.[461] The Director-General basis his decision on collected information[462] and recommendations from the Emergency Committee.[463] The Director-General then consults with the affected state. But the Director-General makes the final decision.[464]

To encourage member nations to settle disputes, Article 56 discusses the IHR's dispute resolution system.[465] The article provides that "[n]othing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to

[459] *Id.* at 12 (art. 6).
[460] *Id.* (art. 7).
[461] *Id.* at 14 (art. 12).
[462] *Id.*
[463] *Id.* Temporary recommendations are found in Article 15. They may "include health measures to be implemented by the State Party experiencing the public health emergency of international concern . . . regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels to prevent or reduce the international spread of disease . . . ." *Id.* at 16 (art. 15).
[464] *Id.* at 14 (art. 12); *see id.* at 32 (art. 49) (setting out rights of states in whose territory the Director-General declares a PHEIC). Yet a state may only propose the termination of a PHEIC. The final decision rests with the director and Emergency Committee.
[465] *Id.* at 34–35 (art. 56).

the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement."[466] Finally, to modify IHR provisions, any state or the Director-General may propose an amendment.[467]

C. CUSTOMARY INTERNATIONAL LAW

Article 38 of the Statute of the ICJ recognizes international law through international conventions, "general principles of law[,]" and customary international law ("CIL").[468] The next section explains why CIL includes the right to health and how China's potential violation of this right is reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Draft Articles").

1. Right to Health

Two instruments affirm the right to health[469]: the Universal Declaration of Human Rights ("UDHR")[470] and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").[471] Although as Eleanor Roosevelt noted, "[the Declaration of Human Rights] . . . does not purport to be a statement of law or of legal obligation[,]"[472] today "almost all states would

[466] *Id.*; *see also id.* at 35 (art. 57) ("The provisions of the IHR shall not affect the rights and obligations of any State Party deriving from other international agreements.").
[467] *Id.* at 34 (art. 55).
[468] Permanent Court of International Justice, Statute of the International Court of Justice art. 38 (Oct. 24, 1945) [hereinafter ICJ Statute].
[469] The right to health reflects the "intrinsic value [of] the individual and . . . society." Tsung-Ling Lee, *Global Health in a Turbulence Time: A Commentary*, 15 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 27, 34 (2020). As the WHO Constitution declares, "[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." WHO Constitution, *supra* note 440, at 186.
[470] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25, ¶ 1 (Dec. 10, 1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and his family.").
[471] *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 at 3, 6 (art. 7) ("The States Parties present Covenant recognize the right of everyone to the enjoyment of . . . [s]afe and healthy working conditions.") [hereinafter ICESCR]; *id.* at 3, 8 (art. 12) ("[T]he right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").
[472] LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW CASES AND MATERIALS 903 (7th ed. 2019) (quoting 19 U.S. Dep't of State Bull. 751 (Dec. 9, 1948)). *But see* Jessie Allen, *Theater of International*

agree that some infringements of human rights . . . are violations of . . . customary international law."[473]

The ICESCR "provides the foundational expression of the right to health."[474] Article 12 states that "[p]arties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and "this right shall include those necessary for . . . [t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases."[475] This right is not that of perfect health, but instead "'a right to the enjoyment of a variety' of diagnostic, curative, and preventive 'facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.'"[476] Moreover, because China signed the ICESCR and UDHR, China has "officially accepted the universality of human rights."[477]

The international community, including China, recognizes the right to health as customary international law.[478] But a barrier to accountability is that each state might define a breach of the right to health differently. Thus, a certain action (i.e., permitting unsanitary wet markets) may or may not be a breach.

One can compare China's denial of a breach to how the United Nations ("U.N.") has avoided responsibility for a potential human rights violation. After a 2010 earthquake, Nepalese

Justice, 3 CREIGHTON INT'L & COMP. L.J. 118, 121 (2012) ("[I]international human rights still evoke skepticism.").

[473] DAMROSCH & MURPHY, *supra* note 472, at 903 (quoting 19 U.S. Dep't of State Bull. 751 (Dec. 9, 1948)).

[474] Lee, *supra* note 469, at 35.

[475] ICESCR, *supra* note 8, at 8.

[476] Patrick Hayden, *The Human Right to Health and the Struggle for Recognition*, 38 REV. INT'L STUD. 569, 572 (2012) (quoting Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶¶ 7–13, UN Doc. E/C. 12/2000/4 (Aug. 11, 2000)).

[477] SONYA SCEATS WITH SHAUN BRESLIN, CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM (Oct. 2012), https://bit.ly/2UK5liu.

[478] *See supra* notes 475–477 and accompanying text.

troops deployed to Haiti under the U.N. flag.[479] Tragically, some troops carried a strain of cholera.[480] And because the U.N. base lacked adequate sanitation facilities, the cholera spread to Haiti's largest water source.[481] Rather than claim responsibility, however, the U.N. has "repeatedly denied their legal and moral obligations . . . ."[482]

China has taken a similar response to COVID-19. Sometimes pandemics emerge beyond a state's control.[483] But under international law, the state must take sufficient action to report and contain the virus's spread.[484] Yet China not taken responsibility for the virus's origin or its spread. China claims that their markets were not the source of patient zero.[485] More importantly, Chinese officials did not provide timely notification or share complete information with the WHO during COVID-19's early stages.[486]

The IHR does not mandate reparations or allow a nation to impose countermeasures for a responsible States' breaches. Instead, those provisions are in the Draft Articles.

2. Draft Articles on Responsibility of States for Internationally Wrongful Acts

[479] Rosalyn Chan et al., *Peacekeeping without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic*, TRANSNAT'L DEV. CLINIC 8 (2013), https://bit.ly/36r7d4C.
[480] *Id.*
[481] *Id*.
[482] Celso Perez & Muneer I. Ahmad, *Why the UN Should Take Responsibility for Haiti's Cholera Outbreak*, ATLANTIC (Aug. 16, 2013), https://bit.ly/35ctK5w; *see* Letter from Ban Ki-moon, UN Secretary General, to Maxine Waters, U.S. Congresswoman, (July 5, 2013), https://bit.ly/3eM7iDI (attempting to justify the U.N.'s decision not to take responsibility for the cholera outbreak).
[483] A state may avoid international responsibility under the doctrine of *force majeure*, defined as "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State." Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, A/56/10, at 76 (art. 23) (2001), https://bit.ly/3o2jF1w [hereinafter Draft Articles with Commentaries].
[484] *See supra* Sections I.B.2–3.
[485] *See* Aylin Woodward, *Chinese CDC Now Says the Wuhan Wet Market Wasn't the Origin of the Virus*, SCI. ALERT (May 29, 2020), https://bit.ly/2JTqaVS.
[486] *See* Walsh, *supra* note 422 ("[T]hough the documents provide no evidence of a deliberate attempt to obfuscate findings, they do reveal numerous inconsistencies in what authorities believed to be happening and what was revealed to the public.

In 2001, the International Law Commission submitted the Draft Articles to the U.N. General Assembly.[487] Drafters sought to formulate "basic rules of international law concerning the responsibility of States for their internationally wrongful acts."[488] The General Assembly suggested in 2007 and 2010 that States should apply the Draft Articles.[489] However, while international tribunals cite the Draft Articles,[490] they are not accepted equally as a normative guideline nor an enforcement mechanism.[491]

Article 1 states the document's underlying principle: "Every internationally wrongful act of a State entails the international responsibility of that State."[492] Article 2 defines an "internationally wrongful act of a State" as when there is an "action or omission" that "is attributable to the State under international law" and "constitutes a breach of an international obligation of the State."[493]

Articles 12 and 13 define when there is a breach. First, "when conduct attributed to a State as a subject of international law amounts to a *failure by that State to comply* with an international obligation incumbent upon it . . . ."[494] Second, "[t]here is a breach of an international obligation by a State when an act of that State is *not in conformity with what is required of it* by that obligation,

[487] Sarkar, *supra* note 375.
[488] Draft Articles with Commentaries, *supra* note 483, at 31.
[489] Mazzuoli, *supra* note 398, at 6; James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN AUDIOVISUAL LIBR. INT'L L. 2 (2012).
[490] "[T]he International Court of Justice treated certain aspects of the draft articles as reflecting the customary international law of state responsibility." DAMROSCH & MURPHY, *supra* note 472, at 482.
[491] Most nations agree that much of the Draft Articles are customary international law. But in 2001, the United States published comments that asserted the articles had "deviate[d] from customary international law and state practice." U.S. Dep't of State, Draft Articles on State Responsibility Comments of the Government of the United States of America 1 (2001).
[492] Draft Articles with Commentaries, *supra* note 483, at 32 (art. 1).
[493] *Id.* at 34 (art. 2).
[494] *Id.* at 54 (emphasis added).

regardless of its origin or character."[495] However, there is no breach "unless the State is bound by the obligation . . . at the time the act occurs."[496]

Once a breach is established, Article 31 prescribes reparations: "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[497] Reparations should "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[498] There must be a link "between the wrongful act and the injury" to merit an "obligation of reparation."[499]

The Draft Articles also address countermeasures.[500] Governments and international tribunals recognize that countermeasures are sometimes justified.[501] Article 49 identifies the object of countermeasures and emplaces limitations.[502] An injured state "may only take countermeasures against a State which is responsible for an internationally wrongful act . . . to induce that State to comply"; an injured state can only apply measures as long as the responsible state's non-performance lasts; and they "shall . . . be taken in such a way as to permit the resumption of performance of the obligations."[503]

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[495] *Id.* (emphasis added).
[496] *Id.* at 57 (art. 13).
[497] *Id.* at 91 (art. 31); Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26) ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.").
[498] *See Factory at Chorzów*, 1927 P.C.I.J. (ser. A) No. 9, at 47–48.
[499] Draft Articles with Commentaries, *supra* note 483, at 92. For example, reference may be made to losses "attributable to [the wrongful] act as a proximate cause", or to damage which is "too indirect, remote, and uncertain to be appraised" *Id.* (citations omitted).
[500] *See* Crawford, *supra* note 489, at 8 ("Among the most debated issues related to the responsibility of States for internationally wrongful acts, the possibility to have recourse to countermeasures as a reaction by, or on behalf of, the injured State.").
[501] Draft Articles with Commentaries, *supra* note 483, at 128.
[502] *Id.* at 130.
[503] *Id.* at 117 (art. 42).

In short, after suffering centuries of pandemics, the international community created a framework to combat global health challenges. These efforts coalesced in the WHO Constitution and 2005 IHR. As Part II now describes, China breached its international obligations under Articles 6 and 7 of the IHR and violated its citizens' right to health.

III. CHINA DID NOT FULFILL ITS INTERNATIONAL OBLIGATIONS

China has taken several steps to achieve international acceptance: hosting the Olympics,[504] the Boao Forum for Asia,[505] and signed the WHO Constitution[506] and the IHR.[507] Yet China threatened its prestige when it did not provide sufficient notification to the WHO for COVID-19[508] and violated its citizens' right to health.[509]

A. IHR BREACH

Under the 2005 IHR, China faces a two-fold breach.[510] China breached its obligation under Article 6 to notify the WHO within twenty-four hours of a possible PHEIC and under Article 7 to provide all relevant health information during an emergency.

1. Article 6: Notification

China's first breach of the IHR is its failure to notify promptly the WHO. China reported "pneumonia of unknown cause" to the WHO on December 31, 2019.[511] However, the first case

[504] Pang Zhongying, *The Beijing Olympics and China's Soft Power*, BROOKINGS (Sept. 4, 2008), https://brook.gs/2Kp6r0F (2008 Olympics); Politics and More Podcast with Dorothy Wickenden, *What the Beijing Olympics Reveal About China*, NEW YORKER (Feb. 10, 2022), https://bit.ly/3D0YG8g (2022 Olympics).
[505] Wang Yiming, *Boao Forum Annual Conference to Focus on Post-Pandemic Economic Recovery*, CHINA.ORG.CN (Jan. 12, 2022), https://on.china.cn/36E8PM6.
[506] WHO Constitution, *supra* note 440, at 186 (signing July 22, 1946).
[507] IHR, *supra* note 383, at 59 (showing China as one of the states party to the IHR).
[508] *See infra* Section II.A.
[509] *See infra* Section II.B.
[510] *See* Mazzuoli, *supra* note 398, at 21–22.
[511] *Timeline*, *supra* note 408.

likely occurred weeks earlier.[512] Article 6 requires notification within twenty-four hours of "all events that might constitute a public health emergency."[513] Thus, notice should have occurred earlier.

Even though China did not formally notify WHO officials until January 2, 2020,[514] there were indications of an outbreak in early December 2019.[515] On December 31, 2019, WHO's office in China noticed a Chinese media statement reporting viral pneumonia in Wuhan.[516] The next day, the WHO requested data on the cluster of pneumonia cases.[517] IHR Article 6 requires that a State "continue to communicate to WHO timely, accurate and sufficiently detailed public health information . . . ."[518] China did not do so. Per IHR Article 6, a state must notify the WHO within twenty-four hours "of all events which may constitute a [PHEIC]."[519] So when "pneumonia of unknown cause" emerged in early December 2019,[520] China should have notified the WHO within twenty-four hours.

2. Article 7: Information-sharing

China breached IHR Article 7 by not sharing full information on the virus in January. IHR Article 7 states that "[i]f a state Party has evidence of an unexpected or unusual public health event in its territory, irrespective of origin . . . it shall provide . . . *all* relevant public health

[512] Chan et al., *supra* note 407; *see also* James Kraska, *China is Legally Responsible for COVID-19 Damage and Claims Could be in the Trillions*, WAR ON THE ROCKS (Mar. 23, 2020), https://bit.ly/32u44Qm.
[513] IHR, *supra* note 383, at 12 (art. 6).
[514] *Timeline*, *supra* note 408.
[515] Chris Buckley & Steven Lee Myers, *As New Coronavirus Spread, China's Old Habits Delayed Fight*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html (citing Huang, *supra* note 404).
[516] *Timeline*, *supra* note 408.
[517] *Id.*
[518] IHR, *supra* note 383, at 12 (art. 6, ¶ 2).
[519] IHR, *supra* note 383, at 12 (art. 6, ¶ 1).
[520] *See* Chan et al., *supra* note 407.

information."[521] The "pneumonia of unknown cause" was an unusual public health event. Given China's history with outbreaks, China should have given the WHO all possible information on the virus during January and February 2020.

The state breached IHR Article 7 when it "initially withheld basic information about the coronavirus from the public, underreported cases of infection, downplayed the severity of the infection, and dismissed the likelihood of transmission between humans."[522] More, the world received a large amount of misinformation about COVID-19 between January and March 2020.[523] As the South China Post reported, China withheld data that showed the prevalence of "'silent carriers'—people who are infected by the new coronavirus but show delayed or no symptoms."[524] Whistleblowers resorted to coded messages to avoid government censors.[525] And China did not appear truthful when officials silenced a physician.[526] Even Dr. Anthony Fauci, Director National

[521] *Id*. at 12 (art. 7) (emphasis added). As one scholar commented, "[t]his provision's wording—in the best *hard law* style—is direct and imperative." Mazzuoli, *supra* note 398, at 12.

[522] *Human Rights Dimensions of COVID-19 Response*, HUM. RTS. WATCH (Mar. 19, 2020, 12:01 AM), https://bit.ly/3lh6cSP; *see also* Devashsish Giri, *Responsibility of China for the Spread of COVID-19: Can China be Asked to Make Reparations?*, JURIST (Tim Zubizarreta ed.) (Apr. 10, 2020, 4:24 PM), https://bit.ly/2IqvYVS.

[523] *See* Ana Santos Rutschman, *Mapping Misinformation in the Coronavirus Outbreak*, HEALTH AFFS. (Mar. 10, 2020), https://bit.ly/2JPZSng. Also, the WHO tweeted on January 14, "[p]reliminary investigations conducted by the Chinese authorities have found no clear evidence of human-to-human transmission of the novel #coronavirus (2019-nCoV) identified in #Wuhan, #China." Nick Givas, *WHO Haunted by January Tweet Saying China Found No Human Transmission of Coronavirus*, FOX NEWS (Mar. 18, 2020), https://fxn.ws/36r7PHs.

[524] Josephine Ma et al., *Exclusive: A Third of Coronavirus Cases may be "Silent Carriers", Classified Chinese Data Suggests*, S. CHINA MORNING POST (Mar. 22, 2020, 6:00 PM), https://bit.ly/35f4Fak.

[525] Ryan Broderick, *Chinese WeChat Users are Sharing a Censored Post About COVID-19 by Filling it with Emojis and Writing it in Other Languages*, BUZZFEED NEWS (Mar. 11, 2020, 1:54 PM), https://bit.ly/3pdzXpR.

[526] *See* Julian Gewirtz, *One Doctor's Place in China's Battle for the COVID-19 Narrative*, JUST SEC. (Mar. 23, 2020), https://bit.ly/2JJWtq2 ("An ophthalmologist in Wuhan, Dr. Li noticed that patients were appearing with strange cases of a severe respiratory illness. He sent out a widely circulated message on December 30 to other doctors in the area, warning them to take precautions, which caused the local police to call him in. They accused him of "making false comments" that had "severely disturbed the social order.").

Institute of Allergy and Infectious Diseases, said that "misinformation from China delayed and affected U.S. response efforts."[527]

Because pandemics like COVID-19 spread quickly,[528] a state must thoroughly report all health emergencies. Because that did not occur here, China breached Articles 6 and 7.

B. VIOLATION OF THE RIGHT TO HEALTH

China violated the right to health by allowing their wet markets to flourish after the 2002 SARS outbreak without imposing sufficient health measures. Article 12 of the ICESCR explains the right to health as peoples' right to "lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."[529] As such, there is no question that wet markets are unsanitary compared to accepted international norms.[530]

After SARS, China should have known that its wet markets, and the exotic animals sold there, were a health risk.[531] Even the WHO recognizes that the wet markets lack sufficient health and safety standards.[532] China banned civets from Chinese wet markets after SARS's emergence

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[527] Vincent J. Vitkowsky & Rachida Mecheri, *Responding to China at the United Nations*, NAT'L SEC. INST. at 9 (Nov. 2020) (citing Tim Haines, *Fauci: Chinese "Misinformation" Delayed US Response to Coronavirus*, REAL CLEAR POL. (Apr. 13, 2020), https://bit.ly/38EbwfA).

[528] *See Clinical Care Guidance*, CDC (last updated Feb. 16, 2020), https://bit.ly/2IiPd3Y ("The incubation period for COVID-19 is thought to extend to 14 days, with a median time of 4-5 days from exposure to symptoms onset.").

[529] Economic and Social Council Res. E.C. 12/2000/4 (Apr. 25, 2000), https://bit.ly/38sFlzq.

[530] *See, e.g.*, Woo et al., *supra* note 405, at 403 ("Here, the animals are closely packed in cages and hygienic conditions are inevitably poor, with the shedding of large amounts of animal excreta. These animal excreta may contain high concentrations of zoonotic microbes of potential hazard to human health. High-risk behaviors of customers, such as blowing the cloacae of chickens commonly practised to examine their healthiness, further increase the risk of transmission of these potential microbes.").

[531] *SARS (Severe Acute Respiratory Syndrome*), WHO, https://bit.ly/35T6LNg (last visited Nov. 8, 2020).

[532] *See* Helen Briggs, *Coronavirus: WHO Developing Guidance on Wet Markets*, BBC (Apr. 21, 2020), https://bbc.in/3kyk6OZ.

in late 2003.[533] But civets were available in wet markets as early as 2004.[534] A similar chain of events happened with COVID-19. China closed its Wuhan wet markets in January 2020 due to the virus.[535] However, China allowed the wet markets to reopen in April, 2020.[536] In short, China should follow the WHO's guidelines in its high-risk wet markets, especially those that have contributed to prior epidemics.[537] Overall, China denies its citizens the right to health because China continues to operate wet markets despite evidence that outbreaks continue to start in these very markets.[538]

C. China's Responsibility for Internationally Wrongful Acts

China can be held responsible for its breaches under the Draft Articles. A state must act "in conformity with what is required . . . regardless of its origin or character."[539] A breach could come from any "international obligation[] of States,"[540] such as bilateral obligations, duties to the international community at large, or treaties.[541] Further, China is bound by the IHR articles on top of the ICESCR's right to health provision.[542]

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[533] Robert G. Webster, *Wet Markets – a Continuing Source of Severe Acute Respiratory Syndrome and Influenza*, 363 Rapid Rev. 234, 235 (2004); *see also Civet*, Britannica, https://bit.ly/3a0Bz11 (last visited Dec. 9, 2020).
[534] *Id.* And are still available. *See* Jason Gale, *China's Wildlife Is a Pandemic 'Waiting to Happen," Study Finds*, Bloomberg Quint (Nov. 15, 2021), https://bit.ly/3DaLgqd (selling civets).
[535] Cate Cadell, *A Year on, Markets Bustling in Chinese City Where COVID-19 Emerged*, Reuters (Dec. 7, 2020, 11:06 PM), https://reut.rs/357Pjac.
[536] Sigal Samuel, *The Coronavirus Likely Came from China's Wet Markets. They're Reopening Anyway*, Vox (Apr. 15, 2020, 11:40 AM), https://bit.ly/35cztbG.
[537] *E.g.*, Robert G. Webster, *Wet Markets – A Continuing Source of Severe Acute Respiratory Syndrome and Influenza?*, 363 Lancet 234 (2004), https://bit.ly/36XMRBu (describing outbreak of avian flu in Shenzhen); Marion Koopmans & Menno D. de Jong, *Avian Influenza A H7N9 in Zhejiang, China*, 381 Lancet 1882 (2013), https://bit.ly/3qE2Z2x.
[538] *See supra* notes 401–412 and accompanying text.
[539] Draft Articles with Commentaries, *supra* note 483, at 54 (art. 12).
[540] *Id.* at 55.
[541] *Id.* at 55–56.
[542] *See id.* at 57 (art. 13) ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

China's wrongful acts would allow reparations for "any damage, whether material or moral."[543] This right is self-evident—"the general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States."[544] Article 31 allows an injured state to claim reparations for any damage.[545]

An injured state can then invoke Article 42. This article outlines the right of the "State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act."[546] A "State is entitled . . . to invoke the responsibility of another State if the obligation breached is owed to . . . (*a*) that State individually; or (*b*) a group of States . . . or the international community."[547]

Under the IHR and ICESCR, China owes obligations to member States: to notify the WHO within twenty-four hours of any potential PHEIC, to give complete information on emergent health events, and to support the right to health.[548] Because China breached these obligations, states have a path under Article 42 to hold China responsible.[549]

The next section describes mechanisms an injured state could leverage, including IHR settlement, seeking an ICJ decision, and imposing countermeasures. Each option will be assessed and weighed against the goals of accountability and prevention.

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[543] *Id.* at 91 (art. 31, ¶ 2).
[544] Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, A/56/10, at 76 (art. 31) (2001), https://bit.ly/3o2jF1w [hereinafter Draft Articles with Commentaries].
[545] *Id.* at 91 (art. 31).
[546] *Id.* at 116.
[547] *Id.* at 117 (art. 42).
[548] *See supra* notes 519–521, 529 and accompanying text.
[549] Draft Articles with Commentaries, *supra* note 483, at 117 (An injured state is "entitled to resort to all means of redress contemplated in the articles, including countermeasures.").

IV. MECHANISMS TO HOLD CHINA ACCOUNTABLE

Assuming China does not provide reparations to injured States, there are three avenues to obtain recourse: (A) settlement, (B) ICJ decisions, or (C) countermeasures.

A. SETTLEMENT

Settlement is the first step to resolving a dispute under the IHR. The regulations direct States to seek negotiation "or any other peaceful means" to settle disputes.[550] States can choose from several methods: mediation, good offices, conciliation, or any other "dispute settlement mechanisms . . . ."[551] But States do not have to accept settlement results or even conduct the settlement in good faith.[552]

If the affected States cannot resolve the matter independently, they may agree to submit the dispute to the Director-General for arbitration.[553] But if China was unlikely to accept a settlement, it is even more unlikely China would consent to arbitration.[554] Before engaging in

[550] IHR, *supra* note 383, at 34–35 (art. 56, ¶1).
[551] *Id.* at 35 (art. 56, ¶ 4).
[552] *See id.* (art. 56, ¶ 2) ("In the event that the dispute is not settled by the means described under paragraph 1 of this Article, the States Parties concerned may agree to refer the dispute.").
[553] *Id.*
[554] For example, in 2012, after China "squeezed out the Philippines from Scarborough Shoal," the two nations engaged in negotiations. Leszek Buszynski, *Law and Realpolitik: The Arbitral Tribunal's Ruling and the South China Sea*, 21 ASIAN Y.B. INT'L L. 121, 125 (2015). When negotiations failed, China and the Philippines appealed to arbitration at the Permanent Court of Arbitration. *Id.* The Tribunal found that China "violated the Philippines' sovereign rights in its exclusive economic zone" and had "inflicted irreparable harm." *Id.* at 126 (quoting Press Release, Permanent Ct. Arb., S. China Sea Arb. (July 12, 2016) (on file with author). China "claimed the ruling had no legal significance," "contested the legitimacy of the ruling," and then "declared that the ruling is 'null and void and has no binding force and China neither accepts nor recognizes it.'" *Id.* at 128 (quoting Press Release, China For. Ministry, Award S. China Sea Arb. Initiated by Phil. (July 12, 2016) (on file with author)).

arbitration, each state would have to "accept [it] as a means of resolving disputes . . . [and] must declare this acceptance 'in writing' to the Director General."[555]

In a similar vein, China has an obligation to pursue settlement.[556] Article 33 of the U.N. Charter directs that States "shall . . . seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements . . . ."[557] The Charter further provides that the Security Council may ask States to settle the dispute,[558] and if the parties fail to do so, the council may "recommend such terms of settlement as it may consider appropriate" if the dispute implicates "international peace and security."[559] Given the rhetoric to hold China responsible,[560] the Security Council should consider its involvement if China rejects settlement.

While no state has ever invoked IHR Article 56,[561] there are advantages to settlement. For one, China could control its fate, as compared to binding arbitration or an ICJ decision.[562] But as Professor Steven Hoffman identifies, seeking settlement may not be feasible. While the IHR requires parties to "attempt settling the dispute, there is no guarantee or requirement that they

[555] Mazzuoli, *supra* note 398, at 19. The WHO cannot force a state to accept settlement. IHR, *supra* note 383, at 35 (art. 56, ¶4).
[556] *See* U.N. Charter art. 33–38.
[557] U.N. Charter, art. 33, ¶ 1.
[558] *Id.* art. 33, ¶ 2.
[559] *Id.* art. 37, ¶ 2.
[560] *See* Patrick Wintour & Tobi Thomas, *China Loses Trust Internationally over Coronavirus Handling*, GUARDIAN (Oct. 27, 2020, 10:30 AM), https://bit.ly/2Ll3EWD ("Overall, the poll suggests there is a receptive global audience for the next US president, if he chooses, to construct an international alliance to challenge China's growing political dominance, and to question the moral values of its leadership.").
[561] Armin von Bogdandy & Pedro A. Villarreal, *Critical Features of International Authority in Pandemic Response: The WHO in the COVID-19 Crisis, Human Rights and the Changing World Order*, MAX PLANK INST. COMPAR. PUB. L. & INT'L L. 23, 24 (2020); Ching-Fu Lin, *COVID-19 and the Institutional Resilience of the IHR (2005): Time for a Dispute Settlement Redesign?*, 13 CONTEMP. ASIA ARB. J. 269, 279 (2020).
[562] *See infra* Section III.B.2.

actually resolve it."[563] The "lack of any obligatory mechanism compelling the parties to participate . . . means that it will be power and political influence" instead of "law and legal norms" that drives state behavior.[564] Indeed, there are "few incentives for states to ever resolve their disputes and no mechanism to ensure a timely settlement."[565] Because settlement is unlikely to occur, however, the ICJ can also play a role in holding China accountable.

B. ICJ DECISIONS

The WHO could seek an advisory opinion or States could bring a contentious claim.

1. Advisory Opinion

Though an advisory opinion is not binding,[566] an advisory judgment would be valuable for its "contribution[] to important substantive issues."[567] The ICJ could examine the IHR's reporting requirements, how COVID-19 began, and measure China's response. The question presented would be, "Was there a failure by a member state to properly notify and inform the WHO under Articles 6 and 7?" An answer to this question would "lay down a path for the subsequent course of action."[568]

An advisory opinion could also have an impact beyond China because the "court gets to decide [the opinion's scope] on the basis of all the available evidence."[569] The issue should not be limited to China's alleged failure to notify the WHO. Instead, a broader holding, using the facts of

[563] Seven J. Hoffman, *Making the International Health Regulations Matter*, *in* ROUTLEDGE HANDBOOK OF GLOB. HEALTH SEC. 239, 242 (Simon Rushton & Jeremy Youde eds., 2014).
[564] *Id*.
[565] Hoffman, *supra* note 563, at 4.
[566] *See* DAMROSCH & MURPHY, *supra* note 472, at 593.
[567] *Id*.
[568] Atul Alexander, *Gauging the Advisory Jurisdiction of the International Court of Justice in the Face of COVID-19*, JURIST (BRITTNEY ZELLER ED.) (Apr. 6, 2020, 3:46 PM), https://bit.ly/2GJbQxR.
[569] *Id*.

China and COVID-19, would help illuminate member States' notification obligations. An ICJ decision could also lead to higher expectations for state notification requirements and strengthen the WHO's notification procedures. Finally, an advisory opinion could help answer whether States pursuing domestic actions against China could overcome legal issues like proving causation.[570]

One potential obstacle is that an organization (other than the U.N. General Assembly or Security Council) may only request an advisory opinion on "any legal question . . . within the scope of the activities of the requesting organ."[571] For example, the ICJ rejected the WHO's request for an advisory opinion on whether State use of nuclear weapons would breach international law and the WHO Constitution.[572]

China's alleged failure to adhere to Articles 6 and 7 is a public health matter within the WHO's scope.[573] COVID-19 falls within the WHO mandate.[574] So even though the WHO has a poor record in advisory opinions,[575] and the ICJ seldom provides them,[576] the request to clarify two key IHR articles, Art. 6 and 7, would likely succeed.[577]

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[570] *See* Sebastián Guidi & Nahuel Maisley, *Who Should Pay for COVID-19?: The Inescapable Normativity of International Law*, 96 N.Y.U. L. REV. 375, 401–05 (2021) (discussing the problem of causation).
[571] DAMROSCH & MURPHY, *supra* note 472, at 593.
[572] INTERNATIONAL COURT OF JUSTICE [ICJ], *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, https://bit.ly/35TmtIh (last visited Apr. 18, 2022). Interestingly, although the WHO could not ask for an advisory opinion, the ICJ stated that "[t]here was no doubt that questions . . . were within the competence of the United Nations." *Id.*
[573] Alexander, *supra* note 568.
[574] The first guiding principle in the WHO Constitution is for the "enjoyment of the highest attainable standard of health." WHO Constitution, *supra* note 440, at 186.
[575] *See supra* note 572 (declining jurisdiction); ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, https://www.icj-cij.org/en/case/65 (last visited Mar. 24, 2022) (accepting jurisdiction).

[576] The ICJ has ruled on only twenty-eight advisory opinions in its history. *Judgments, Advisory Opinions and Orders*, ICJ, https://bit.ly/3eKRukh (last visited Mar. 24, 2022).
[577] *See* Sandrine De Herdt, *A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic*, EJIL: TALK! (May 20, 2020), https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/.

2. Contentious Decision

Since its inception, the ICJ has issued 139 contentious decisions.[578] A contentious decision would provide a binding (on the parties), neutral, and generally internationally accepted decision that would allocate state or organizational responsibility and calculate damages. Here, the two matters in dispute are whether China's IHR breaches led to injuries and whether China had sufficient health measures in its wet markets.

Before the ICJ exercises its power, it must establish jurisdiction over the dispute. The ICJ statute first explains that "[t]he Court shall be open to the states parties to the present Statute."[579] In other words, States must recognize the court's jurisdiction.[580] Article 75 of the WHO Constitution provides for jurisdiction: "Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice."[581] Thus, if dispute resolution fails, a state might be able to obtain jurisdiction.

Thus, China's breaches of IHR Articles 6 and 7 provide apt legal questions for the ICJ.[582] Unlike an advisory opinion, injured States would benefit from the court directly answering the question, "Did China's breach of Articles 6 and 7 contribute to the pandemic and lead to damages?" On the other hand, the violation of the right to health is a more difficult analysis. As section II.B discusses, there are problems with defining the right to health and proving that China

[578] *Contentious Cases*, ICJ, https://bit.ly/36V3bl7 (last visited Mar. 24, 2022).
[579] ICJ Statute, *supra* note 468, art. 35(1) Jurisdiction is also open to other states through the UN Security Council. *Id.* art. 35(2).
[580] *See id.* art. 36(6).
[581] WHO Constitution, *supra* note 440, at 202 (art. 75).
[582] *See* Mazzuoli, *supra* note 398, at 21–22 ("A plausible solution would be to hold China accountable for the failure to comply with the duty to report, which is a rule contained in the IHR grounded on the provisions of the WHO Constitution . . . .") (citations omitted); *see also* Alexander, *supra* note 568.

violated this right.[583] While an ICJ advisory or contentious decision is a viable route, countermeasures could also play a role.

C. COUNTERMEASURES

Countermeasures could be available to bring China into health compliance. The Draft Articles recognize countermeasures in "certain circumstances . . . as necessary to ensure cessation of the wrongful act and reparation for its consequences."[584] They function as "a feature of a decentralized system by which injured States may seek to vindicate their rights" and affirm that they are "recognized by Governments and the decisions of international tribunals."[585] An injured state may have a valid basis for imposing countermeasures against China for its violations.[586]

A state must ensure that countermeasures satisfy five criteria. First, the injured state must notify the offending state of its breach and give time to correct the situation.[587] Second, the measures must be proportional.[588] Third, the measures must be narrowly focused to ensure their "function . . . to induce a wrongdoing State to comply with obligations of cessation and reparation . . . ."[589] Fourth, measures must be corrective.[590] Finally, the measures "must be as far as possible reversible in their effects in terms of future legal relations between the two States . . . ."[591]

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[583] *See supra* notes 532–538 and accompanying test.
[584] Draft Articles with Commentaries, *supra* note 483, at 32.
[585] Draft Articles with Commentaries, at 128.
[586] *See supra* Part II.
[587] Draft Articles with Commentaries, *supra* note 483, at 135 (art. 52, ¶ 2).
[588] *Id.* at 134 (art. 51) ("Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.").
[589] *Id.* at 70.
[590] *Id.* at 135 (art. 52, ¶ 3) ("Countermeasures may not be taken, and if already taken must be suspended without undue delay if: (a) the internationally wrongful act has ceased."); *id.* at 137 (art. 53) ("Countermeasures shall be terminated as soon as the responsible State has complied with its obligations . . . .").
[591] Draft Articles at 129, (art. 49, ¶¶ 2, 3); *see id.* at 137 (art. 53).

For example, in 1978, an airline carried a route between the United States and Paris, with a transfer in London.[592] Yet France objected and did not allow the passengers to disembark in Paris.[593] In response, the United States prohibited all flights by French-designated carriers to the West Coast.[594] Trying to resolve the impasse, the United States and France signed a *compromis* and submitted the dispute to an Arbitral Tribunal.[595]

The tribunal supported the United States's right to impose countermeasures.[596] First, the tribunal stated that if "a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled . . . to affirm its rights through 'counter-measures.'"[597] Next, the tribunal weighed the direct and indirect injuries to both sides and found the measures proportional.[598] The measures were valid because the United States did "everything . . . expedite the arbitration[.]"[599]

Injured States could seek countermeasures in this case. WHO member States could limit China's leadership roles at WHA and WHO. This would meet countermeasures' requirements (assuming notice and cessation of measures upon China's compliance). The measure is proportional and narrow. China could not fully participate in the WHA or WHO until it met the standard and the proposed action focuses on international health.

Because countermeasures cannot correct China's failure to notify, an injured state can only point to China's violation of the right to health. But there is one immediate barrier: defining a

[592] Air Services Agreement Case (France v. U.S.), Decision, 18 R.I.A.A. 416 (1978), https://bit.ly/3kfDqR9.
[593] *Id.*
[594] *Id.*
[595] *Id.*
[596] France v. U.S.. ¶ 98.
[597] *Id.* ¶ 81.
[598] *Id.* ¶ 90.
[599] *Id.* ¶ 98.

breach of the "right to health." No evidence conclusively shows the virus started in the wet markets.[600] Nor are there any firm international health standards for these markets.[601] Even if international standards existed, China would likely argue that they are making reasonable efforts to promote safe, healthy markets.[602] For example, Hong Kong has banned live ducks and geese from markets since 1998.[603] And China has targeted regulations for wet markets, market sanitation, and food safety.[604]

There may be undesirable consequences. China might claim the countermeasures themselves were internationally wrongful acts and lead to reciprocal countermeasures. Alternatively, if a state imposes countermeasures against China, China might then target other States that might also have violated the "right to health."

The goal of countermeasures is to bring a state in line with its obligations, not harm third parties.[605] States should thus consider the targeted state's reaction and ripple effects on the global health picture before using this tool. China's likely response would be more harmful overall to global health. Because States may have difficulties justifying and imposing countermeasures, they

[600] *See, e.g.*, Kenji Mizumoto, Katsushi Kagaya & Gerardo Chowell, *Effect of a Wet Market on Coronavirus Disease (COVID-19) Transmission Dynamics in China, 2019–2020*, 97 INT'L J. INFECTIOUS DISEASES 96 (2020) ("[S]ignificant evidence strongly links the Huanan Seafood Wholesale Market in Wuhan with the early spread of the novel coronavirus (COVID-19) among humans."); Qun Li et al., *Early Transmission Dynamics in Wuhan, China, of Novel Coronavirus-Infected Pneumonia*, 382 NEW ENG. J. MED. 1199 (2020) ("[T]he first 4 cases reported, all linked to the Huanan (Southern China) Seafood Wholesale Market . . . .").

[601] *See* WHO, A GUIDE TO HEALTHY FOOD MARKETS 1 (2006), https://bit.ly/2IzOPi2. The report offers several recommendations to "reduce transmission of avian influenza," including education and awareness, monitoring, visual inspection, personal protective equipment, market zoning, and potable water and hand washing. *Id.* at 31–34.

[602] *E.g.*, Woo et al., *supra* note 405, at 405 (discussing Hong Kong's health measures in its livestock markets); *Regulation of Wild Animal Wet Markets in Selected Jurisdictions*, L. LIBR. CONG. 1, 3 (Aug. 2020), https://bit.ly/3nyvCMb ("China . . . ha[s] specific regulations that apply to wet markets.").

[603] Woo et al., *supra* note 405, at 405.

[604] *Regulation of Wild Animal Wet Markets in Selected Jurisdictions*, *supra* note 602, at 3.

[605] Draft Articles with Commentaries, *supra* note 483, at 129 (art. 49, ¶¶ 1, 2).

might turn to unilateral options.[606] These other options, like domestic legal action and reprisals, may irreparably harm global health.

States have several options to seek recourse for China's breaches. First, States can engage in settlement or arbitration.[607] However, no state has ever engaged in settlement under the IHR.[608] Second, the WHO can seek an advisory opinion from the ICJ, or States could pursue a contentious decision.[609] Yet, this would be a time-consuming process and an injured state would have difficulty proving the breach of the right to health.[610] Third, States could impose countermeasures for China's violation of the right to health.[611] Nevertheless, countermeasures would be hard to justify and likely to incur reciprocal action. Punishing China is not the best way to prevent the next pandemic. States and the WHO should instead improve the international health framework.

IMPROVEMENTS TO THE INTERNATIONAL FRAMEWORK

Existing international law mechanisms are not ideal for prevention. States must therefore (A) improve the WHO, (B) build upon the IHR, and (C) strengthen global health.

A. CHANGE THE WHO

Because a strong WHO is crucial to prevent outbreaks, the WHO must seek informational, financial, and structural improvements. This section will discuss WHO's weaknesses and suggest a Compliance and Accountability Committee as a cure.

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[606] Unilateral measures might include "reprisals," which are "otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach" or domestic legal action. *Id.* at 128; *see also* Isabel Vincent, *New Yorkers Seek Justice with Class-Action Coronavirus Lawsuits Against China*, N.Y. POST (May 16, 2020, 11:17AM), https://bit.ly/3pzIgfM (lawsuits).
[607] *See supra* Section III.A.
[608] *See supra* note 561 and accompanying text.
[609] *See supra* Section III.B.
[610] *See supra* notes 582–583 and accompanying text.
[611] *See supra* Section III.C.

1. Address WHO Weaknesses

The WHO must overcome multilateralism and a lack of independence. The first shortfall is Trojan multilateralism.[612] Professors Devi Sridhar and Ngaire Woods explain how "concerns about . . . pandemics" led to new health initiatives that "created a model that is tempting States to import new and greater control into traditional international organizations."[613] In essence, "governments might be using their 'gifts' to multilateral organizations to further . . . bilateral initiatives" instead of global ones.[614] Second, the WHO is over-reliant on States for information and financial support.

a. Informational Improvements.

The WHO must strengthen information collection. IHR Article 12 gives the Director-General unilateral power to declare a PHEIC.[615] Yet to "determin[e] whether an event constitutes a public health emergency of international concern," the director considers, among other factors, information given by states."[616] While the director has the final say on declaring a PHEIC,[617] there is too much deference given to the state where the incident occurred.[618]

One option is to modify Article 12 to decrease reliance on information given by States. Instead of saying that the Director-General "shall consider . . . information provided by the State party," the article should replace "shall" with "may."[619] Further, IHR Article 9 allows the WHO

[612] Meisterhans, *supra* note 434, at 9.
[613] Devi Sridhar & Ngaire Woods, *Trojan Multilateralism: Global Cooperation in Health*, 4 GLOB. POL'Y 325, 325 (2013)).
[614] *Id.* at 326.
[615] *See supra* notes 555–558 and accompanying text.
[616] IHR, *supra* note 383, at 14 (art. 12, ¶ 4).
[617] *See supra* note 558 and accompanying text.
[618] IHR, *supra* note 383, at 14–15 (art. 12, ¶ 3).
[619] *Id.* at 14 (art. 12, ¶ 4).

to "take into account reports from sources other than notifications or consultations."[620] For States that have shown a hesitance to share complete or timely information,[621] the WHO should put more weight to other information sources.[622]

Naturally, the WHO should not send health inspectors uninvited to States. But gathering timely and accurate information is vital. As a result, the WHO must adjust its leadership style to promote greater state cooperation given COVID 19.

The Director-General should act more independently, particularly during an emergent health crisis.[623] The director should not have to wait on a state's approval to convene the emergency committee or declare a PHEIC.[624] Instead, the WHO's executive should be "standing up to even the most powerful member States."[625] Also, the Director-General should avoid the appearance of partiality.[626] But this does not mean the Director-General should be aggressive; he should offer unifying remarks as he gave at the G20 Leader's Summit.[627] By acting more

[620] *Id.* at 12 (art. 9, ¶ 1).
[621] *See, e.g.*, Justine Coleman, *Leaked Documents Show China Mishandled Early COVID-19 Pandemic: Report*, Hill (Nov. 30, 2020, 7:04 AM), https://bit.ly/3osfhJE (describing how Chinese officials withheld information like the actual number of COVID-19 cases in early February, the time required for a positive diagnosis (23.3 days), and a severe influenza outbreak in late 2019).
[622] *See, e.g.*, *supra* notes 408–412 and accompanying text (describing how WHO received notice of an unusual health event and activated its IMST).
[623] Lawrence O. Gostin & Sarah A. Wetter, *Using COVID-19 to Strengthen the WHO: Promoting Health and Science Above Politics*, MILBANK Q. (May 6, 2020), https://bit.ly/3nTQMob.
[624] As political consultant Lee Atwater once opined, "perception is reality." Victoria Times-Colonist Staff, *In Politics, Perception Is Reality*, TIMES COLONIST (Aug. 3, 2017, 8:04 AM), https://www.timescolonist.com/opinion/letters/in-politics-perception-is-reality-4652492. Thus, the WHO's delay in declaring a PHEIC "suggested something troubling: that the WHO was letting Beijing influence what was supposed to be an independent, science-driven process." Jennifer Nuzzo, *To Stop a Pandemic: A Better Approach to Global Health Security*, FOREIGN AFFS., Jan./Feb. 2021, at 39.
[625] Gostin & Wetter, *supra* note 623.
[626] Instead, he "should always speak truth to power." *Id.*
[627] Press Release, WHO, WHO Director-General Calls on G20 to Fight, Unite, and Ignite Against COVID-19 (Mar. 26, 2020), https://bit.ly/2U84Q0N. Dr. Tedros Adhanom Ghebreyesus observed that "[t]his is a global crisis that requires a global response," and he called on leaders to "fight, unite, and ignite." *Id.*

independently and forcefully, the director will be able convince States to cooperate more with the WHO.

b. Financial Improvements.

The WHO lacks funds to pursue the kind of transformative programs necessary to fight global pandemics effectively.[628] In 2018, the WHO called for $14.1 billion for 2019–23 to "deliver on the Triple Billion strategy."[629] Yet, the WHO projected an annual income of less than $4 billion.[630] The shortfall thus limits the "WHO to single issue-oriented health goals and isolated programs . . . ."[631]

As of 4Q 2021, the WHO receives 83.6% of its funding from specified and thematic voluntary contributions ("earmarks"), and only 12.6% from assessed contributions.[632] Unlike earmarks, assessments are dues for WHO membership.[633] These assessments provide a dependable and flexible income. And assessments can act as penalties for delinquent States such as "loss of voting rights[,] . . . significant criticism[,] . . . [and] reputational costs."[634] With fewer assessments, the WHO loses a key compliance lever.

[628] Greater financial independence will help the WHO. *See* Bogdandy & Villarreal, *supra* note 561, at 26.
[629] WHO, A HEALTHIER HUMANITY: THE WHO INVESTMENT CASE FOR 2019–2023, at 9 (2018), https://bit.ly/38tBdzq.
[630] WHO, 72d World Health Assembly, Prov. Agenda Item 11.1 at 20, A72/4 (May 10, 2019).
[631] Meisterhans, *supra* note 434, at 12.
[632] *Contributors*, WHO, https://bit.ly/35Bqwc1 (last visited Mar. 24, 2022).
[633] *How WHO Is Funded*, WHO, https://bit.ly/2UDfTzf (last visited Nov. 17, 2020).
[634] *Id*.

Decades ago, most of the WHO budget came from state assessments.[635] The model changed however, as States began giving more funds to intergovernmental organizations ("IGO").[636] The WHO followed suit,[637] which led to the WHO facing "strategic distortions" due to reliance on earmarks.[638]

Because only 16% of WHO's funding is flexible, the WHO has severe restrictions on how it may spend its funding.[639] Granted, States have increased voluntary contributions to fight COVID-19.[640] However, because the WHO does not have discretionary spending over these funds, the WHO will not be able to accomplish its other goals. For that reason, the WHO should increase state assessments.[641]

In a similar vein, the WHO can use its power of the purse to influence compliance.[642] The 2020–21 WHO budget describes how the Secretariat "measures WHO's impact at the country level"[643] and prioritizes resources.[644] The Secretariat could therefore scrutinize developed nations

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[635] *See* Tedros Adhanom Gebreyesus, WHO Director-General, *WHO's Director-General Outlines Funding Challenges and Strategies*, YOUTUBE (May 25, 2020), https://bit.ly/2IGX3V8 (describing "the shift of assessed contributions" from 80% in the 1970s to 20% today).

[636] "[B]etween 1995 and 2010 earmarked contributions for operational activities for development in the UN system grew by 252 per cent." Erin R. Graham, *Follow the Money: How Trends in Financing are Changing Governance at International Organizations*, 8 GLOB. POL'Y 15, 15 (2017), https://bit.ly/3nw70Uw.

[637] *See supra* note 274 and accompanying text.

[638] Graham, *supra* note 636, at 18 (citation omitted).

[639] *Contributors*, *supra* note 632. Flexible funds are those that are not tied to specific projects. *Flexible Funding*, WHO, https://bit.ly/3NnhWkU (last visited Mr. 24, 2022).

[640] *See* Elaine Ruth Fletcher, *China Announces US$ 2 Billion COVID-19 Initiative; US Assails China's Pandemic Response; WHO Decries Global "Amnesia" About Epidemic Lessons*, HEALTH POL'Y WATCH (May 18, 2020), https://bit.ly/3pgHLHg; *Contributors*, *supra* note 632 (showing Pandemic Influenza Preparedness (PIP) funds at $51,828,000 for 4Q 2021).

[641] *See* Gostin & Wetter, *supra* note 623 (discussing how at least half of the WHO's budget should come from mandatory assessments).

[642] Dr. Nuzzo supports this reasoning. She proposes that "countries that honor their obligations to report outbreaks should be rewarded with help and priority access to resources—not penalized." Nuzzo, *supra* note 624, at 39.

[643] WHO, *Programme Budget 2020–2021*, 72nd WHA, at 13, A72/4 (May 2019), https://bit.ly/3pBVXLl.

[644] *Id.* at 50 (based on "the severity of the crisis [and] to the Member State's capacity to respond and to the risk of international spread").

more closely that have fallen short of primary obligations.[645] As such, the WHO could prioritize funding for countries that better support the WHO's mission.

If the WHO presses too hard on States for funding, there might be consequences. As Professor Lawrence Gostin and Sarah Wetter explain, the "WHO is often placed in an impossible position: if it acts too harshly . . . countries may . . . pull their funding, ultimately putting global health at greater risk."[646] States may be therefore "reticent to invest in the core budget of the WHO" because they think they are "relinquishing their state sovereignty."[647] Indeed, a state frustrated with the WHO could simply walk away.[648]

Still, the WHO should take a firm stance against States that do not fund the WHO or are partly responsible for pandemics.[649] If the international community trusts the WHO's judgments, States like China might bow to social pressure. But for now, the WHO relies on providing budget transparency[650] and pleading with States for donations.[651]

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[645] *Id.* at 14. Specifically, the Secretariat could investigate "the extent to which the [state] interventions . . . have integrated . . . equity and human rights[.]" *Id.*

[646] Gostin & Wetter, *supra* note 623.

[647] Srikanth K. Reddy et al., *The Financial Sustainability of the World Health Organization and the Political Economy of Global Health Governance: a Review of Funding Proposals*, Globilization & Health (2018) at 9, https://bit.ly/2ItTv8V.

[648] For example, in 2020, the United States announced its withdraw from the WHO after then-President Trump "criticized WHO for being slow to respond to the pandemic and for being too 'China-centric.'" Pien Huang, *Trump Sets Date to End WHO Membership over its Handling of Virus*, NPR (July 7, 2020, 6:14 PM), https://n.pr/3fbsPWC. Yet, the current Biden administration declared in early 2021 that the United States will rejoin the WHO. Christina Morales, *Biden Restores Ties with the World Health Organization that were Cut by Trump*, N.Y. TIMES (Jan. 20, 2021), https://nyti.ms/36N6kqQ.

[649] As of 4Q 2021, China contributed 2.3% of the WHO's budget ($177,659,000). *Contributors*, *supra* note 632. Yet SARS and COVID-19 originated in China. *See* Sarkar, *supra* note 375; Davidson, *supra* note 398.

[650] *See generally Contributors*, *supra* note 632.

[651] *See* Gebreyesus, *supra* note 635 (highlighting "the two objectives of the Organization's transformation agenda in this context are to increase overall funding for the Organization and to increase flexible funding to expand and strengthen WHO's programmes.").

Other than achieving greater financial independence, increased surveillance and reporting can be met through a compliance and accountability committee.

2. Form a Compliance and Accountability Committee

A Compliance and Accountability Committee ("CAC"), as offered by Professor Ching-Fu Lin,[652] could ensure that States maintain a core capacity for surveillance and reporting.[653] Because there are no obligatory compliance mechanisms, the WHO is often at the mercy of state reporting.[654] China in particular is reticent to "collaborate with surveillance systems or engage in other information-sharing activities."[655]

For that reason, the CAC should act against a state that does not meet its surveillance responsibilities. Of course, the CAC's initial actions should be restrained. The committee could launch an "'assess and comment' procedure to review specific cases" and "issue a '*Specific Comment*' on such a case."[656] A comment is not legally binding, however; its purpose is to "help[] other State Parties urge[] the State Party concerned to bring its measure into compliance."[657] Under Professor Lin's model, the CAC could identify a wrong and suggest remediation, but it would have to rely on other States to enforce compliance. Granted, the targeted state might not like being

[652] Lin, *supra* note 561, at 282–83; *cf.* Ahmed Al-Baidhani, *The Role of Audit Committee in Corporate Governance: Descriptive Study*, 2 INT'L J. RSCH. & METHODOLOGY IN SOC. SCI. 45, 55 (2016) (discussing how "[t]he audit committee plays a major role in corporate governance").
[653] As Dr. Nuzzo reports, less then twenty-five percent of WHO member states reported complete compliance as of 2012 and only a third had met the standard by 2014. Nuzzo, *supra* note 624, at 38.
[654] *See* Vitkowsky & Mecheri, *supra* note 527, at 9 ("The World Health Organization's (WHO) response in light of the recent COVID-19 pandemic has demonstrated its reliance on China's assessments in its own reporting and the effect of the WHO's failure to exercise independent critical judgment independent of the Chinese government.").
[655] JEREMY YOUDE, GLOBAL HEALTH GOVERNANCE IN INTERNATIONAL SOCIETY 133 (2018).
[656] Lin, *supra* note 561, at 283.
[657] *Id*.

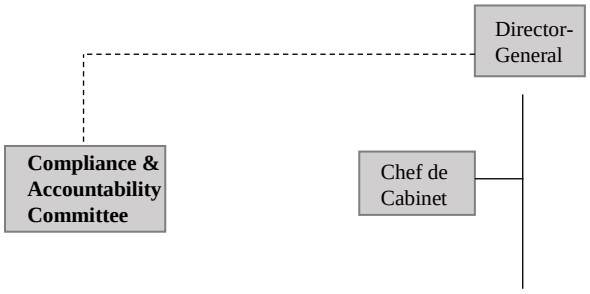
censored or "urged" by other States. If the CAC had authority as an independent body, it could take more forceful measures without needing other States to expend their political capital.

Measures should be narrowly tailored to influence States. In essence, actions against a noncompliant state should mirror those of countermeasures.[658] Of course, allowing the committee to censure States would require an IHR amendment.[659] Given the WHO's inability to reprimand China, however, at least two-thirds of member States would likely support a proposal to allow the CAC the power to rebuke a recalcitrant state.[660]

Further, the committee would be a "standing body" that "function[s] independently from the Director-General" and would "answer directly to the WHA."[661] An independent, standing body would help inoculate the WHO against political influence. The committee, however, should not be independent. The director should retain veto power over decisions by the committee to provide a political check. Of course, the committee could override the veto with a two-thirds vote, as is the case in several multi-branch governments and organizations.[662] The diagram below depicts where the CAC would fall within the WHO's existing structure.

[658] *See supra* Section III.C.
[659] *See* IHR, *supra* note 383, at 34 (art. 55).
[660] WHO Constitution, *supra* note 440, at 192 (art. 19) ("A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements . . . .").
[661] Lin, *supra* note 561, at 282.
[662] *See* Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 N.W. J. INT'L L. & BUS. 398, 431 (1997) ("Horizontal and vertical institutional 'checks and balances' are one of the major objectives of international organizations . . . .").

Proposed WHO Organizational Structure[663]



The CAC's mission would be to "monitor, assess, and comment upon compliance information of State Parties' measures, or the lack thereof," and review disputes upon the request of a state or the Director-General.[664] Rather than rely on States to start settlement, the independent committee could objectively examine a dispute and offer recommendations.[665] For example, the CAC could, "on its own initiative, or at the request of a State Party, examine the process of how the Director-General reached the conclusion of a PHEIC determination, point out procedural flaws, and even suggest corrective actions and best practices in its specific comment."[666]

More importantly, the committee's composition must reflect expertise and independence. Professor Lin offers a thorough description of what the CAC should look like,[667] which shares similarities to the ICJ's composition.[668] First, members should be impartial experts. The Director-General could canvas the existing IHR Expert Roster and select "international health law experts

[663] For the full organizational chart, see *World Health Organization Headquarters*, WHO (May 10, 2021), https://bit.ly/2GO1MDW.
[664] Lin, *supra* note 561, at 283.
[665] At least in theory. This may just create yet another bureaucratic arm of the WHO that runs the risk of becoming politicized. Ching-Fu Lin is optimistic, however, that the improvements will work. *See id.* at 284 ("Backed by careful scrutiny, thorough assessment, and legal reasoning from independent international health law experts, Specific Comments may serve as strong legal anchors in dispute settlements between State Parties and the WHO before the WHA, which is prone to purely political self-interest considerations, international realities, and structural barriers to equal participation . . . .").
[666] *Id.*
[667] *See* Lin, *supra* note 561, at 282–85.
[668] *See generally* ICJ Statute, *supra* note 468.

on the basis of their expertise and experience" to serve on the committee.[669] Like the ICJ, the committee should have fifteen members and there could not be more than two experts from the same state.[670] Finally, barring objections (which would be adjudicated by an ad hoc committee appointed by the WHA), the Director-General would appoint experts to serve a defined term.[671] To allow for greater diversity, the term's initial length would vary much like the ICJ Statute.[672] Then, the process would repeat as vacancies arise.[673]

Decision-making should be straightforward. For recommendations and sanctions, the committee would need only a majority vote, and there need not be an appeals process for recommendations. But if the committee issues a sanction, the target state could appeal the decision to the Director-General, who could then veto the committee's actions. Of course, if the committee still desired the measure, it could override the veto.

The WHO lacks a robust mechanism to confirm compliance. As COVID-19 has shown, the system does not work if a state prioritizes politics over health. With the CAC, the WHO will have an impartial tool to provide recommendations and impose limited sanctions. Along with strengthening the WHO by empowering the Director-General, seeking financial independence, and forming the CAC, the IHR could use an improved dispute resolution system that includes triggering the ICJ if arbitration fails.

[669] Lin, *supra* note 561, at 283; *IHR Expert Roster*, WHO, https://bit.ly/35RU2ug (last visited Mar. 24, 2022).
[670] *See* ICJ Statute, supra note 86, art. 3(1).
[671] *Cf. id.* art. 13(1).
[672] *Id.* (describing how the term length of the court's initial class are staggered).
[673] *Id.* art. 14.

B. AMEND THE IHR

COVID-19 was an "acid test" for the IHR,[674] and the test has illuminated several flaws.[675] However, IHR drafters included Article 55 so that the regulations could be amended.[676] To better promote global health, the IHR should be amended by including a provision that triggers the ICJ if settlement and arbitration fail.

1. Settlement Provision

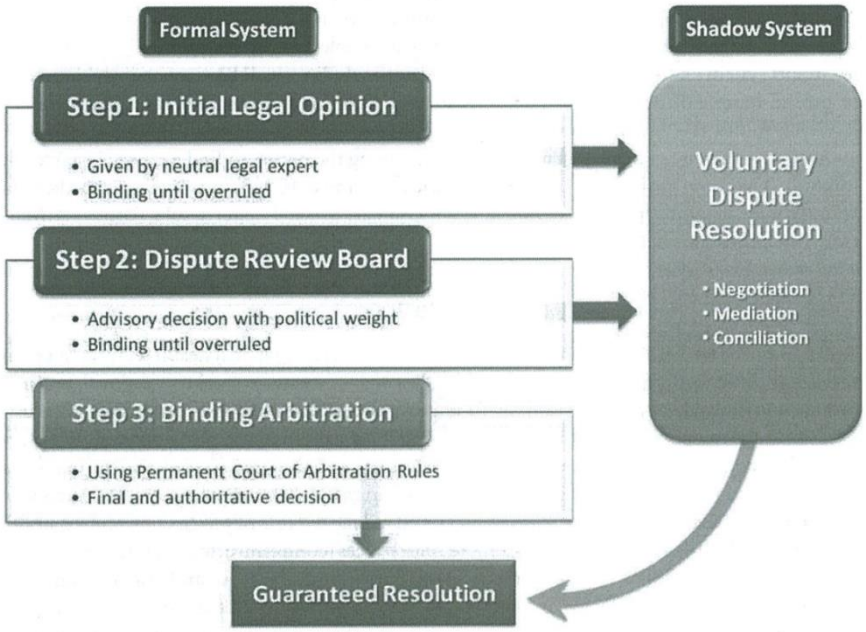
Settlement reform is desperately needed.[677] An amendment could replace the current settlement article with a more effective mechanism for dispute settlement.[678] And while the CAC will help encourage States to engage in the settlement process, formalizing the process will also encourage dispute resolution.

Several scholars have called for reform.[679] Professor Hoffman suggests replacing the current system with a three-tier construct consisting of an "*initial legal opinion*, which, if unsatisfactory . . . could be appealed to an . . . *advisory body*," which could also be appealed to an "*adjudicative body* for final resolution."[680] This system has several advantages. One strength is that the "pressure of a mandatory and structured adjudication process . . . facilitate[s] a voluntary

[674] Jennifer Nuzzo, *supra* note 624, at 39 (citing WHO Director-General Ghebreyesus).
[675] *See supra* Section I.A., Part II.
[676] IHR, *supra* note 383, at 34 (art. 55).
[677] *See supra* Section III.A.
[678] Lin, *supra* note 561, at 281–82. Additionally, "Thomas Bollyky and Yanzhong Huang argue that '[t]o fix those problems, we may need a new mechanism to respond to dangerous disease events, a mechanism that has greater independence from affected member states.'" *Id.* at 282.
[679] *See, e.g.*, *id.* at 282–83 (providing a set of specific improvements that can be implemented at the procedural level, such as the incorporation of a compulsory, procedurally structured arbitration system.)
[680] Hoffman, *supra* note 563, at 247 (emphasis in original).

and collaborative 'shadow system' of (diplomatic) dispute resolution . . . ."[681] Hoffman's proposal is reproduced below.

Hoffman's Proposed Multitiered IHR Dispute Resolution Process/Shadow System[682]



The three-tier construct is a step forward from the IHR's settlement process. However, one improvement to the model would be to combine steps one and two. The CAC would offer the initial recommendation and function as the dispute review board. If one of the States refused to accept the CAC's recommendation, the committee would begin arbitration. The present settlement article is too weak concerning arbitration: "States Parties concerned may agree to refer the dispute to the Director-General."[683] If States cannot agree to settle, their dispute should automatically go to the CAC for arbitration. However, Article 56(3)'s reference to the Permanent Court of

[681] Lin, *supra* note 561, at 282–83.
[682] Hoffman, *supra* note 563, at 247.
[683] IHR, *supra* note 383, at 35 (art. 56, ¶ 2).

Arbitration ("PCA") should remain in force. Further, having a shadow system as an alternative to the mandatory, binding system might prompt states to use the informal methods.[684]

Professor Lin identifies weaknesses in Hoffman's model. He points out that states may balk at a "long and costly adjudication process[,]" and these proposals do not adequately address a "dispute between State Parties and the WHO."[685] States may not want to engage in a laborious process. But if the alternative is no resolution, states would likely choose to settle. It would be to their advantage to leverage an informal system instead of the mandatory process. A binding settlement system with alternative informal methods will provide tangible options for states to achieve satisfaction under the IHR. Offering a direct path to the ICJ is another option.

2. ICJ provision

States should amend the 2005 IHR so that failed arbitration would automatically trigger the ICJ. First, the CAC, serving as the dispute review board, would provide a recommendation. If states still refuse to settle, arbitration would be triggered. Finally, if arbitration fails, the dispute would go to the ICJ. Though the WHO Constitution offers a path to the court,[686] putting an ICJ provision in the IHR would crystalize this right.

This Note so far has discussed WHO and IHR changes. However, states and the WHO should also focus on policy improvements to prevent future pandemics.

[684] Hoffman, *supra* note 563, at 248 (arguing that "if mandatory processes exist, it will be within parties' own self-interest to actively seek out acceptable settlements rather than leave the resolution to others who will impose one on them").
[685] Lin, *supra* note 561, at 282.
[686] *See* WHO Constitution, *supra* note 440, at 202 (art. 75).

C. STRENGTHEN GLOBAL HEALTH JURISPRUDENCE

Recent global pandemics[687] should not discourage states from relying on the WHO and IHR framework. On the contrary, the need for international health is paramount.[688] Nations must strengthen their domestic health laws and work together.[689]

1. Domestic Improvements

Professor David Fidler cautions that "[l]egal knowledge and skill alone are insufficient for preventing, protecting against, and responding to disease challenges."[690] He points to the dearth of government guidance, which has led to the "traged[y] of the global health commons, where we find overexploitation and under exploitation in terms of public health activity."[691] States can improve in two specific ways: develop expertise in international health law and use their domestic law to contribute to global health law.

First, the global health community needs more professionals with "expertise across a daunting range of legal fields (for example, public health, law enforcement, emergency

[687] *See supra* notes 375–384 and accompanying text.
[688] *See* David P. Fidler, *Global Health Jurisprudence: A Time of Reckoning*, 96 GEO. L.J. 393, 395 (2008). Though written in 2008, these words still hold true today. In fact, "[t]he need for law reflects the emergence of public health threats that the existing public health capacities and skill sets proved ill-equipped to handle. The inadequacies run deeper than the decay in the public health infrastructure in developed and developing countries that occurred in previous decades. The threats public health increasingly confronts forced a radical rethinking of public health strategies and, consequently, the policy and governance actions required to implement them." *Id.* at 397.
[689] As Dr. Nuzzo explains, this "requires a fundamental change in the way that countries think about global health security." Nuzzo, *supra* 624, at 36. In this vein, countries must provide the WHO adequate resources and pledge share scientific data. *Id.*
[690] *See* Fidler, *supra* note 688, at 398.
[691] *Id.* at 406.

management, national security, trade and commerce) in both domestic and international settings."[692] To achieve this goal, States should encourage professional growth.[693]

Second, states should use domestic law to drive how they respond to future pandemics. Governments are quick to enact laws in response to health challenges.[694] Yet, they should be equally quick to "develop legal preparedness strategies for public health emergencies."[695] The focus should be on "surveillance and intervention to protect population health."[696] Of course, that will present a challenge for nations that have constitutional limitations to surveillance.[697]

To address this challenge, states must look beyond their borders. Nations should consider refining their domestic laws to better guard against the spread of disease and infections.[698] Ideally, domestic health law should embrace the IHR's goals: "connect[ing] public health to national and international security, economic interests, development concerns, and the protection of human rights."[699]

China has an enormous opportunity. Specifically, China could enact legislation to clean up wet markets and improve surveillance and reporting. Of course, China is not the only nation that can improve its domestic laws. Because of China's past behavior related to COVID-19, however,

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[692] David P. Fidler, *Global Health Jurisprudence: A Time of Reckoning*, 96 GEO. L.J. 393, 398 (2008).
[693] *See, e.g.*, Laura W. Perna et al., *Promoting Human Capital Development: A Typology of International Scholarship Programs in Higher Education*, 43 EDUC. RESEARCHER 63 (2014).
[694] *See* Giovanni Salvoet al, *Legal Responses to Health Emergencies*, L. LIBR. CONG. (Feb. 2015), https://bit.ly/3kbtrMx (discussing how "[m]easures taken by national governments in response to recent outbreaks of infectious diseases); We The People Podcast, *The Constitution and the Coronavirus*, NAT'L CONST. CTR. (Mar. 19, 2020), https://bit.ly/32wH17j (discussing history of government "combatting diseases" and what restrictions the government can impose during COVID-19).
[695] Fidler, *supra* note 688, at 398.
[696] *Id.* at 401.
[697] *See* Rita F. Aronov, *Privacy in a Public Setting: The Constitutionality of Street Surveillance*, 22 QUINNIPIAC L. REV. 769 (2004) (analyzing the constitutionality of street surveillance); *see also* U.S. CONST. amend. IV.
[698] *See* Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, 96 GEO. L.J. 423, 442 (2008).
[699] Fidler, *supra* note 688, at 403–04.

China is well placed to lead the way in advancing domestic legislation to support a revamped global framework for the right to health.

2. Intergovernmental Improvements

Global health can also improve if states overcome state self-interest, particularly in internal health surveillance.[700] No state wants to self-report that it started a pandemic.[701] As a result, many states make decisions in terms of politics, not health.[702] Fidler describes the current structure as "open-source anarchy."[703] However, he does not suggest that states return to a "closed, state-centric condition."[704] Instead, Fidler argues that states should develop more substantive treaties[705] and "solidif[y] . . . public health law."[706]

For these reasons, the WHO can be a transformative leader.[707] The WHO "will require the Organization to [continue] develop[ing] and utiliz[ing] public health law capabilities."[708] Politics, however, is a significant barrier. The WHO has the difficult task of repairing the relationship

[700] Before the 2005 IHR, "[o]ne analysis of the IHR's effectiveness over their fifty-six-year history concluded that they had been relatively ineffective in achieving their main objective, due primarily to a failure in their surveillance system and the ineffectiveness of protection measures." Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, 96 GEO. L.J. 423, 437 (2008).
[701] Dr. Nuzzo describes a system that "[r]el[ies] on individual governments to report data in a timely, complete fashion" as "not work[ing] out well[.]" Nuzzo, *supra* note 624, at 41.
[702] *See* Richard A. Cash & Vasant Narasimhan, *Impediments to Global Surveillance of Infectious Diseases: Consequences of Open Reporting in a Global Economy*, 78 BULL. OF THE WHO 1358, 1364 (2000), https://www.who.int/bulletin/archives/78(11)1358.pdf ("[W]hen a country reports an outbreak, the international community may benefit relatively little, whereas the reporting country . . . may suffer . . . .").
[703] Fidler, *supra* note 688, at 410.
[704] *Id.*
[705] *Id.* at 401.
[706] *Id.* at 405.
[707] And a necessity. *See* David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079, 1081–82 (1998) ("[P]ursuit of global health jurisprudence constitutes a strategy that WHO needs to include as an essential element of its future global health policy.").
[708] Fidler, at 1082.

between China and the rest of the world. But the WHO should not bear the burden alone—other states must support the organization.

Critics, however, have called for a NATO-like organization "with prepositioned supplies, a deployment blueprint, and an agreement . . . that an epidemic outbreak in one country will be met with" collective action.[709] In other words, these critics want to create a super-WHO that has a NATO Article 5-like provision triggering collective action.[710] While the WHO can be strengthened, it should not become a mini-NATO.[711]

The proposals in this Note will help the WHO address fundamental shortfalls in managing emerging pandemics. A CAC can help keep recalcitrant states in check.[712] Then, as disputes arise, a revised dispute resolution system can provide formal and informal opportunities for states to resolve their differences.[713] Indeed, COVID-19 has wreaked enormous damage.[714] Rather than focus on how to punish China,[715] however, states and the WHO should work to solidify global health infrastructure.

[709] *See, e.g.*, Michael T. Osterholm & Mark Olshaker, Chronicle of a Pandemic Foretold: Learning from the COVID-19 Failure—Before the Next Outbreak Arrives, FOREIGN AFFS., July/Aug. 2020, at 24 ("Instead, something along the lines of NATO will be necessary-a public-health-oriented treaty organization with prepositioned supplies, a deployment blueprint, and an agreement among signatories that an epidemic outbreak in one country will be met with a coordinated and equally vigorous response by all.").

[710] Cf. *Collective Defence – Article 5*, NATO (Nov. 25, 2019, 11:12 AM), https://bit.ly/2IDUkvQ. NATO's Article 5 states that an "armed attack" against one nation is "an attack against them all[,]" thus requiring all NATO member states to automatically defend a state that has been attacked.

[711] *See* Carolina I. Andrada & Paul E. Cormarie, *Questioning NATO for Health*, THINK GLOBAL HEALTH (Jan. 12, 2022), https://www.thinkglobalhealth.org/article/questioning-nato-health ("[T]he WHO needs all governments to participate willingly, actively, and cooperatively.").

[712] *See supra* Section IV.A.2.

[713] *See supra* Section IV.B.1.

[714] *See supra* Section I.A.

[715] Press Release, Chairman Graham Applauds Committee Passage of Bill to Allow Americans to Sue China over Coronavirus Pandemic, Comm. on the Judiciary (July 30, 2020), https://bit.ly/35cQO46.

VI. CONCLUSION

The world faces the daunting task of improving international structures to help prevent the next outbreak. When the first cases of COVID-19 appeared,[716] China had the duty to report immediately to the WHO and they should have given the WHO full and accurate information. They did not. Thus, injured states may have a way to hold China accountable for its breaches of IHR Articles 6 and 7 and the right to health.[717]

However, blame is not conducive to preventing another global pandemic. Instead, member states must push to modify the WHO and IHR in order to strengthen global health jurisprudence. As U.S. Surgeon General Jerome Adams noted, "we can't just pull up the drawbridges; we've got to have international cooperation."[718] If the international community comes together and takes these steps, perhaps the world will avoid another devastating pandemic the next time Fortune spins her wheel.

[716] *See supra* Section I.A.
[717] *See supra* Part III.
[718] Meridian International Center, *The Case For Global Health Diplomacy: U.S. Surgeon General Jerome Adams*, YOUTUBE (Oct. 27, 2020), https://bit.ly/3pYx9NY.