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Description of Cover Art: The cover features the ILSJ logo (feather wrapped in the lower right portion of the outlined globe). The outlined globe and feather represent the journal's aim to produce peer-reviewed scholarly articles on significant developments in various areas of International Law, and related fields.

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EDITOR'S NOTE

The International Legal Studies Journal (ILSJ) is the successor of The World Bulletin, the former journal of the Institute of International Legal Studies (IILS) and the International Studies Institute of the Philippines (ISIP). Since 1985, The World Bulletin has published articles on international law and international relations relevant to the Philippines. Due to institutional changes, The World Bulletin was discontinued. With the growing interest in scholarship on international law and international relations, IILS decided to revive the publication and rebrand it to fit evolving circumstances; hence, the journal was renamed to ILSJ.

Yet, the shift represents far more than a superficial name change. The ILSJ is a peer-reviewed interdisciplinary academic journal featuring articles, commentaries, and notes on issues arising at the intersection of international law and other political, socio-economic, and cultural phenomena. It offers views on developments in international law using a variety of approaches, combining conceptual and theoretical treatment of international law issues with practical grounding. It builds on the interdisciplinary and contextual approach initiated by the World Bulletin materials and captures the breadth of international legal studies by contextualizing recent events in international law through a mix of problematizing international law instruments and reviewing new materials on legal issues.

ILSJ is managed by a Board of Editors who are experts in their respective areas of study in international law. It engages scholars from around the world to analyze international legal developments using theoretical and practical approaches and to provide scholarly inquiry into alternative approaches or strategies for foreign policy and international legal questions. The aim of ILSJ is to be eventually registered and recognized in SCOPUS, the largest bibliographic database of peer-reviewed literature in the social, medical, and technical sciences. For its first issue, the ILSJ provides a diverse selection of articles.

The first article is titled "**Marine Environmental Protection and Cooperation in the South China Sea**" and is written by Prof. Rommel J. Casis. The article argues that states bordering the South China Sea have a mandatory duty under international law to cooperate in protecting its marine environment, despite unresolved territorial disputes. It identifies the legal basis of this duty based on existing international treaties. The article emphasizes that UNCLOS and other environmental treaties require states to prevent pollution, protect biodiversity, conduct environmental assessments, share scientific data, and prioritize ecological preservation over unilateral exploitation.

The second article, titled "**Case Report: *The Prosecutor v. Charles Ghankay Taylor*: The Treatment of Head of State Immunity under International Criminal Law by the Special Court for Sierra Leone,**" written by Atty. Jamil Sahid Fofanah, examines the landmark case of *The Prosecutor v. Charles Ghankay Taylor* heard by the Special Court for Sierra Leone (SCSL). The article highlights its significance in shifting international criminal law from head-of-state immunity toward individual accountability for serious international crimes. It explains how the ruling reinforced that official status does not shield leaders from prosecution, while also noting ongoing debates over selective justice, sovereignty, enforcement challenges, and transitional justice.

Written by Atty. Justine Kaye O. Solano, the third article titled "**Where Will They Go: A Case Study on the Application of the Non-Refoulement Principle during the COVID-19 Pandemic**" examines the non-refoulement principle during the COVID-19 pandemic. The article examines how Turkey, Germany, and the United States applied the non-refoulement principle during the COVID-19 pandemic. It argues that although states faced legitimate public health and national security concerns, they remained bound by international obligations not to return or reject asylum seekers without due process. The article concludes that each country's pandemic-era policies created risks or violations of non-refoulement, showing how crises can be used to limit refugee protections.

This maiden issue of ILSJ also features several essays commemorating the 40th anniversary of the EDSA Revolution. In the first essay titled **"Reflections on EDSA and Access Rights in Environmental Law,"** Atty. Cecilia Therese "Niner" Guiao & Atty. Jurella Guiahara D. Santos examined the impact of the EDSA Revolution and how it restructured the Philippines' legal framework in improving environmental governance, making the state more accountable and participatory in environmental access rights. The essay explains how the 1987 Philippine Constitution expanded environmental access rights after the EDSA Revolution, including rights to information, public participation, and a balanced and healthful ecology. It notes that later laws and court rules reinforced these principles, but implementation remains weak due to threats against environmental human rights defenders. The essay ultimately calls for stronger environmental justice, climate litigation, and protection of defenders to preserve democratic access rights.

The second essay titled "**Considering 'People Power' through the Idea of Revolutions under International Law,"** written by Atty. Ruby Rosselle L. Tugade, looks at the events of EDSA, or the People Power Revolution, through the lens of revolutions under international law. The essay explains how revolutions, though not clearly defined under international law, are often judged through "authorized" modes of political transformation that affect recognition, legitimacy, and self-determination. Using the People Power Revolution as an example, it argues that international and domestic legal frameworks can validate peaceful regime change while also narrowing acceptable forms of revolutionary struggle by criminalizing other methods as terrorism or violence.

Lastly, the third essay written by Atty. Samantha Tirthdas van der Kleij titled "**The Good, The Bad, and The Ugly: Myths and Realities of Philippine Trade during the Marcos Regime"** examines the economic and trade policies and timeline of the Marcos Sr. regime through the lens of international trade law. The essay argues that the Marcos Sr. regime's trade and industrial policies failed to produce meaningful economic progress despite claims of "golden years." It highlights persistent protectionism, selective reforms, favoritism toward capital-intensive industries and family-linked conglomerates, and debt-driven policies that weakened the economy, burdened the Philippines with massive debt, and showed how politics can distort trade policy with lasting consequences.

The inaugural issue of ILSJ would not have been possible without the hard work of many colleagues in IILS, in particular, Associate Editor Ruby Rosselle L. Tugade and IILS Senior Research Associate Chloe Cheyne Wu.

The other members of the editorial team include Patricia Isabel G. Arago (Layout and Copyediting), John Paolo V. Cabrera (Copyediting, Proofreading, and Source Checking), Aira Lynn M. Cunanan (Copyediting, Proofreading, and Source Checking) Maria Franchesca Louise P. Fajemolin (Research Support), Mackie N. Valenzuela (Cover Design and Art) and Elma Patrisha Latayan (Layout, Administration, and Author Coordination).

WORLD BULLETIN HISTORY

The World Bulletin started in 1985 as a periodical of the International Studies Institute of the Philippines ("ISIP"), which former Dean Merlin M. Magallona headed as Founding Director. Materials published were generally long papers and short research notes on current world, regional, and national events prepared by ISIP staff members, faculty across the University of the Philippines ("UP"), and foreign experts.

Consistent with ISIP's objective of offering solutions to the country's most pressing problems in its international relations, the World Bulletin was a regular publication devoted to the analysis and documentation of relevant changes in the international situation. Thus, in all four issues from the very first World Bulletin volume, Dean Magallona wrote articles exploring the context and implications of the United States Subic and Clark Military Bases Agreement ("MBA") on Philippine sovereignty and security in light of the ongoing Senate debates on renewing the 1947 MBA treaty.

Other notable experts who contributed works to the ILSJ were then Secretary of Foreign Affairs Raul S. Manglapus, now Supreme Court Senior Associate Justice Marvic F. Leonen, prominent historian Renato Constantino, and International Committee of the Red Cross Press Attaché Françoise Bory. Transcripts from Senate Privilege Speeches of Alberto G. Romulo on the foreign debt crisis in 1989 and Wigberto E. Tañada advocating for a "world free of nuclear weapons" in 1988 were likewise published.

After ISIP was reorganized into the Institute of International Legal Studies ("IILS"), IILS took over the World Bulletin in 1990. In its first release as IILS, it included two articles highlighting the intersection between global issues and women, authored by Dr. Rosalinda Pineda-Ofreneo (formerly an ISIP Graduate Researcher in 1985, and later became Dean of the College of Social Work and Community Development in 2013), and Sister Mary Soledad Perpiñan, RGS, among others.

Papers published in the World Bulletin have been cited in other literature, such as on maritime law,[1] human rights,[2] environmental law,[3] and in the 2014 Supreme Court decision on *Arigo v. Swift*.[4]

Today, the World Bulletin has been renamed the International Legal Studies Journal ("ILSJ") to highlight that it has evolved into a peer-reviewed annual publication offering a rigorous peer-review process, a commitment to high-quality publications, and a long-held tradition of honor and excellence. The publication is a response to the need to systematize the analysis of international legal issues, particularly as they impact and apply to the Philippines, especially from an interdisciplinary lens. It will continue to build on the legacy of *World Bulletin*, which expanded the treatment of international law from the siloed and compartmentalized to a broader reflection of the cross-section of issues that occur in the international legal environment.

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[1] L. B. Bautista, "The Historical Background, Geographical Extent and Legal Bases of the Philippine Territorial Water Claim", *Journal of Comparative Asian Development*, Vol. 8, No. 2, 2009, pp. 365–395. https://doi.org/10.1080/15339114.2009.9678488; Jay L. Batongbacal, *The Maritime Territories and Jurisdictions of the Philippines and the United Nations Convention on the Law of the Sea*, 76 PHIL. L.J. 123 (2001); Jay L. Batongbacal, *The Philippines' Right to Designate Sea Lanes in Its Archipelagic Waters under International Law*, 1 OCEAN L. & POL'Y SERIES, January-June 1997, at 81; L. B. Bautista, "International Legal Implications of the Philippine Treaty Limits on Navigational Rights in Philippine Waters", *Australian J. of Maritime & Ocean Affairs*, Vol. 1, No. 3, 2009.

[2] Nina Cascio, "Human Rights in South and Southeast Asia: A Selective Bibliography", *in Human Rights in South and Southeast Asia* 211 (Routledge, 2017).

[3] Alan Khee-Jin Tan, *All That Glitters: Foreign Investment in Mining Trumps the Environment in the Philippines*, 23 PACE ENVTL. L. REV. 183 (2005).

[4] G.R. No. 206510, September 16, 2014.

ARTICLES

MARINE ENVIRONMENTAL PROTECTION AND COOPERATION IN THE SOUTH CHINA SEA*

Rommel J. Casis**

I. Introduction

The South China Sea (SCS) holds great importance for all states of the world for many reasons, aside from the ecological and economic reasons discussed in this paper. But this paper mainly focuses on the environmental challenges faced by the SCS and the cooperation required from states to resolve these issues. Unfortunately, cooperation is hampered by territorial claims. However, this paper argues that these claims and the conflicts that arise from them do not erase states' international legal obligations to the marine environment of the SCS.

This paper seeks to establish the existing legal grounds for individual action and state cooperation for the marine environmental protection of the SCS. It argues that states have specific legal obligations to protect the SCS marine environment independent of states' individual sovereignty claims.

Part II of the paper introduces the SCS by highlighting its geographical location and briefly summarizing the territorial claims of states surrounding it.

Part III tackles the marine environment of the SCS, particularly its significance to biodiversity and ecology, and its economic value.

Part IV discusses the environmental challenges to the SCS, including pollution, overfishing, coral reef damage, biodiversity, and habitat loss.

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* An earlier version of this paper was written and delivered during the 2024 International Symposium on a New Vision for East Asian Studies held in Taiwan on October 5, 2024. The author thanks Ms. Elma Patrisha Latayan and Ms. Janelle Sentina for their extensive research assistance. Likewise, the author thanks Ms. Marianne Sasing and Ms. Chesca Fajemolin for their research support and the International Legal Studies Journal editorial team for the work on this updated version of the paper.
** Professor, University of the Philippines (UP) College of Law; Director, Institute of International Legal Studies, UP Law Center.

Part V explains the necessity of cooperation because of the nature of the marine environment and the causes of the environmental problems.

Part VI outlines the international legal framework, beginning with the obligations in multilateral treaties such as the UN Convention on the Law of the Sea, the Convention on Biological Diversity, and others. It also briefly mentions the applicability of environmental principles.

Part VII summarizes the obligations of states and a few recommendations based on the preceding discussion on the legal framework.

Thus, this paper proposes a way forward to protect the SCS marine environment without waiting to resolve territorial disputes.

II. The SCS

A. Geographical location, islands, and features

The SCS is "a semi-enclosed sea in the western Pacific Ocean, spanning an area of almost 3.5 million square kilometers."[1] According to the International Hydrographic Organization, the southern boundary of the SCS is from:

> The Eastern and Southern limits of the Malacca straits as far west as Tanjong Kedabu down the East coast of Sumatra to Lucipara Point, thence to Tanjong Nanka, the Southwest extremity of Banka Island, through this island to Tanjong Berikat, the Eastern point on to Tanjong Djemang in Biliton along the North Coast of this island to Tanjong Booreong Mandi and thence a line to Tanjong Sambat, the Southwest extreme of Borneo.[2]

On the other hand, its eastern boundary is from:

> Tanjong Sambar through the West coast of Borneo to Tanjong Sampanmangio, the North point thence a line to West points of Balabac and Secam Reefs on to the West point of Bancalan Island

[1] The South China Sea Arbitration Award of 12 July 2016 (Phil. vs China), 33 R.I.A.A 153 (Perm. Ct. Arb. 2016) [hereinafter *The South China Sea Arbitration*].
[2] Int'l Hydrographic Org., Limits of Oceans and Seas 30-31 (3rd ed. 1953).

> to Cape Buliluyan, the Southwest point of Palawan, through the island to Cabuli point, the Northern point thereof thence to the Northwest point of Busuanga and to Cape Calavite in the island of Mindoro to the Northwest point of Lubang Island and to Point Fuego in Luzon Island, through this island to Cape Engano to the Northeast point of Luzon, along a line joining this cape with the East point of Balintang Island, and to the East point of Y' Ami Island thence to Garan Bi, the Southern point of Taiwan (Formosa) through the island to Santyo its North Eastern Point.[3]

In addition, its northern boundary is from:

> Fuki Kaku, the North point of Formosa to Kushan Tao (Turnabout Island) on to the South point of Haitan Tao and thence Westward on the parallel of North to the coast of Fukien.[4]

Finally, its western boundary is determined by the Asian "mainland, the Southern limit of the Gulf of Thailand and the East coast of the Malay Peninsula."[5]

The Arbitral Tribunal in the South China Sea Arbitration (SCSA) describes the SCS in this way:

> The South China Sea lies to the south of China; to the west of the Philippines; to the east of Viet Nam; and to the north of Malaysia, Brunei, Singapore, and Indonesia. The South China Sea is a crucial shipping lane, a rich fishing ground, home to a highly biodiverse coral reef ecosystem, and believed to hold substantial oil and gas resources.[6]

The SCS is a part of the Large Marine Ecosystem (LME) within the Asian Seas.[7] LMEs are defined as:

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[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] The South China Sea Arbitration, *supra* note 3.
[7] Ussif Rashid Sumaila, *Comparative Valuation of Fisheries in Asian Large Marine Ecosystems with emphasis on the East China Sea and South China Sea LMEs,* 163 DEEP-SEA RSCH. PART II 96, 97, (2019), https://doi.org/10.1016/j.dsr2.2018.12.008.

> Relatively large areas of ocean space of about 200,000 km2 or more, adjacent to the continents and extending out to the break in a continental shelf or the seaward extent of a current system. They are characterized by their unique undersea topography, current, marine productivity and food chain interactions and many are transboundary in nature by virtue of interconnected currents and movement and migration of marine resources.[8]

The United Nations Convention on the Law of the Sea defines an "enclosed or semi-enclosed sea" as a “gulf, basin, or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.”[9] Being surrounded by at least seven states, the SCS is considered a semi-enclosed sea. Semi-enclosed seas may be characterized by “adversarial competition for resources and boundaries.”[10] This competition is expected, considering the “... natural geographical difficulty of bordering States to claim a full 200-nautical-mile exclusive economic zone and continental shelf, or even a full 12-nautical-mile territorial sea ...”[11] in a semi-enclosed sea.

There are two main island groups in the SCS: the Paracel Islands “in the northwest corner of the Sea, and the Spratly Islands in the southeast corner.”[12] Liu explains that there are “four island groups and submerged features in the SCS, namely the Pratas Islands, the Paracel Islands, the Macclesfield Bank and certain adjacent shoals, sandbanks and reefs, and the Spratly Islands. These four island

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[8] U.N. Educ., Sci., and Cultural Org., The Large Marine Ecosystem Approach, An Engine for Achieving SDG 14 1 (2017), *Retrieved from:* https://www.undp.org/sites/g/files/zskgke326/files/publications/Large_Marine_Ecosystem_Approach_22062017.pdf.

[9] United Nations Convention on the Law of the Sea, art. 122, Dec. 10, 1982, 1833 U.N.T.S. 3. [hereinafter *UNCLOS*].

[10] Lee & Bautista, *Semi-enclosed Seas Cooperation under UNCLOS*, Routledge Handbook of the South China Sea, 323, citing Alfred Hu Nien-Tsu, “Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea,” (2010) 41 OCEAN DEV. & INT’L L., 323.

[11] *Id.*

[12] Sean Mirski, *The South China Sea Dispute: A Brief History,* LAWFARE (2015), https://www.lawfaremedia.org/article/south-china-sea-dispute-brief-history.

groups and submerged features consist of more than 200 islands, islets, shoals, rocks and reefs."[13]

B. Sovereignty issues and territorial disputes

Several coastal States have claimed sovereignty over various islands and submerged features in the SCS.[14]

Brunei, China, Malaysia, the Philippines, and Vietnam claim the Spratly Islands, which are the largest island group, in whole or in part. All the claimants, except Brunei, occupy or have garrisons on the disputed maritime features.[15]

On the other hand, Vietnam and China currently claim the Paracel Islands. In addition, "[m]ost of the Macclesfield Bank and some adjacent shoals, sandbanks, and reefs are submerged and are claimed by China and the Philippines,"[16] whereas "[t]he Pratas Islands are not contested by non-Chinese coastal States and are under the control of the Republic of China."[17]

These claimant states often have divergent and sometimes overlapping territorial claims based on various historical and geographical data.[18] Spanning decades, it does not seem that the territorial disputes will be resolved anytime soon.

III. The Marine Environment of the SCS

A. Significance of SCS

1. *Biodiversity and ecological importance*

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[13] Yulu Liu, Regional Cooperation on Marine Environmental Protection in the South China Sea 42 (2021) (University of Wollongong) (University of Wollongong Thesis Collections).
[14] *Id.*
[15] *Id.*
[16] *Id.* at 43.
[17] *Id.*
[18] Yunus Erbas, *The Conflict in the South China Sea: A Focus on a Possible Solution,* BEYOND THE HORIZON (April 11, 2022), https://behorizon.org/the-conflict-in-the-south-china-sea-a-focus-on-a-possible-solution/.

The SCS is home to a rich marine biodiversity comprising thousands of species of mammals, sharks, coral reefs, giant clams, crustaceans, and mangroves, all living together in an ecosystem within the SCS. Furthermore, according to McNamara, the SCS "is a global hotspot for biodiversity, home to important marine ecosystems, mangrove forests, and thousands of fish and sponge species.[19] In fact, "scientists believe the region holds some of the highest marine biodiversity on earth, with 571 known species of coral reef alone."[20]

According to Ives, "[s]cientists describe the Spratlys as biological 'stepping stones' for successive generations of corals and fish, meaning that larvae float hundreds of miles toward the Spratlys on ocean currents and stop in eddies near their corals to breed."[21] Furthermore, according to Wilkinson, "[i]n addition to producing larvae, the Spratly reefs also function as biological 'roadside cafes' for migratory fish, including tuna, that travel through the South China Sea on their way to the Indian Ocean and stop at the Spratlys to feed."[22]

While the SCS is known to be "biologically diverse," knowledge of its marine fauna is still relatively incomplete.[23] But "the most comprehensive list of marine fishes in the SCS lists 3365 species in 263 families ..., although pelagic and abyssal fishes are poorly represented."[24] Liu points out that "[t]he SCS hosts a vast number of marine resources which comprise part of the 34% of the world's coral reefs that belong to Southeast Asia. In particular, there are 571 coral reef species and 3,365 marine fish species."[25]

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[19] Ryan McNamara, *The Environmental Collateral Damage of the South China Sea Conflict,* NEW SECURITY BEAT (October 13, 2020), https://www.newsecuritybeat.org/2020/10/environmental-collateral-damage-south-china-sea-conflict/, citing Houdre, *Environmental Ramifications of the South China Sea Conflict: Vying for Regional Dominance at the Environment's Expense*, GEORGETOWN ENV'T L. REV. (2018).

[20] *Id.* citing Ives, The Rising Environmental Toll of China's Offshore Island Grab, YALE ENV'T 360 (2016).

[21] Mike Ives, *The Rising Environmental Toll of China's Offshore Island Grab*, YALE ENV'T 360 (October 10, 2016), https://e360.yale.edu/features/rising_environmental_toll_china_artificial_islands_south_china_sea.

[22] *Id.*

[23] Sumaila, *supra* note 7.

[24] *Id.*

[25] Liu, *supra* note 13, at 15.

This rich biodiversity supports food security, livelihoods, and blue economy initiatives, particularly through fisheries.[26]

Sato et al. report that "[c]oral reefs support nearly 25% of global marine life [and] [o]f the world's 1,683 reef-forming coral species, 571 are found in the South China Sea."[27] In fact, "[c]oral reefs are considered one of the most vital ecosystems in the South China Sea, providing food and shelter to thousands of species in their surrounding environment."[28]

These figures do not even include the SCS' contribution as a sink in the context of climate change. The International Tribunal for the Law of the Sea (ITLOS) has also pointed "to the role of the ocean in storing heat trapped in the atmosphere caused by increasing concentrations of greenhouse gases (GHGs) and storage of excess carbon dioxide. The ocean is the world's largest sink."[29]

Clearly, the SCS holds great significance for the world for ecological reasons.

2. *Economic value*

The SCS is considered a strategic body of water with one of "the busiest trade routes in the world and home to a wealth of marine and mineral resources; the South China Sea holds great economic and geostrategic importance."[30] Erbas says the SCS is "estimated to contain 11 billion barrels of oil, 190 trillion cubic feet of natural gas … and 10% of the world's fishery resources."[31]

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[26] *Id.*

[27] Monica Sato, Harrison Prétat, Tabitha Mallory, Hao Chen & Gregory Poling, *Deep Blue Scars: Environmental Threats to the South China Sea,* Center for Strategic & International Studies (December 18, 2023), https://features.csis.org/environmental-threats-to-the-south-china-sea/.

[28] *Id.*

[29] Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion (May 21, 2024), ¶ 390 [*hereinafter* ITLOS Case No. 31].

[30] The ASEAN Secretariat, *Situation in South China Sea: Overview*, Association of Southeast Asian Nations (2026), https://asean.org/our-communities/asean-political-security-community/peaceful-secure-and-stable-region/situation-in-the-south-china-sea/.

[31] Erbas, *supra* note 18, citing "Territorial Disputes in the South China Sea", COUNCIL ON FOREIGN RELATIONS, 2021, https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea.

a) *Fisheries*

Anh and Pomeroy note that "[t]he SCS is one of the world's top five most productive fishing zones, accounting for about 12% of global fish catch in 2019."[32] They add that "[m]ore than half of the fishing vessels in the world operate in these waters, officially employing around 3.7 million people and likely many more when illegal, unreported, and unregulated fishing is included."[33]

Sumaila reports that SCS is "one of the top five fishing grounds in the world."[34] From 1950 to 2014, it "contributed to around 20% of the 2.5 billion tons of fish taken out of Asia's [large marine ecosystems]."[35] During the same period, SCS contributed 584.90 billion dollars of the 2.8 trillion dollars of catch value generated by the large marine ecosystems of Asia. [36]

Juinio-Meñez reports that "[t]he commercial fisheries from the Kalayaan Island Group in the Spratly Islands, for example, are estimated to be worth about US$ 47 to 105 million km^{-2} annually, in addition to US$ 39 to 60 million from commercial reef fisheries."[37] She adds that "[o]n a broader scale, the SCS fisheries play a major role in food security and export earnings of Southeast Asian countries. These capture fisheries contribute about 5×10^6 tons $year^{-1}$ which is 10% of the world's landed catch."[38]

b) *Oil and gas*

Because of territorial disputes, the SCS is "underexplored," and "[m]ost discovered oil and natural gas fields are in uncontested areas, close to the shorelines."[39] According to the US Energy Information Agency, "[a]pproximately

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[32] Soojung Ahn & Robert Pomeroy, *Evaluating the Economic Impact of Distant Water Fleet Activities on Small-scale Fishers in the South China Sea*, 168 MARINE POL'Y 1, 2 (2024), https://doi.org/10.1016/j.marpol.2024.106324.
[33] *Id.*
[34] Sumaila, *supra* note 7, at 99.
[35] *Id.* at 98-99.
[36] *Id.* at 99.
[37] Marie Antonette Juinio-Meñez, *Biophysical and Genetic Connectivity Considerations in Marine Biodiversity Conservation and Management in the South China Sea*, 18 J. INT'L WILDLIFE L. POL'Y 110, 112 (2015), https://doi.org/10.1080/13880292.2015.1044803.
[38] *Id.*
[39] US Energy Info. Admin., Regional Analysis Brief: South China Sea 2 (2024).

3.6 billion barrels (b) of petroleum and other liquids and 40.3 trillion cubic feet (Tcf) of natural gas in proved and probable reserves are in the South China Sea."[40]

c) *Global trade*

Erbas says, "roughly 30% of the global maritime trade passes through the South China Sea on its way to the highly trafficked ports in Southeast Asia."[41] In 2023, around 28 million barrels per day (b/d) were shipped through the SCS.[42] This volume was 37% of the 76 million b/d of petroleum and petroleum products shipped globally via maritime transport.[43] On the other hand, the United Nations Conference on Trade and Development (UNCTAD) estimates that the SCS carries around "one-third of the global shipping." Considering that "roughly 80% of global trade by volume and 70% by value is transported by sea,"[44] that is significant.

Thus, the SCS is a critical world trade route, with 21% of global trade ($3.4 trillion dollars) in 2016.[45]

d) *Tourism*

Despite the territorial disputes, there is a tourist industry in the SCS. For example, "[s]ince 2023, the Philippines has been organizing tours to the Kalayaan Island Group."[46] Tan reports that "the seven-day tour aboard a dive yacht, the Great Kalayaan or Freedom Expedition, costs about US$2,000 per person."[47] On the other hand, "China's tourism in the SCS was launched in the Xisha Islands (Paracel Islands in English) in 2013 in the form of cruise tourism."[48] Since "December 2016,

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[40] *Id.* at 2-3.
[41] Erbas, *supra* note 18, citing Khoury, E. (2017). "Recent Trends in the South China Sea Disputes", Asia Focus#16 – Asia Programme, Insititut de relations internationales et stratégiques.
[42] US Energy Information Administration, *supra* note 39, at 20.
[43] *Id.*
[44] China Power Team, *How Much Trade Transits the South China Sea?,* CHINA POWER (August 2, 2017), https://chinapower.csis.org/much-trade-transits-south-china-sea/.
[45] *Id.*
[46] Angeline Tan, *Philippines Uses Tourism to Assert Sovereignty at Disputed South China Sea,* MARITIME FAIR TRADE (July 1, 2024), https://maritimefairtrade.org/philippines-uses-tourism-to-assert-sovereignty-at-disputed-south-china-sea/.
[47] *Id.*
[48] Yan Huang & Yungang Liu, *Encountering and Experiencing the Geopolitics of Tourism (im) mobilities: A Case of China's Tourism in the South China Sea*, 54 AUSTL. GEOGRAPHER 545, 549 (2023), https://doi.org/10.1080/00049182.2023.2261097.

a Chinese airline began daily flights to Woody Island, the largest in the Paracel group."[49]

Thus, the SCS is of significant economic value to the majority, if not all, of the states of the world.

IV. Environmental Challenges in the SCS

The SCS is not exempt from the environmental problems that plague the rest of the planet. Its economic and political value and its nature as a semi-enclosed marine system make it more vulnerable to anthropogenic disturbances.[50]

Trajano et al. point out that "[t]he marine environment in the SCS is deteriorating at an alarming rate, threatening national and human securities of littoral states and their people."[51]

A. Pollution

Pollution in the SCS is caused by "population growth and urbanization in coastal cities, economic growth and increased material consumption, and highly polluting technologies for energy production and primary resource extraction."[52] Rosenberg notes that "industrial output and energy consumption have grown faster in the countries around the South China Sea than anywhere else in the world, driven by the region's rapid economic growth and increasing population."[53] Because the SCS has become a busy "interstate highway," it has also "become a sink for regional environmental pollution from the industrial effluents of the littoral countries, as well as the spills and dumpings of vessels in transit."[54]

1. *Marine-based pollution*

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[49] Andrew Chubb, *Patriotic Tourism in the South China Sea*, E. ASIA F. (June 7, 2017).
[50] Michael MacCracken et al., *Vulnerability of Semi-Enclosed Marine Systems to Environmental Disturbances*, *in* WATERSHEDS, BAYS, AND BOUNDED SEAS: THE SCIENCE AND MANAGEMENT OF SEMI-ENCLOSED MARINE SYSTEMS 8, 8 (2009).
[51] Julius Cesar Trajano et al., *Marine Environmental Protection in the South China Sea: Challenges and Prospects Part 2*, NTS INSIGHT, Jan. 1, 2018.
[52] David Rosenberg, *Environmental Pollution around the South China Sea: Developing a Regional Response,* 21 CONTEMPORARY SOUTHEAST ASIA 119, 121 (1999), https://doi.org/10.1355/CS21-1F.
[53] *Id.*
[54] *Id.*

While "[m]aritime transport is only responsible for 10% of the total marine pollution and that the extent of vessel-source pollution in the SCS area [is] moderate. Nevertheless, prevention of vessel-source pollution, especially the operational pollution from vessels, is of particular importance for the SCS."[55] Liu explains that "[t]he SCS contains some of the world's busiest international sea-lanes, as well as two of the world's busiest ports (Singapore and Hong Kong). As a result, shipping and harbor-related activities contribute significantly to the marine pollution of the area."[56]

Morton and Blackmore note that "[o]ne third of the 1.6 million tons annually discharged into the sea by shipping is released accidentally and the incidence of tar balls in the South China Sea ... and that tar balls were the most common form of surface pollution" in the SCS.[57] But aside from this, "oil enters the sea from the regular discharge by ships of contaminated ballast water and water used for flushing out tanks."[58]

Gomez states that "[s]warms of Chinese vessels have dumped human waste and wastewater for years in a disputed area of the South China Sea, causing algae blooms that have damaged coral reefs and threatened fish in an unfolding catastrophe."[59] To support this, he notes that "[s]atellite images over the last five years show how human waste, sewage and wastewater have accumulated and caused algae in a cluster of reefs in the Spratly region where hundreds of Chinese fishing ships have anchored in batches."[60]

In the South China Sea Arbitration (SCSA) case, the Tribunal accepted the observation in the Ferse Report on cyanide and blast fishing.[61] The Tribunal also considered "the use of both dynamite and cyanide to be 'pollution' of the marine

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[55] Nengye Liu, *Prevention of Vessel-Source Pollution in the South China Sea: What Role Can China Play,* 15 ASIA PAC. J. OF ENVT'L. L 147, 149 (2013).
[56] *Id.*
[57] Brian Morton & Graham Blackmore, *South China Sea,* 42 MARINE POLLUTION BULL. 1236, 1250 (2001).
[58] *Id.*
[59] Jim Gomez, *Images Show Chinese Ships Dumping Human Waste, Endangering Reefs, U.S. experts say*, L.A TIMES (July 12, 2021), https://www.latimes.com/world-nation/story/2021-07-12/images-show-chinese-ship-human-waste-endangering-reefs.
[60] *Id.*
[61] The South China Sea Arbitration, *supra* note 1, at ¶ 970.

environment within the meaning of the Convention—they are substances introduced by man that 'result in such deleterious effects as to harm living resources and marine life.'"[62]

2. *Land-based pollution*

The source of most of the pollution in the SCS "originates from the land, e.g., waste from large cities (sewage, industrial waste and hydrocarbons) and agricultural runoff (nutrients, pesticides and sediment)."[63] Morton and Blackmore explain that "[t]he populations of the countries that fringe the South China Sea generate about six million tons of organic matter each year."[64] Furthermore, agricultural production adds to the pollution as herbicides, insecticides, and animal wastes make their way to the SCS.[65]

Jiang notes that "serious marine microplastic pollution" plagues the SCS.[66] Microplastics from China flow from its rivers and into the SCS.[67] Specifically, Sembiring notes that the Xi, Dong, and Zhujiang rivers in China discharge "approximately 0.106 million tons of plastic waste per year into the SCS via the Pearl River Delta."[68] She adds that in 2015 alone, "around 2.56 to 7.08 million tons of plastic marine debris from six SCS-bordering countries accounted for approximately 65% of the world's top twenty contributors to plastic waste."[69]

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[62] *Id.*
[63] Morton and Blackmore, *supra* note 57.
[64] *Id.*
[65] *Id.*
[66] Tingye Jiang, *Institutional Dilemmas and Solutions to Marine Microplastic Pollution Governance in the South China Sea*, 19 CHINA OCEANS L. REV. 104, 105 (2023), https://doi.org/10.3389/fmars.2025.1687898.
[67] *Id.* Jiang observes that "In 2021, Hainan Province monitored its marine microplastics for the first time, identifying 11 types of marine microplastics including fibers, fragments, particles, foam, and films. According to the 2022 Hainan Ecological and Environmental Bulletin, over 10 types of microplastics were identified in the monitoring of floating microplastics in the Nandu River, Wanquan River, Changhua River Estuary, and the northwest waters of Yongxing Island in the Xisha Islands, with polyethylene, polypropylene, and polyester as major components."
[68] Margareth Sembiring, *Marine Environmental Protection in the South China Sea: Advancing Stronger People-To-People Cooperation on Plastic Waste Management*, S. Rajaratnam School of International Studies (2024), https://www.rsis.edu.sg/wp-content/uploads/2024/04/PR240408_Marine-Environmental-Protection-in-the-South-China-Sea-Advancing-Stronger-People-to-People-Cooperation-on-Plastic.pdf.
[69] *Id.*

According to Harris et al., the "amount of plastic pollution that has entered the SCS … is likely to be of the order of many millions of tons."[70] They further add that "countries bordering the SCS may contribute as much as 2.56–7.08 million tons of plastic pollution to the ocean every year."[71] Thus, it is no surprise that "marine plastic waste is widely distributed in the deep sea of the SCS region."[72]

Jiang further notes that "[t]he rapid spread of marine microplastic pollution in the SCS region poses a serious threat to the health of ecosystems and biodiversity, as these pollutants can be transferred across the surface, middle layer, and seabed of seawater, easily ingested by marine organisms."[73] The presence of plastic pollution creates "risks of entanglement of animals in plastic debris and the consequences of ingestion."[74] If fish ingest plastic, "it may result in starvation of the affected organism as well as possible contamination by toxic chemicals transferred from the plastic particles, with potential risks for human health."[75]

3. *Air pollution*

Suharman et al. note that "[r]apid economic development in the food and energy sector stimulates more activities taking place in and utilizing maritime environments, such as offshore oil drilling, construction of artificial islands, and fishing vessel industries in SCS waters."[76] Because of this, "[n]itrogen oxide (NOx), hydrocarbon (HC), sulfur oxide (SOx), and carbon monoxide (CO) are several pollutants in exhaust gas emitted by ships sailing through these waters, affecting air quality and climate change."[77]

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[70] P.T. Harris, J. Tamelander, Y. Lyons, M.L. Neo & T. Maes, *Taking a Mass-Balance Approach to Assess Marine Plastics in the South China Se*a, 171 MARINE POLLUTION BULL. 1, 1 (2021), https// doi.org/ 10.1016/j.marpolbul.2021.112708.
[71] *Id.*
[72] Jiang, *supra* note 66.
[73] *Id.*
[74] Harris et al., *supra* note 70, at 5.
[75] *Id.*
[76] Yoga Suharman, Sadewa Purba Sejati & Iman Amirullah, *Understanding the Carbon Monoxide Threat in the South China Sea*, 13 REGIONS & COHESION 29, 30 (2023), https://doi.org/10.3167/reco.2023.130303.
[77] *Id.*

Rosenberg reports that "[d]ense clouds of smoke haze were widely evident in satellite photo-images of the South China Sea during the last half of 1997."[78] While he admits that "[m]ost of this air pollution came from forest fires in Sumatra, Kalimantan and East Malaysia [he notes that] [a]dditional large quantities of carbon and sulphur emissions came from smoke-stacks of coal-fired power stations, aluminium smelters, and cement and steel factories in southern China."[79] Furthermore, "[m]otor vehicles also generate additional particulate and aerosol pollution, especially in highly urbanized areas along the coastline of the South China Sea."[80]

B. Overfishing

Liu notes that "[t]he increasing populations over the past decades have led to a significant rise in subsistence demand for fisheries, which has resulted in the commercialization of fisheries and overfishing."[81]

Sail points out that "to support their territorial claims, China and Vietnam have intensified commercial fishing. Fish supplies have been declining as a result of overfishing in the South China Sea."[82] Thus, the territorial disputes may be aggravating the environmental problems.

Bateman and Emmers state that overexploitation of fisheries in the shared waters of the South China Sea can be seen in the declining yields for specific species, increasing efforts per fish catch, smaller fish sizes, and market movements down the food chain.[83] They also note that "the incidence of illegal, unreported, and unregulated fishing has increased."[84]

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[78] Rosenberg, *supra* note 52, at 124.
[79] *Id.*
[80] *Id.*
[81] Liu, *supra* note 13, at 56, citing UNEP, GEO-6 Regional Assessment for Asia and the Pacific, 70 & Serge M Garcia and Andrew A Rosenberg, 'Food Security and Marine Capture Fisheries: Characteristics, Trends, Drivers and Future Perspectives' (2010) 365(1554) Philosophical Transactions of the Royal Society B: Biological Sciences 2873 and 2974.
[82] Anushka Sail, *Maritime Disputes in the South China Sea*, 5 INT'L J. OF L. MGMT. & HUMANITIES 1991, 1994 (2022), https://ijlmh.com/paper/maritime-disputes-in-the-south-china-sea/.
[83] David Rosenberg, *Fisheries Management in the South China Sea*, *in* SECURITY AND INTERNATIONAL POLITICS IN THE SOUTH CHINA SEA 61 (1st ed. 2008).
[84] *Id.* at 66.

Furthermore, "fishing stocks have plunged by a third over the past 30 years and will fall further by 59% by 2045. This threatens food security in the densely populated region."[85]

Yen cites the Food and Agriculture Organization of the United Nations as stating that "most stocks in the West Central Pacific fishing area are either fully fished or overfished, particularly in the western part of the South China Sea."[86] Yen also cites a report by Sumaila and Cheung in 2015, which determined that because the fish stocks in the SCS "have declined by 70-95% since the 1950s, [it] is imperative that immediate regional cooperative efforts should be made in order to manage and conserve the fisheries resources."[87]

According to Liu, destructive fishing activities are the main threat to bottom-dwelling living resources.[88] Greer says that because of shrinking fisheries, "[d]estructive practices, including the use of coral-damaging bottom trawlers, muro-ami nets, or even dynamite and cyanide, are often employed to squeeze more from dwindling fisheries."[89]

C. Coral Reef Damage

Liu reports that "[o]verfishing is considered to be a pervasive threat to healthy coral reefs, which puts 64% of reefs at risk."[90] Citing a 2010 report from the ASEAN Centre for Biodiversity, Liu further notes that "88% of the ASEAN region's coral reefs were at risk due to destructive fishing practices and coral bleaching."[91]

According to Sato et al., "claimants have engaged in dredging and landfills across the region [in order] [t]o build outposts that support their competing

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[85] Pratnashree Basu, *Troubled Waters: Marine Ecology Threats in the South China Sea*, OBSERVER RESEARCH FOUNDATION (June 18, 2021), https://www.orfonline.org/research/troubled-waters-marine-ecology-threats-in-the-south-china-sea.
[86] Yen Hoang Tran, *The South China Sea Arbitral Award: Legal Implications for Fisheries Management and Cooperation in the South China Sea*, 6 CAMBRIDGE INT'L L. J. 87, 88 (2017), https://doi.org/10.4337/cilj.2017.01.06.
[87] *Id.*
[88] Liu*, supra* note 13, at 53.
[89] Adam Greer, *The South China Sea Is Really a Fishery Dispute*, THE DIPLOMAT, https://thediplomat.com/2016/07/the-south-china-sea-is-really-a-fishery-dispute/.
[90] Liu*, supra* note 13, at 45.
[91] *Id.* at 16.

claims in the South China Sea."[92] This dredging and landfill is very destructive. In fact, "[d]redging ... is primarily responsible for the destruction of corals and reef flats, which sustain the entire marine ecosystem."[93] She further notes that "[c]ommercial satellite imagery analysis ... has revealed the approximate total area of coral reefs destroyed by China, Vietnam, and other claimants in the region. The results show that China has caused the most reef destruction through dredging and landfill, burying roughly 4,648 acres of reefs."[94] In fact, "27% of the shallow reef area of the seven reefs in the South China Sea has been permanently lost."[95]

Aside from this, the harvesting of giant clams has led to the destruction of coral reefs. According to Sato et al., "many reefs show arc-shaped scars, which are created when fishers dig up reef surfaces by dragging specially made brass propellers in a semicircle around the anchor chain on the front of their boats. This allows them to more easily harvest both live and dead clams attached to the reef."[96] They note that "[a]lthough fishers from the Philippines and Vietnam have a history of giant clam harvesting, only Chinese fishers are known to use this method."[97]

According to estimates, "approximately 16,535 acres of reef have been damaged by Chinese giant clam harvesting."[98] Ives, citing McManus, states, "China has already caused 55 square miles of 'decadal-scale' damage through giant-clam harvesting and seafloor dredging near its new islands."[99] He notes that this "is worrying because seafloor dredging can kill corals by blocking their access to sunlight, as has happened near Australia's Great Barrier Reef, where sediment plumes extended for up to 28 miles from a seafloor dredging site."[100]

Liu also reports that a "2012 meta-analysis of maritime studies found that in just the last 10 to 15 years, SCS coral coverage rates in disputed regions have

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[92] Sato et al., *supra* note 27.
[93] Basu, *supra* note 85.
[94] Sato et al., *supra* note 27.
[95] Basu, *supra* note 85.
[96] Sato et al., *supra* note 27.
[97] *Id.*
[98] *Id.*
[99] Ives, *supra* note 21.
[100] *Id.*

declined from over 60% to just 20%. Reefs along China's coastline are in even worse shape and have declined by over 80% in the last several decades." [101]

D. Biodiversity and Habitat Loss

The pollution, overfishing, and destruction of coral reefs inevitably result in biodiversity loss in the SCS.

Juinio-Meñez reports that "the SCS Large Marine Ecosystem Assessment, which is based on expert opinion, showed that the majority of the areas in the SCS were graded as 'poor' in relation to biodiversity conditions (e.g., nearshore ecosystems and species)."[102] She further notes that "experts judged that the majority of the parameters evaluated were declining or stabilizing, and very few indicated that biodiversity or ecosystem health was improving. Three habitats (coral reefs, seagrass, and mangroves) and species groups were in the poorest condition because of overexploitation and coastal development."[103]

Basu reports that "China has lost half its coastal wetlands, 57% of mangroves and 80% of coral reefs in its exclusive economic zone (EEZ)."[104]

According to Sato et al., "[a]lthough local Hainan authorities attempted to crack down on the sale of giant clams in 2017, satellite imagery from 2019 shows that harvesting in the South China Sea persisted … Giant clam products continue to be sold in China on the black market."[105] These giant clams have been classified as vulnerable, but "the method by which Chinese fishers have harvested these creatures is even more damaging, laying waste to large swathes of coral reef."[106]

Other methods of giant clam harvesting have been observed to have similar destructive effects.

> In 2019, near Scarborough Shoal, a method seemingly adapted from salvagers was captured on film. A high-pressure water pump

[101] Greer, *supra* note 89.
[102] Juinio-Meñez, *supra* note 37, at 113.
[103] *Id.*
[104] Basu, *supra* note 85.
[105] Sato et al., *supra* note 27.
[106] *Id.*

> is used to quickly suck sediment from the seabed. This extracts giant clams while also destroying the seabed and sending abrasive sediment drifting through nearby areas. This method of clam harvesting has likely been employed beyond Scarborough Shoal.[107]

Sato et al. further report that "[o]ver 20% of maritime features in the South China Sea have sustained damage from giant clam harvesting. Since clam harvesting on deeper reef structures cannot be monitored by satellite, there is no telling how many other lagoons have been damaged in the same way."[108]

In the past, Vietnam "primarily used clamshell dredgers and construction equipment to scoop up sections of shallow reef and deposit the sediment on the area targeted for landfill. This method is slower and causes less collateral damage to surrounding areas."[109] But Sato et al. point out that this "still destroys the coral reef where the sediment is extracted and deposited."[110] But "Vietnam has turned to cutter suction dredgers like China's. This large-scale expansion of Vietnam's South China Sea outposts remains ongoing and will have major consequences for the surrounding marine environment."[111]

V. Necessity of Cooperation

The necessity for cooperation to address the environmental problems discussed in the preceding section is obvious given the nature of the SCS marine environment and the causes of the problems.

Liu argues that "[e]nsuring the oceans' sustainable development requires effective coordination and cooperation, including at global and regional levels, between relevant bodies, and actions."[112]

Trajano et al. argue that "[t]he alarming state of the marine environment in the SCS highlights the urgency for enhancing cooperation among countries concerned as effective governance is beyond the capacity of any individual

[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] Liu, *supra* note 13, at 77.

nation."[113] In fact, Ma and Liu note that "[i]n order to prevent the impact of human activities on the overall environment of semi-closed seas, the major semi-closed sea areas have established a cooperation framework with regional agreements as the foundation for … environmental protection."[114]

A. Nature of the SCS Marine Environment

The borderless nature of the marine environment, where waters freely flow from one area to another, requires cooperation among the various states involved. More importantly, the SCS is a semi-enclosed area. As Hu points out, in a semi-enclosed area:

> From a marine space perspective, the bordering States may encounter difficulty of claiming a full 200-nautical-mile exclusive economic zone (EEZ) and continental shelf, or even a full 12-nautical-mile territorial sea, without the occurrence of overlapping claims with neighboring opposite or adjacent States. From a resources perspective, the bordering States share the same water body for land-based effluent discharge and the same marine resource base, both living and nonliving, for their livelihood and economic development. Thus, States bordering enclosed or semi-enclosed seas can be said to be "geographically disadvantaged States."
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> The geographical reality or limitation of enclosed or semi-enclosed seas requires the bordering States to develop "intraregional" mechanisms to reduce, mitigate, or eliminate competition and conflicts.[115]

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[113] Trajano et al., *supra* note 51.
[114] Mingfei Ma & Xinyang Liu, *The Control of Microplastic Pollution in Semi-Closed Seas: Good-Faith Cooperation and Regional Practice*, 15 SUSTAINABILITY 12412.
6 (2023), https://doi.org/10.3390/su151612412. [These include 1995 Barcelona Convention for the Protection of the Marine Environment Coastal Region in the Mediterranean, the 1992 Helsinki Convention for the Protection of the Marine Environment of the Baltic Sea Area, 1982 Jeddah Convention for the Conservation of the Red Sea and the Gulf of Aden Environment; 1978 Kuwait Convention for Cooperation on the Protection of the Marine Environment from Pollution]
[115] Nien-Tsu Alfred Hu, *Semi-Enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea*, 41 OCEAN DEV. & INT'L L. 281, 282 (July-September 2010), https://doi.org/10.1080/00908320.2010.499306.

Furthermore, the SCS is the habitat of straddling and highly migratory species. Thus, the States concerned are obligated to cooperate to protect such species.[116] As these species migrate from one area to another, States must cooperate to protect them.

The ITLOS has also pointed out that because of the global and transboundary nature of anthropogenic GHG emissions, "joint actions should be actively pursued [because] it is only through joint action that global levels of GHG emissions in the atmosphere and the consequent pollution of the marine environment can be prevented, reduced and controlled."[117]

B. Causes of Environmental Problems

To deal with the causes of the destruction of the marine environment which come from different places, the SCS states must coordinate efforts to enforce environmental protection measures. For instance, those guilty of illegal fishing and other activities can only be apprehended and prosecuted through cooperative efforts.

To avoid leakage (i.e., perpetrators of environmental damage moving from an area of strict regulation to an area of lax regulation), states must coordinate and harmonize regulations.

This is also perhaps why international law obligations to solve marine environmental problems recognize cooperation. For example, Article 194 of the United Nations Convention on the Law of the Sea refers to measures undertaken "jointly." The ITLOS points out that this "indicates the importance of cooperation in addressing pollution of the marine environment. This point is also underscored by requiring States to 'endeavor to harmonize their policies'" in taking necessary measures indicated in Article 194 (1) of UNCLOS.[118] Furthermore, the International Law Commission has stated, "[t]he principle of cooperation between States is

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116 Hoang Tran, *supra* note 86, at 91.
117 ITLOS Case No. 31, *supra* note 29, at ¶ 201-202.
118 *Id.*

essential in designing and implementing effective policies to prevent significant transboundary harm or at any event to minimize the risk thereof."[119]

VI. International Legal Framework

A. Multilateral Treaties

1. *UN Convention on the Law of the Sea* (*UNCLOS*)

Virtually all the claimants to areas in the SCS are parties to the UNCLOS.[120] Thus, they are all bound to comply with their treaty obligations under the principle of *pacta sunt servanda.*

a) *Duty to Protect and Preserve the Marine Environment*

Part XII of UNCLOS deals with the Protection and Preservation of the Marine Environment. The first article of Part XII is Article 192, which provides for the general obligation of states "to protect and preserve the marine environment."

i. *Obligation under Article 192*

In general

In the SCSA, the Tribunal considered it well established that Article 192 imposes a duty on States Parties, although it is phrased in general terms. The

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119 Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries art. 4 ¶ 1, [2001] 2 Y.B. Int'l L. Comm'n 148, 155, U.N. Doc. A/56/10.

120 Although Taiwan is not a party, "Taiwan has demonstrated its willingness to comply with international law when it comes to maritime claims. After UNCLOS (1982) was opened for signature, the Republic of China (ROC) published an official statement in the Central Newspaper in January 1983 stating that Taiwan would adhere to the Convention. Taiwan has demonstrated its willingness to comply with international law when it comes to maritime claims. After UNCLOS (1982) was opened for signature, the Republic of China (ROC) published an official statement in the Central Newspaper in January 1983 stating that Taiwan would adhere to the Convention." Huynh Tam Sang, UNCLOS's Relevance to Taiwan Amid a Raging Storm, Fulcrum Analysis on Southeast Asia (Oct. 4, 2022), https://fulcrum.sg/uncloss-relevance-to-taiwan-amid-a-raging-storm/.

Tribunal further explained that "[t]his 'general obligation' extends both to 'protection' of the marine environment from future damage and 'preservation' in the sense of maintaining or improving its present condition." The Tribunal added:

> Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.[121]

In the *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* ("ITLOS Ad Op"), the ITLOS explained that Article 192 "has a broad scope, encompassing any type of harm or threat to the marine environment."[122] It added that:

> The obligation under this provision has two distinct elements. The first element is the obligation to protect the marine environment. It is linked to the duty to prevent, or at least mitigate, environmental harm ... The second element is the obligation to preserve the marine environment, which entails maintaining ecosystem health and the natural balance of the marine environment.[123]

ITLOS further explained that "[w]here the marine environment has been degraded, ... the term "preservation" may include restoring marine habitats and ecosystems."[124] Also, while the term "restoration" cannot be found in Article 192, it "flows from the obligation to preserve the marine environment where the process of reversing degraded ecosystems is necessary in order to regain ecological balance."[125]

It should be noted that Article 192 "does not specify the relevant harms and threats to which it applies [which means that] it can be invoked to combat

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[121] The South China Sea Arbitration, *supra* note 1, at ¶ 941.
[122] ITLOS Case No. 31, *supra* note 29, at ¶ 385.
[123] *Id.*
[124] *Id.* at ¶386.
[125] *Id.*

any form of degradation of the marine environment, including climate change impacts, such as ocean warming and sea level rise, and ocean acidification."[126]

ITLOS has concluded that "Article 192 of the Convention also requires States to implement measures to protect and preserve the marine environment in relation to climate change impacts and ocean acidification that include resilience and adaptation actions as described in the climate change treaties."[127]

In the SCSA case, the Tribunal clarified that Article 192 "set forth obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment."[128] Moreover, in the ITLOS Ad Op, the ITLOS said that it "considers that the obligation to take measures necessary to protect and preserve the marine environment requires States to ensure that non-State actors under their jurisdiction or control comply with such measures. The obligation of the State, in this instance, is one of due diligence."[129] Thus, States must ensure that the activities of private individuals and corporations do not harm the marine environment.

The ITLOS further explained that under Article 192, States "are required to take measures as far-reaching and efficacious as possible to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment."[130]

The ITLOS concluded that Article 192:

> [I]mposes a general obligation on States Parties to protect and preserve the marine environment. It applies to all maritime areas and can be invoked to combat any form of degradation of the marine environment, including climate change impacts, such as ocean warming and sea level rise, and ocean acidification. Where the marine environment has been degraded, this may require restoring marine habitats and ecosystems. This obligation is one

[126] *Id.* at ¶ 388.
[127] *Id* at ¶ 391.
[128] The South China Sea Arbitration, *supra* note 1, at ¶ 944.
[129] ITLOS Case No. 31, *supra* note 29, at ¶ 396.
[130] *Id.* at ¶ 399.

> of due diligence. The standard of due diligence is stringent, given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification.[131]

Under other articles

The Tribunal also stated that the other provisions of Part XII inform the content of the obligation under Article 192.[132] It subsequently reiterated that "[t]he content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention.[133]

Under international environmental law

The Tribunal also stated that the "corpus of international law relating to the environment … informs the content of the general obligation in Article 192."[134] It also noted that "the content of the obligation is informed by … other applicable rules of international law.[135] It reiterated that "[t]he content of the general obligation in Article 192 is further detailed … by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention."[136] Thus, it seems that Article 192 is the portal through which the entire body of international environmental law becomes applicable to the marine environment.

Duty not to cause transboundary harm

The Tribunal further stated that international environmental law "requires that States ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control."[137] It

[131] *Id.* at ¶ 400.
[132] The South China Sea Arbitration, *supra* note 1, at ¶ 941.
[133] *Id.* at ¶ 942.
[134] The South China Sea Arbitration, *supra* note 1, at ¶941.
[135] *Id.*
[136] *Id.* at ¶ 942.
[137] *Id.* at ¶ 941.

concluded that "States have a positive 'duty to prevent or at least mitigate' significant harm to the environment when pursuing large-scale construction activities."[138] The Tribunal seems to refer to the customary principle of *sic utere tuo.* This rule is codified in Article 3 of the Draft Articles on the Prevention of Transboundary Harm ("APTH"), which states that: "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.[139] Moreover, Article 4 of the APTH also emphasizes cooperation, stating that "States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.[140]

Convention on International Trade in Endangered Species (*CITES*)

In the SCSA, the Tribunal noted that "CITES is the subject of nearly universal adherence, including by the Philippines and China, and in the Tribunal's view forms part of the general corpus of international law that informs the content of Articles 192 and 194(5) of the Convention."[141] The Tribunal further noted that "[a]ll of the sea turtles (*Cheloniidae*) found on board Chinese fishing vessels are listed under Appendix I to the CITES Convention as species threatened with extinction and subject to the strictest level of international controls on trade."[142]

The Tribunal quoted from the *Southern Bluefin Tuna*[143] *case*: "[T]he conservation of the living resources of the sea is an element in the protection and preservation of the marine environment." It said that it "considers that the general obligation to 'protect and preserve the marine environment' in Article 192 includes a due diligence obligation to prevent the harvesting of species that are recognized internationally as being at risk of extinction and requiring international protection."[144]

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[138] *Id.* at ¶ 941.
[139] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, *supra* note 119, at 153.
[140] *Id.* at 155.
[141] The South China Sea Arbitration, *supra* note 1, at ¶ 956.
[142] *Id.*
[143] Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Rep. 1999, 280; 295, 70.
[144] The South China Sea Arbitration, *supra* note 1, at ¶ 956.

The Tribunal noted that "the duty to prevent the harvest of endangered species follows from Article 192."[145] It said that Article 192 imposes a *due diligence* obligation to take those measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."(emphasis supplied)[146] It ruled that "in addition to preventing the *direct harvesting* of species recognized internationally as being threatened with extinction, Article 192 *extends to the prevention of harms that would affect* depleted, threatened, or endangered species indirectly through the destruction of their habitat." (emphasis supplied)[147]

Consequently, "the harvesting of … species threatened with extinction [constitutes] a harm to the marine environment as such."[148] Thus, the "failure to take measures to prevent" practices that have "a harmful impact on the fragile marine environment would constitute a breach" of Article 192.[149]

ii. *Limitation on the sovereign right*

Article 193 of UNCLOS clarifies that while "states have the sovereign right to exploit their natural resources," it must be "pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment."[150] This article suggests an inherent limitation on the sovereign right of states to exploit their own resources. It is arguable, therefore, that the exploitation of shared resources should also be limited by the duty to preserve and protect the marine environment.

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145 *Id.* at ¶ 959.
146 *Id.*
147 *Id.*
148 *Id.* at ¶ 960.
149 *Id.*
150 UNCLOS art. 193.

iii. Measures to prevent, reduce, and control pollution

Article 194 of UNCLOS deals with "Measures to prevent, reduce and control pollution of the marine environment" and "is drafted in terms whose generality excludes any restriction on the duty to prevent marine pollution."[151]

Article 194 requires all states "to take … all measures … that are necessary to prevent, reduce and control pollution of the marine environment from any source."[152]

For this purpose, states must use "the best practicable means at their disposal and in accordance with their capabilities."[153] The ITLOS has explained that "[t]he reference to "the best practicable means at their disposal" and "in accordance with their capabilities" injects a certain degree of flexibility in implementing the obligation."[154] It adds:

> In particular, it seeks to accommodate the needs and interests of States with limited means and capabilities, and to lessen the excessive burden that the implementation of this obligation may entail for those States. However, the reference to available means and capabilities should not be used as an excuse to unduly postpone, or even be exempt from, the implementation of the obligation to take all necessary measures.[155]

This obligation applies to any source and any kind of pollution.[156] ITLOS clarified that this includes anthropogenic GHG emissions into the atmosphere.[157]

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[151] Philippe Weckel & Raphaëlle Didillon, *The Obligation of States to Protect and Preserve the Marine Environment, Summary of the General Report*, Institut du Droit Économique de la Mer, 5 (2023). https://www.indemer.mc/wp-content/uploads/2023/03/Obligation-de-proteger-et-preserver-le-milieu-marin-Resume-du-rapport-general-english.pdf.
[152] UNCLOS art.194, ¶ 1.
[153] *Id.*
[154] ITLOS Case No. 31, *supra* note 29, at ¶ 226.
[155] *Id.*
[156] *Id.* at ¶ 197.
[157] *Id.*

The ITLOS Adv Op stated, "[w]hile the obligation to protect and preserve the marine environment is much broader in scope than the obligation to prevent, reduce and control marine pollution, the latter obligation constitutes the main component of the former obligation under the Convention."[158]

Article 194 provides that necessary measures shall be taken "individually or jointly as appropriate." The ITLOS has explained that the phrase "as appropriate" in Article 194 "implies that there is no priority between an individual action and a joint action. Either action can be taken if it is appropriate. The appropriateness of an individual or joint action depends on the particular circumstances in which measures are taken."[159] But despite the importance of cooperative measures, "[s]tates are required to take all necessary measures, including individual actions as appropriate."[160] Some argue that Article 194 "imposes general responsibility on all States—theoretically-, not merely on the coastal or directly affected States."[161]

Article 194, paragraph 1, requires States to take "all measures ... that are necessary." The ITLOS has explained that the term "necessary" "should be understood broadly."[162] Thus, "necessary measures include not only measures which are indispensable to prevent, reduce and control marine pollution but also other measures which make it possible to achieve that objective."[163]

The ITLOS has clarified that "what is required of States under this provision is not to guarantee the prevention, reduction and control of marine pollution at all times but to make their best efforts to achieve such result."[164] Thus, "[i]t is thus the conduct of a State, not the result which would be entailed by the conduct, that will determine whether the State has complied with its obligation" under this article."[165]

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[158] *Id.* at ¶ 188.
[159] *Id.* at ¶¶ 201-202.
[160] *Id.*
[161] Detlef Czybulka, *Article 194: Measures to prevent, reduce and control pollution of the marine environment*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1295, 1303 (Alexander Proelss ed., Nomos Verlagsgesellschaft 2017).
[162] ITLOS Case No. 31, *supra* note 29, at ¶ 203.
[163] *Id.*
[164] *Id.* at ¶ 233.
[165] *Id.*

Similar to Article 192, the standard for Article 194 is "due diligence," which "requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective."[166]

Because Article 194 (1) is an obligation *erga omnes partes,* "it may be invoked by a State which has suffered no damage to its marine environment."[167] Furthermore, Article 194 (1) includes "measures to prevent future pollution." [168]

Article 194 (2) also provides for two obligations of states. First, states must "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment."[169] Second, states must "take all measures necessary to ensure that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with [UNCLOS]."[170] These obligations resemble or are versions of the duty not to cause transboundary harm.

The ITLOS has noted that the term "damage" is referred to in the first obligation but not in the second.[171] Thus, this means that the first obligation "should be understood as requiring the prevention of actual damage by pollution, whereas the obligation in the latter situation extends not only to damage that actually occurred but also to damage that is likely to occur."[172] This means "that the obligation to impede the spread of pollution arising from incidents or activities (under the jurisdiction or control of the State) is triggered by the fact itself and no other reasons such as threat or hazard to neighboring areas are needed."[173] This

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[166] *Id.* at ¶¶ 234-236.
[167] Philippe Weckel & Raphaëlle Didillon, *The Obligation Of States to Protect and Preserve the Marine Environment, Summary of the General Report*, Institut du Droit Économique de la Mer, 5 (2023). https://www.indemer.mc/wp-content/uploads/2023/03/Obligation-de-proteger-et-preserver-le-milieu-marin-Resume-du-rapport-general-english.pdf.
[168] Czybulka, *supra* note 161, at 1302.
[169] UNCLOS art. 194, ¶ 2.
[170] *Id.*
[171] ITLOS Case No. 31, *supra* note 29, at ¶ 248.
[172] *Id.*
[173] Czybulka, *supra* note 161, at 1306.

means that the second obligation "imposes a more stringent obligation by requiring States to prevent the "spread" of pollution than the principle laid down in the Stockholm Declaration and the Rio Declaration which refers to "damage" to the environment of other States and of areas beyond the limits of national jurisdiction."[174] In other words, damage does not have to be proven, but only the existence of pollution.

The ITLOS has explained that "[t]he phrase 'activities under their jurisdiction or control' refers to activities carried out by both public and private actors."[175] Thus, the state is responsible not only for the acts of its agents but also for failing to regulate the acts of private actors, provided there is a "link of jurisdiction or control between such activities and a State."[176] Furthermore, obligations "to ensure" in UNCLOS establish a responsibility to exercise their power over entities under their jurisdiction and control, such as ships flying their flag or companies subject to their national jurisdiction.[177]

The phrase "jurisdiction or control" of a State includes its territory and "areas in which the State can, in accordance with international law, exercise its competence or authority … Activities carried out on board ships or aircraft which are registered in a State may also be considered activities under the jurisdiction of that State."[178] Furthermore, "activities 'under control' may be fisheries, seabed-mining, or scientific research regardless of where they are exercised."[179]

Article 194 (5) also clarifies that "[t]he measures taken in accordance with [Part XII] shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."[180]

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[174] ITLOS Case No. 31, *supra* note 29, at ¶ 248.
[175] *Id.* at ¶ 247.
[176] *Id.*
[177] Robert Beckman, *State Responsibility and Transboundary Marine Pollution*, National University of Singapore Centre for International Law. https://cil.nus.edu.sg/wp-content/uploads/2014/02/Session-4-Beckman-State-Responsibility-and-Transboundary-Marine-Pollution-27-Feb-PowerPoint.pdf.
[178] ITLOS Case No. 31, *supra* note 29, at ¶ 247.
[179] Czybulka, *supra* note 161, at 1306.
[180] UNCLOS, art. 194, ¶ 5.

The term "necessary" "should be understood broadly' to include 'those [measures] which make it possible to achieve' the permissible objective."[181]

An example of a necessary measure under Article 194 95) is "[t]he establishment and management of a marine protected area (MPA).[182]

Czybulka notes that "by reason of the measures it contains," Art. 194 (5), "is a provision that aims to protect ecosystems and biodiversity as a whole. It has to be understood in an all-encompassing sense that includes all issues of protection of the marine environment and not only the prevention, reduction and control of pollution."[183]

Article 194 (5) also refers to the preservation and protection of "the habitat of depleted, threatened or endangered species and other forms of marine life." Czybulka notes that "[i]t is not necessary that these habitats are also 'rare' or scarce; they may be common or widespread, and they also can be pre-damaged. Their specific ecological value lies in the fact that endangered etc. marine species live there permanently or seasonally."[184] It must be noted that endangered species of sea turtles (Cheloniidae) or cetaceans listed under Appendix I to the CITES Convention and marine species like giant clams (Tridacnidae spp.) listed under Appendix II to CITES are found in the SCS.[185]

Article 195 deals with the "Duty not to transfer damage or hazards or transform one type of pollution into another." It requires that "[i]n taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another."

Czybulka explains that "[t]his duty is not limited to cases where the pollution risks spilling over into areas where the inducing State does not exercise

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[181] Joshua Paine, *The ITLOS Advisory Opinion on Climate Change: Selected Issues of Treaty Interpretation*, EJIL: TALK BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (Jun. 3, 2024), https://www.ejiltalk.org/the-itlos-advisory-opinion-on-climate-change-selected-issues-of-treaty-interpretation/.
[182] Czybulka, *supra* note 161, at 1280.
[183] *Id.* at 1309-1310.
[184] *Id.* at 1312.
[185] *Id.*

sovereign rights … Consequently, it does not matter for the application of this provision if the area concerned by the pollution-related action lies within the scope of the state's authority or not."[186] Thus, "the acting State shall contain the pollution within the affected area, as far as possible, and combat it as soon as possible where it occurred."[187] The prohibition against transformation "means that the pollution is to be combatted at the source (or/and in its original condition)."[188]

It must be noted that Article 195 is "applicable in all coastal and maritime zones including the internal waters, the exclusive economic zone and the high seas. It is also applicable to measures on the continental shelf and the Area."[189]

iii. *General and regional cooperation*

Article 197 of UNCLOS requires states to "cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with [UNCLOS], for the protection and preservation of the marine environment, taking into account characteristic regional features."[190] Thus, Article 197 requires states to cooperate in creating rules to protect and preserve the marine environment. This duty does not depend on an existing environmental problem or dispute.

The Tribunal in the SCSA case cited *MOX Plant*, where the ITLOS "emphasized that 'the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.'"[191]

In Article 197, "cooperation is expressly aimed at developing a common regulatory framework."[192] Taken together with Article 194(1), "[i]t follows that cooperation in the formulation and elaboration of international rules, standards

[186] *Id.* at 1315.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 1319.
[190] UNCLOS art. 197.
[191] The South China Sea Arbitration at ¶ 946.
[192] ITLOS Case No. 31, *supra* note 29, at ¶ 301.

and recommended practices and procedures under Article 197 is among the joint measures contemplated in [Article 194 (1)]."[193]

The obligation to cooperate under Article 197 "is characterized by a large degree of flexibility"[194] such that the "rules, standards, practices and procedures may be binding or non-binding."[195]

ITLOS clarified that Article 197 "does not oblige States to achieve a normative outcome but to participate meaningfully in the formulation and elaboration of rules, standards and recommended practices and procedures for the protection and preservation of the marine environment."[196] Furthermore, it "is an obligation of conduct which requires States to act with 'due diligence.' States are required to fulfill this obligation in good faith."[197] Moreover, the obligation has "a continuing nature. It requires States to make an ongoing effort to formulate and elaborate rules, standards and recommended practices and procedures."[198]

Article 198 of UNCLOS deals with "Notification of imminent or actual damage." It requires a state that "becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution … to immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations."

In addition, Article 199 deals with "Contingency plans against pollution" and covers cases referred to in Article 198. It requires states in the area affected and the competent international organizations to "cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage."[199] It adds that "[t]o this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment."[200]

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[193] *Id.*
[194] *Id.* at ¶ 302.
[195] *Id.*
[196] *Id.* at ¶ 307.
[197] *Id.* at ¶ 309.
[198] *Id.* at ¶ 311.
[199] UNCLOS art. 199.
[200] *Id.*

The obligation to notify of danger or damage and to develop contingency plans is prescribed "so that States can best coordinate their efforts."[201] Lee and Bautista explain that "Marine pollution contingency plans respond to marine pollution disasters and emergencies in order to protect marine resources. In light of existing State practices of marine contingency planning and *opinio juris*, these UNCLOS provisions also appear to codify an established customary international rule."[202]

Lee and Bautista note further that Article 198 "does not provide for a specific standard as to the degree of damage incurred that requires notification. Once notification under Article 198 is given, States are expected, however, to proceed under the contingency plans developed under Article 199 with assistance from competent international organizations."[203]

Article 200 of UNCLOS is titled "Studies, research programs and exchange of information or data." It requires states to "cooperate, directly or through competent international organizations, for the purpose of promoting studies, undertaking programs of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment."[204] Thus, the cooperation is for three purposes: (1) promotion of studies, (2) undertaking scientific research programs, and (3) exchange of information and pollution data.

ITLOS notes that Article 200 "is important for the development of an adequate common regulatory framework to protect and preserve the marine environment."[205]

b) *Monitoring and environmental assessment*

Article 204 of UNCLOS deals with "Monitoring the risks or effects of pollution." Article 204 (1) provides that states "shall, consistent with the rights of

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[201] Seokwoo Lee & Lowell Bautista, *Part XII of the United Nations Convention on the Law of the Sea and the duty to mitigate against climate change: making out a claim, causation, and related issues*, 45 ECOLOGY L.Q. 129, 141 (2018), https://doi.org/10.15779/Z38M32N965.
[202] *Id.*
[203] *Id.* at 142.
[204] UNCLOS art. 200.
[205] ITLOS Case No. 31, *supra* note 29, at ¶ 315.

other States, endeavor, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution of the marine environment."[206] The ITLOS has explained that Article 204 (1) "aims to enhance knowledge of the harmful consequences of marine pollution as a whole" and "provides for two phases of monitoring."[207] The first is the observation and measurement of the risks and effects of pollution, and the second is the evaluation and analysis of the data.[208] While the language suggests that the obligation is not mandatory, Article 204 (2) states that "[i]n particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment."[209] The language of paragraph 2 is clearly mandatory. Thus, "[i]t shifts the object of monitoring from the marine environment as a whole to activities conducted under the control of a State party."[210] The obligation applies irrespective of the place where the activities are conducted or the nationality of the individuals or entities carrying out the activities.[211]

The Tribunal in the SCSA case explained that "[t]he duty to monitor the marine environment is … not limited to either coastal or flag States, but applicable to all States Parties" to UNCLOS.[212]

Article 205 of UNCLOS deals with "Publication of reports." It requires States to "publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States."[213]

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[206] UNCLOS, art. 204, ¶ 1.
[207] ITLOS Case No. 31, *supra* note 29, at ¶¶ 347-349.
[208] *Id.*
[209] Article 204, ¶ 2.
[210] Eike Blitza, *Article 204: Monitoring of the risks or effects of pollution, in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1356, 1363 (Alexander Proelss ed., Nomos Verlagsgesellschaft 2017).
[211] ITLOS Case No. 31, *supra* note 29, at ¶¶ 347-349.
[212] Blitza, *supra* note 210 at 1360.
[213] UNCLOS art. 205.

Blitza explains that "to fulfill this duty, States may either publish pertinent reports themselves or provide them to competent international organizations, which make them available to all States."[214]

Article 206 of UNCLOS deals with "Assessment of potential effects of activities." It requires states that "have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment" to, "as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205."[215] Thus, Article 206 provides for the undertaking and communication of environmental impact assessments.

ITLOS has argued that "the obligation to conduct environmental impact assessments is crucial to ensure that activities do not harm the marine environment and is an essential part of a comprehensive environmental management system."[216] It noted that this obligation also forms part of customary international law.[217]

ITLOS has pointed out that "although article 206 of the Convention does not specify the scope and content of an environmental impact assessment, it indicates some of the components that are relevant."[218] For instance, it noted that "the obligation to conduct an environmental impact assessment concerns 'planned activities,'[219] which implies that such assessment is to be conducted prior to the implementation of a project." It further noted that "[t]he activities under assessment comprise both those planned by private entities and those planned by States."[220]

Thus, Article 206 requires an environmental impact assessment if the activity is under the "jurisdiction or control" of the State and if there are

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[214] Eike Blitza, *Article 205: Publication of Report*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1364, 1364-65 (Alexander Proelss ed., Nomos Verlagsgesellschaft 2017).
[215] UNCLOS art. 206.
[216] ITLOS Case No. 31, *supra* note 29, at ¶ 354.
[217] *Id.* at ¶ 355.
[218] *Id.* at ¶¶ 357-358.
[219] *Id.*
[220] *Id.*

"reasonable grounds for believing" that this activity "may cause substantial pollution of or significant and harmful changes to the marine environment."[221]

In the SCSA case, the Tribunal noted that "[t]o fulfill the obligations of Article 206, a State must not only prepare an EIA but also must communicate it."[222]

ITLOS has explained that the obligation under Article 206 "does not … require a transboundary context to be triggered."[223] Thus, "it covers activities which are likely to only pollute … the coastal State's territorial sea, as well as those affecting the high seas … or maritime zones under the exclusive jurisdiction … or sovereignty … of other States."[224] This "broad scope of application is further complemented by the fact that the provision contains virtually no spatial limitation. It is not confined to planned activities within a State's territory or zones of jurisdiction but applies everywhere – even in the territory of another State."[225]

c) *Cooperation in semi-enclosed areas*

Article 122 of UNCLOS defines an enclosed or semi-enclosed area as "a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States." Hu notes, "[a]n enclosed or semi-enclosed sea inevitably entails a situation in which the bordering States are competing for marine space and resources."[226]

Article 123 of UNCLOS requires States bordering an enclosed or semi-enclosed sea to "cooperate with each other in the exercise of their rights and in the performance of their duties under [the UNCLOS]. To this end, they shall endeavor, directly or through an appropriate regional organization" the following:[227]

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[221] *Id.* at ¶ 359.
[222] The South China Sea Arbitration*, supra* note 1 at ¶ 991.
[223] Eike Blitza, *Article 206: Assessment of potential effects of activities*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1369, 1371 (Alexander Proelss ed., Nomos Verlagsgesellschaft 2017).
[224] *Id.*
[225] *Id.*
[226] Hu, *supra* note 115.
[227] UNCLOS art. 123.

- to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

- to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

- to coordinate their scientific research policies and undertake where appropriate joint programs of scientific research in the area;

- to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Lee and Bautista argue that "Article 123 reflects the reality that States bordering a semi-enclosed sea are under an enhanced duty to cooperate."[228]

In the SCSA case, the Tribunal noted that "[w]ith respect to China's island-building program, the Tribunal has before it no convincing evidence of China attempting to cooperate or coordinate with the other States bordering the South China Sea."[229]

2. *Convention on Biological Diversity* (*CBD*)

Virtually all states with a territorial claim within the SCS are parties to the CBD. Taiwan, referred to as a province of China in the official documents of discussions in relation to the CBD,[230] has also expressed its participation. The CBD's objectives are the "conservation of biological diversity, the sustainable use

[228] Lee & Bautisa, *supra* note 10 at 323 citing Satya N. Nandan, and Shabtai Rosenne (eds.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, Vol. 3, (Martinus Nijhoff 1995), p. 343, 356, 365.
[229] The South China Sea Arbitration*, supra* note 1 at ¶ 986.
[230] As an example, in the Preliminary Report of First Global Taxonomy Initiative Workshop in Asia, UNEP/CBD/SBSTTA/9/INF/17, 12 September 2003, on p. 16, fn 10. https://www.cbd.int/doc/meetings/sbstta/sbstta-09/information/sbstta-09-inf-17-en.pdf.

of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."[231]

The CBD has been referred to by the Tribunal in the SCSA case across multiple portions of the decision.

For instance, the Tribunal referred to Article 2 of the CBD in defining the term "ecosystem":

> An 'ecosystem' is not defined in the [United Nations] Convention [on the Law of the Sea], but internationally accepted definitions include that in Article 2 of the CBD, which defines ecosystem to mean "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit. The Tribunal has no doubt from the scientific evidence before it that the marine environments where the allegedly harmful activities took place in the present dispute constitute "rare or fragile ecosystems." They are also the habitats of "depleted, threatened or endangered species," including the giant clam, the hawksbill turtle and certain species of coral and fish.[232]

This implies that the provisions of the CBD apply to the marine environment in general and the SCS in particular.

Furthermore, Article 4 of the CBD provides that its provisions apply:

> (a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and
>
> (b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.

Thus, if what is involved are "components of biological diversity," the provisions of the CBD apply "in areas within the limits of its national

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[231] Convention on Biological Diversity art. 1, Jun. 5, 1992, 1760 U.N.T.S. 79 [*hereinafter* CBD].
[232] The South China Sea Arbitration*, supra* note 1 *at* para. 945 (citations omitted).

jurisdiction."[233] However, "in the case of processes and activities," the provisions of the CBD apply to a party if carried out under that state's jurisdiction or control, within the area of its national jurisdiction, or beyond the limits of national jurisdiction.

In discussing the relationship between the CBD and UNCLOS, Nishimura states:

> In relation to the law of the sea, Article 22 of the CBD is of significance, providing in paragraph 2 that "Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea." International jurisprudence also clarifies that "Article 22 (2) of the CBD recognizes the substantive overlap between the two parallel conventions and therefore requires that they be implemented consistently.'
>
> In practice the COP repeatedly adopted the resolutions that the law of the sea, including the UNCLOS provides a legal framework for regulating activities in marine area beyond national jurisdiction.[234]

Thus, there is a sufficient legal basis for applying CBD provisions to the SCS marine environment.

a) *Duty to cooperate*

Article 5 of the CBD requires parties to "cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity."

Liu explains that Article 5 "obligates a contracting party to cooperate with other contracting parties in areas beyond national jurisdiction and on other

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[233] CBD, art. 4(a).

[234] Tomoaki Nishimura, *The Legal Framework for Marine Genetic Resources: The Relationship between the UNCLOS and the Convention on Biological Diversity Regime,* 21 ASIAN. BUS. L. 63, 68 (2018), https://doi.org/10.12662/2447-66410j.v20i34.p164-179.2022.

matters of mutual interest, for the conservation and sustainable use of biological diversity."[235]

The Conference of the Parties (COP) to the CBD "has addressed this Article substantively only in relation to marine protected areas (MPAs) beyond national jurisdiction."[236] Specifically, "COP 7 mandated the Ad Hoc Working Group on Protected Areas to explore options for cooperation for the establishment of MPAs in marine areas beyond the limits of national jurisdiction, consistent with international law, including UNCLOS, and based on scientific information."[237]

Zaman notes that the Preamble of the CBD states "the importance of and the need to promote, international, regional and global cooperation among States and intergovernmental organizations and the non-governmental sector for the conservation of biological diversity."[238]

b) *Protection of Ecosystems*

Article 8(d) of the CBD requires contracting states to "[p]romote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings."

Article 8(f) of the CBD requires contracting states to "[r]ehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies."

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[235] Liu, *supra* note 13 at 96.

[236] Secretariat of the Convention on Biological Diversity, *Handbook of the Convention on Biological Diversity* 94 (3rd ed. 2005), https://www.cbd.int/doc/handbook/cbd-hb-06-en.pdf.

[237] *Id.*

[238] Sharaban Tahura Zaman, *Recognising Biodiversity Conservation as a "Common Concern of Mankind": A Legal Apprais*al, 50 ENVT'L. POL'Y. & L. 3, 175-176 (2020), https://doi.org/10.3233/EPL-200212.

According to the Conference of the Parties to the CBD, the terms rehabilitate (i.e., to return to productive use) and restore (i.e., to return to the original condition) “are not very distinct.”[239] It adds:

> As natural ecosystems constantly change, the concept of "original condition" is somewhat arbitrary. Rehabilitating and restoring ecosystems (sometimes collectively called "restoration ecology") is a fairly new discipline which may rely on natural vegetation succession or on active human intervention such as tree-planting, removal of invasive species, controlled burning or re-introduction of extirpated species. Restoration has typically been accomplished on a small scale such as on abandoned mines or small wetlands.[240]

3. *Other Treaties*

In addition to UNCLOS and CBD, other treaties may be applied for marine environmental protection of the SCS

a) *London Convention and London Protocol*

The "London Convention" is the short name for the "Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972." The London Convention “is one of the first global conventions to protect the marine environment from human activities and has been in force since 1975”[241] and “[i]ts objective is to promote the effective control of all sources of marine pollution and to take all practicable steps to prevent pollution of the sea by dumping of wastes and other matter.”[242]

The "London Protocol" is the short title of the “1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972.” The London Protocol was intended “to further modernize the

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[239] Convention on Biological Diversity (14 September 1995), *Conference of the Parties to the Convention on Biological Diversity,* UNEP/CBD/COP/2/12, available at: https://enb.iisd.org/biodiv/sbstta/2-12e.html.

[240] *Id.*

[241] International Maritime Organization*, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*. https://www.imo.org/en/OurWork/Environment/Pages/London-Convention-Protocol.aspx.

[242] *Id.*

[London] Convention and, eventually, replace it."[243] Article 2 of the London Protocol provides for its objective:

> Contracting Parties shall individually and collectively protect and preserve the marine environment from all sources of pollution and take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter. Where appropriate, they shall harmonize their policies in this regard.

The London Protocol prohibits all dumping except for possibly acceptable wastes on the so-called "reverse list."[244]

Article 12 of the London Protocol also provides for regional cooperation. It provides that:

> Contracting Parties with common interests to protect the marine environment in a given geographical area shall endeavor, taking into account characteristic regional features, to enhance regional cooperation including the conclusion of regional agreements consistent with this Protocol for the prevention, reduction and where practicable elimination of pollution caused by dumping or incineration at sea of wastes or other matter.

While the People's Republic of China and the Philippines are the only SCS State parties to the London Convention and London Protocol, it may be argued that membership in the UNCLOS might bind the other states to observe rules set by the London Convention and Protocol by rule of reference.[245]

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[243] *Id.*
[244] *Id.*
[245] Lan Ngoc Nguyen, *Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits.* OCEAN DEV. & INT'L L. 52, 419–444, 420. (2021), https://doi.org/10.1080/00908320.2021.2011509.

b) *Stockholm Convention*

Fiedler et al. explain that "[t]he Stockholm Convention on POPs is a legally binding instrument for environmental protection … which strives to eliminate persistent organic chemicals worldwide by either prohibiting their production and use or gradually reducing them."[246] Jiang briefly cites the Stockholm Convention as one of the many legal documents governing marine microplastic pollution in the SCS, contributing to a diversified legal foundation for this issue.[247]

Five claimant states (i.e., Philippines, Vietnam, China, Brunei, and Malaysia) have ratified and entered into force the Stockholm Convention since the early 2000s.

B. Principles

In addition to multilateral treaties, international environmental law principles can also provide a basis for marine environmental cooperation in the SCS. Admittedly, the status of these principles as custom is doubtful. However, these principles are arguably general principles of law.[248] Furthermore, versions of these principles can be found in multilateral treaties like the UNCLOS, CBD, and the London Protocol. The most prominent environmental principles are discussed below as examples.

1. *Sustainable Development*

In the 1987 Brundtland Report, sustainable development was defined as "development that meets the needs of the present without compromising future generations' ability to meet their own needs."[249] Barral and Dupuy point out that

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[246] Heidelor Fiedler, Roland Kallenborn, Jacob de Boer, Leive K. Sydnes, *The Stockholm Convention: A Tool for the Global Regulation of Persistent Organic Pollutants*, 41 CHEM. INT. 2, 4-11 (2019), https://doi.org/10.1515/ci-2019-0202.
[247] Jiang, *supra* note 66 at 109-110 (citations omitted).
[248] *See* Draft Conclusion on the Identification of General Principles of Law with commentaries (A/78/10)
[249] Liu, *supra* note 13 at 74, *citing* Brundtland Report.

"Principle 4 of the Rio Declaration is a key principle in the operation of sustainable development."[250]

Principle 4 states, "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[251]

Thus, sustainable development would require states to consider environmental protection in planning and pursuing economic development plans.

2. ***Precautionary Principle***

Principle 15 of the Rio Declaration provides:[252]

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Gullett explains, "[t]he principle of precautionary action is a new legal response to scientific uncertainties to avoid the paralysis of decision-makers when confronted with uncertainty, and we should not wait for conclusive proof of environmental harm before adopting appropriate avoidance measures."[253] Ma & Liu argue that "[b]ased on this principle, coastal countries of semi-enclosed seas shall take measures to control the spread of [microplastic] pollution in the region. The [microplastic] pollution to be governed is a matter of common interest in

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[250] Virginie Barral & Pierre-Marie Dupuy, *Principle 4: Sustainable Development through Integration*, *in* THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 157, 158 (Jorge E. Viñuales ed., 1st ed. 2015), https://doi.org/10.1093/law/9780199686773.003.0008.
[251] Rio Declaration on Environment and Development, annex I, prin. 4, June 14, 1992, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I).
[252] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, principle 15, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992)
[253] Warwick Gullet, *Environmental Protection and the Precautionary Principle: A Response to Scientific Uncertainty in Environmental Management*, 14 ENV'T. PLAN. L.J. 1, 52–69 (1997).

semi-enclosed seas, which represents global marine governance practice at the regional level."[254]

Liu also notes that "Chapter 17 of Agenda 21, which is on the protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources, also takes the precautionary approach into account."[255] She further argues that:

> A precautionary and anticipatory rather than a reactive approach is necessary to prevent the degradation of the marine environment. This requires, inter alia, the adoption of precautionary measures, environmental impact assessments. Any management framework must include the improvement of coastal human settlements and the integrated management and development of coastal areas.[256]

Other environmental principles such as inter-generational equity, common but differentiated responsibilities and polluter pays principle may also apply. However, time and space constraints prevent a more in-depth discussion of environmental principles in this paper.

VII. Summary of Obligations and Recommendations

Spanning an area of 3.5 square kilometers and surrounded by at least seven states, the SCS occupies a significant portion of the globe. This semi-enclosed area is a "global hotspot" for biodiversity, including endangered species. But the area is also rich with natural resources, including billions of barrels of oil, trillions of cubic feet of natural gas, and billions of tons of fish caught yearly. The SCS also serves as a critical highway for international trade, accounting for nearly a third of the total global trade. In times of armed conflict, control over the area is strategically important. But because of this status, value, and configuration, it is no surprise that territorial disputes have arisen. There seems to be no end in sight to these conflicts.

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[254] Ma and Liu, *supra* note 114.

[255] Liu, *supra* note 13 at. 85.

[256] *Id.*

However, while states remain at odds with each other, the SCS marine environment deteriorates. The economic and population growth of the states in the area has resulted in massive amounts of pollution from multiple sources. The greed for resources has led to overfishing and the destruction of habitats of endangered species, with a state or two abetting illegal practices to further territorial claims. Cooperation is necessary because of the nature of the marine environment and the causes of the environmental problems. However, waiting for conflicts to be resolved before taking action to protect and rehabilitate the environment is out of the question. Time is of the essence. States surrounding the SCS must act quickly. But usually, states will not act unless they are required to. The question is whether states have legal obligations to preserve the SCS marine environment and to act cooperatively, which do not depend on whether their territorial disputes are resolved. This paper has answered that question in the affirmative.

A. *Compliance with the legal framework*

Part IV of this paper discussed the various legal obligations of the states surrounding the SCS. These obligations, for the most part, do not require that the issue of sovereignty be resolved. States occupying disputed territories are primarily responsible for complying with the legal framework and cannot excuse themselves from compliance because the area is disputed. For those areas not under the control of any state, all states surrounding the SCS become jointly responsible for complying with the applicable legal framework.

1. *Effective control and environmental responsibility*

Perhaps the most important task in any territorial dispute is identifying which state has the better title. One key element in proving title is effective control over the area claimed. If claimant states have effective control as they allege, they should comply with the responsibilities emanating from control. While jurisdiction as an aspect of sovereignty may be disputed, control is a factual matter. One of the best ways to demonstrate control is compliance with treaty obligations on protecting the environment.

2. *Sovereignty limited by environmental obligations*

Claimant states don't just claim control but sovereignty. But even states claiming absolute sovereignty over areas of the SCS must recognize the limits of sovereignty under Article 193 of UNCLOS. While states have the sovereign right to exploit natural resources, it must be limited by their environmental policies in accordance with their duty to protect and preserve the marine environment. Sovereignty is limited by a state's obligations outlined under Part XII of UNCLOS.

3. *Individual state obligations*

For obvious reasons, UNCLOS provides the most substantial legal framework for marine environmental protection in the SCS. Individually, states have obligations to protect the marine environment.

a) *Protect and preserve the marine environment*

First and foremost, among the obligations is the duty to protect and preserve the marine environment. All claimant states must observe their duty to protect the SCS marine environment from future damage and to maintain or improve its condition.[257] This requires taking active measures and prohibiting activities that degrade the marine environment. This includes regulating activities undertaken by private entities. Thus, states must effectively regulate the activities of non-state actors in the SCS and ensure compliance with environmental obligations. For example, states should prevent overfishing or the employment of fishing methods that destroy habitats.

b) *Prevent pollution from all sources*

The broad scope of Article 192 of UNCLOS encompasses any type of harm or threat. Because of this, states must ensure that pollution of all kinds and sources does not flow from their territory and into the SCS. This obligation is further bolstered by Article 194 (1) of UNCLOS, which requires States to take all necessary measures to prevent, reduce, and control pollution from any source. This covers present and future pollution.[258] As previously explained, a measure is necessary

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[257] UNCLOS art. 192 *See* Part IV A (a) (a) (i) infra.
[258] Czybulka, *supra* note 161, at 1302.

not only when it is indispensable but also when it makes the objectives possible. Article 195 also requires states to act so as not to transform one type of pollution into another. As previously discussed, for this duty, it does not matter if the area concerned lies within the scope of the state's authority.[259] The duty against transformation requires that pollution be dealt with at its source.[260]

The London Convention, London Protocol,[261] and the Stockholm Convention further enhance the obligations of some of the SCS states to protect the environment from pollution.

Thus, states surrounding the SCS must prevent pollution from reaching the area from their territory or areas and activities under their control.

c) *Protect and preserve biodiversity and endangered species*

States also have the specific obligation to protect and preserve biodiversity and endangered species. The obligations under the CITES inform the content of Articles 192 and 194(5) of UNCLOS. As species listed under Appendix I of CITES are found in the SCS, states in the area are obligated to protect them. Furthermore, Article 192 "includes a due diligence obligation to prevent the harvesting of species that are recognized internationally as being at risk of extinction and requiring international protection."[262]

This obligation is further supported by the CBD, which obligates states to promote the maintenance of viable populations of species in natural surroundings.[263] It also requires states to promote the recovery of threatened species.[264]

Thus, states in the SCS should not tolerate overfishing or the hunting or harvesting of endangered species.

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[259] *See* Part IV (A) (1) (a) (iii) infra.
[260] *Id.*
[261] The People's Republic of China and the Philippines are parties to the London Convention and London Protocol.
[262] The South China Sea Arbitration*, supra* note 1 at ¶ 956.
[263] CBD art. 8 (d).
[264] CBD art. 8 (f).

d) *Protect and preserve ecosystems and habitats*

Claimant states also have the obligation to protect and preserve ecosystems and habitats. Thus, they should also restore marine habitats and ecosystems. This is based on Article 192, which the CBD supports. In particular, under Article 192, states have the "due diligence obligation to take those measures to protect and preserve rare or fragile ecosystems."[265] As pointed out, Article 194 (5) includes actions to protect rare or fragile ecosystems and habitats of depleted, threatened, or endangered species as necessary measures for states.

This obligation is further bolstered by the CBD, which requires parties to promote the protection of ecosystems and natural habitats.[266] It also requires states to rehabilitate and restore degraded ecosystems.[267]

Thus, all states in the SCS should not tolerate activities that damage ecosystems and habitats. In this regard, states should consider establishing more marine protected areas in the SCS.

e) *Not cause transboundary harm*

States must ensure that activities within their jurisdiction or control respect the environment of other states or areas beyond national control. This duty is one of the principles of international environmental law, which informs the content of Article 192.[268]

Furthermore, under Article 194 (2) UNCLOS, states must take all necessary measures to ensure that activities in the areas they control, or activities conducted by agents or actors they control or regulate, do not cause damage by pollution to other states. These states are also responsible for taking all necessary measures to ensure that pollution arising from incidents or activities they control does not spread beyond the areas where they exercise sovereign rights. As discussed previously, this obligation applies as long as there is pollution and regardless of whether there has been damage. It must be reiterated that the state is responsible

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[265] The South China Sea Arbitration, *supra* note 1 at ¶ 959.
[266] CBD art. 8 (d).
[267] CBD art. 8 (f).
[268] *See* The South China Sea Arbitration, *supra* note 1 at ¶ 941.

not only for its agents or official acts but also for the acts of private actors. Article 195 also obligates states not to directly or indirectly transfer damage or hazards from one area to another.

Thus, the claim of control on the part of claimant states gives rise to these obligations not to cause transboundary harm.

f) *Monitor and assess*

Under UNCLOS, states should endeavor to observe, measure, evaluate, and analyze the risks and effects of pollution.[269] Furthermore, states must keep the effects of activities they permit or engage in under surveillance to determine whether they are likely to pollute the environment.[270] As previously explained, this "obligation applies irrespective of the place where the activities are conducted or the nationality of the individuals or entities carrying out the activities."[271] Furthermore, states must assess the potential effects of their activities.[272] This is also in accordance with states' customary duty to conduct environmental impact assessments.[273]

In situations where claimant states prevent other state agents and scientists from other states from approaching certain areas, the controlling state becomes even more responsible for monitoring the situation.

States are also obligated to either publish reports obtained from monitoring or to provide them to competent international tribunals.[274] Thus, states should not keep to themselves the results of their monitoring and environmental impact assessment.

B. Obligation to cooperate

Admittedly, the general obligation to protect and preserve the environment implies the necessity for cooperation, given the nature of the marine

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[269] UNCLOS art. 204, ¶ 1.
[270] UNCLOS art. 204, ¶ 2.
[271] ITLOS Case No. 31, *supra* note 29, at ¶¶ 347-349.
[272] UNCLOS art. 206.
[273] ITLOS Case No. 31, *supra* note 29, at ¶ 355.
[274] UNCLOS art. 205.

environment and the causes of its degradation. Indeed, the earnest efforts of one state can be sabotaged by a lack of cooperation from neighboring states.

In addition, several obligations under UNCLOS explicitly provide for a duty to cooperate. For instance, the necessary measures to prevent, reduce, and control pollution shall be taken jointly as appropriate.[275]

States must cooperate to promote studies, undertake scientific research programs, and exchange information and pollution data.[276]

Moreover, states are also obligated to cooperate in eliminating the effects of pollution and preventing or minimizing damage and, to this end, jointly develop and promote contingency plans for responding to pollution.[277]

Furthermore, the SCS states are tasked by UNCLOS to formulate and elaborate on international rules, standards, recommended practices, and procedures for the protection and preservation of the marine environment.[278]

Finally, because the SCS is a semi-enclosed area, the bordering states are obligated to cooperate with each other in the exercise of their rights and the performance of their duties.[279]

This duty to cooperate is also embodied in the CBD, which requires states to cooperate with other parties for the conservation and sustainable use of biological diversity.[280]

Initially, cooperation among the states bordering the SCS may seem impossible, considering the territorial disputes. However, this may be possible if the participating states agree that any cooperative undertaking does not constitute a waiver or furtherance of territorial claims. It would also help if these cooperative efforts included non-claimant states that are proximate to or make use of the SCS.

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[275] UNCLOS art. 194 ¶ 1.
[276] UNCLOS art. 200.
[277] UNCLOS. art. 199.
[278] UNCLOS art. 197.
[279] UNCLOS art. 123.
[280] CBD art. 5.

Interaction among the claimant states and other states for the common purpose of protecting and preserving the SCS marine environment may also help ease tensions. If the parties focus more on their shared interests (e.g., a healthy marine environment) rather than opposing views (e.g., territorial claims), conflict may be avoided. At the very least, cooperative efforts may make it possible to protect and preserve the SCS marine environment without waiting to resolve territorial claims.

Moreover, cooperation may also be considered part of due diligence, as discussed in the next section.

C. Exercise due diligence

As found in multiple legal obligations, claimant states in the SCS should exercise due diligence in complying with their legal obligations. In fact, due diligence is the standard of compliance for all the obligations listed above.

Due diligence should be considered as proof of title, and the absence of diligence should be taken against claimants. The logic is clear. The actual owners of a property will be careful when using it and exercise due diligence in its use. Usurpers or trespassers would not care about the property and would only seek to abuse it.

Thus, activities undertaken by states in the disputed areas that degrade the marine environment should be taken as evidence of a lack of title. Failure to enforce environmental standards and obligations against agents and citizens should be considered as proof of a lack of ownership.

D. Encourage treaty ratification and compliance

The legal obligations governing the SCS marine environment are primarily treaty-based. Thus, all the states surrounding the SCS and those making use of the SCS should be encouraged to become parties to the applicable treaties.

Claimant states to disputed territories should strongly consider becoming state parties to treaties that can apply to the SCS to bolster their claim

Even before becoming parties to the relevant treaties, states should comply with the obligations under these treaties to support their claim of better title. Compliance with treaty obligations, whether as a party or a non-party, can be considered an act of administration that can serve as proof of ownership.

Conclusion

Clearly, SCS states have obligations to protect the marine environment. The treaties they are parties to establish this legal framework. The fact that the status of some portions of the SCS is disputed or that there are conflicting territorial claims does not diminish these obligations.

The SCS marine environment is important to the world and not just to the SCS states. Thus, the spirit of cooperation and compliance with legal obligations to protect the environment must prevail over territorial claims.

CASE REPORT: *THE PROSECUTOR V. CHARLES GHANKAY TAYLOR*: THE TREATMENT OF HEAD OF STATE IMMUNITY UNDER INTERNATIONAL CRIMINAL LAW BY THE SPECIAL COURT FOR SIERRA LEONE

Jamil Sahid Fofanah[*]

Introduction

The doctrine of head-of-state immunity, a feature of the Westphalian system of sovereign equality,[1] historically served as an absolute shield for state leaders in the judicial processes of foreign courts.[2] It aimed to promote the smooth operation of international relations based on the principle *par in parem non habet imperium*, meaning "an equal has no authority over an equal."[3] However, the twentieth-century mass atrocities during the World Wars triggered a normative shift toward individual accountability for serious international crimes.[4] This shift has created one of the most profound tensions in contemporary international criminal law: the conflict between sovereign immunity and accountability for core

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[1] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 73 (2d rev. ed. 2012).

[2] Merve Gertik, *An Analysis of the Concept of Head of State Immunity in the Post-Westphalian World Order*, 25 LAW & JUST. REV. 107 (2023), https://dergipark.org.tr/en/pub/ljr/article/1267888.

[3] Deepshikha Gupta, *LLB SNBP Module 6: Law of Diplomatic Immunity & Consular Relations*, STUDOCU (Nov. 22, 2025), https://www.studocu.com/in/document/savitribai-phule-pune-university/llb/llb-snbp-module-6-law-of-diplomatic-immunity-consular-relations/146465893.

[4] *Genocide War Crimes and Crimes Against Humanity*, LAWTEACHER (Feb. 2, 2018), https://www.lawteacher.net/free-law-essays/international-law/genocide-war-crimes-and-crimes-against-humanity-international-law-essay.php.

crimes[5]—a tension further heightened by the current rising nationalism around the world.

The position from the post-World War II tribunal (The Nuremberg Tribunal) to the permanent International Criminal Court (ICC) demonstrates an inclination toward the erosion of the immunity shield before international judicial bodies.[6] Article 7 of the Nuremberg Charter declared that "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[7] The actualization of this principle, however, against a sitting head-of-state, happened decades later. The first major milestone was the International Criminal Tribunal for the former Yugoslavia's (ICTY) indictment of Slobodan Milošević in 1991 while he was President of the Federal Republic of Yugoslavia.[8] Furthermore, the seminal obiter dictum of the International Court of Justice (ICJ) in the *Arrest Warrant Case* (Congo v. Belgium 2002) reinforces the notion of non-application of sovereign immunity before international tribunals.[9]

It was the Special Court for Sierra Leone (SCSL), the first hybrid tribunal, that delivered the most definitive consequential ruling against head-of-state immunity under customary international law prior to the ICC Appeals Chamber 2019 intervention in the Omar al-Bashir case.[10] The SCSL's indictment of the Liberian President, Charles Ghankay Taylor, served as a defining legal test. Charged with war crimes and crimes against humanity committed during Sierra

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[5] Michelle Burgis-Kasthala & Barrie Sander, *Contemporary International Criminal Law After Critique: Towards Decolonial and Abolitionist (Dis-)Engagement in an Era of Anti-Impunity*, 22 J. INT'L CRIM. JUST. 127, 127–50 (2024).

[6] NUREMBERG HUMAN RIGHTS CTR., FED. FOREIGN OFF., & GOETHE INST., *From Nuremberg to The Hague* 1 (2020), https://www.corteidh.or.cr/tablas/24618.pdf.

[7] Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284.

[8] Leila Nadya Sadat, *The Trial of Slobodan Milošević*, ASIL INSIGHTS, Vol. 7, Issue 10 (Oct. 15, 2002), https://www.asil.org/insights/volume/7/issue/10/trial-slobodan-milosevic [Last visited Dec. 30, 2025].

[9] Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14).

[10] Astrid Reisinger Coracini & Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/ (last visited Dec. 29, 2025).

Leone's civil war, Taylor's defense filed a preliminary objection grounded in sovereign immunity, challenging the authority of the court to hold "those who bear the greatest responsibility" accountable.[11] The SCSL Appeals Chamber's 2004 decision, which rejected Taylor's motion to quash his indictment on immunity grounds, was more than a procedural ruling; it was a landmark affirmation that there is no immunity for core crimes, regardless of the individual's status.[12]

This article provides an analysis of the Taylor case with a specific focus on the immunity ruling as a landmark ruling in the law governing the immunity of heads of state before international criminal tribunals. It argues that the SCSL Appeals Chamber's decision served as the critical bridge between the established legal framework from the post-World War II period and the current operations of the ICC, providing the convincing reasoning authority that, for the need for individual accountability to triumph over immunity, subsequent tribunals have ever since relied upon. The article has four parts.

Part I establishes the factual and legal background, detailing the rise of Charles Taylor and the origin of the civil war in Sierra Leone. It also discusses the hybrid nature of the SCSL due to its location within the territory of the crimes. Part II constitutes the core legal analysis, assessing the SCSL Appeals Chamber's decision on immunity. It carefully examines the defense's three-pronged argument based on customary international law, sovereign equality, and the SCSL's purported status as a "national court." It further analyzes the Chamber's reasoning in rejecting each claim, with particular emphasis on its interpretation of the ICJ's Arrest Warrant dictum. Part III traces the immediate and enduring legacy of the decision. It follows the political and legal saga of Taylor's exile, arrest, and eventual conviction, analyzing how the immunity ruling paved his path to justice. It then assesses the decision's profound jurisprudential legacy, demonstrating its direct citation and application by the ICC in the Al-Bashir case, thereby cementing its place as a precedent in customary international law. Part IV explores the criticism of the Taylor precedent, including the dilemma of Taylor's exile, the African Union's disapproval of selective justice, and the persistent challenges of enforcement that reveal the enduring interplay between law and geopolitics.

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[11] Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 51 (Special Ct. for Sierra Leone App. Chamber May 31, 2004).

[12] *Id.* at ¶ 52.

I. Factual and Institutional Backdrop: Conflicts, Diamonds, and a Novel Court

A. Charles Taylor and the Sierra Leonean Conflict

Charles Ghankay Taylor's path to power and his role in the Sierra Leonean Civil War are crucial to understanding the severity of the charges against him and the political implications of his prosecution.

An erstwhile Liberian bureaucrat, Taylor launched a rebellion in 1989 that led to a bloody civil war in Liberia after escaping from prison in the United States, where he was awaiting extradition back to Liberia on corruption allegations charges.[13] Taylor had received military training in Libya; however, he was schooled with advanced education in the United States.[14] By 1990, the armed rebellion under the National Patriotic Front (NPFL) rewarded him with the seat of power (as the head of state) following the violent killing of President Samuel Doe;[15] however, the execution was carried out by a splinter group of the NPFL led by Prince Johnson.[16] By 1997, Taylor transitioned from a head of state to president following an easy victory in the Presidential election,[17] a position he held until his involuntary resignation in 2003.[18] Taylor's presidency followed his reputation as a warlord and a hub for a transnational criminal network, including drug trafficking and mercenary bases.[19]

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[13] Charles C. Jalloh, *The Law and Politics of the Charles Taylor Case*, 43 DENV. J. INT'L L. & POL'Y 1 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524366 [hereinafter *Law and Politics*].

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See* Prosecutor v. Taylor, Case No. SCSL-03-01-T, Trial Chamber Judgment, ¶¶ 23, 25 (Special Ct. for Sierra Leone May 18, 2012), http://www.scsldocs.org/documents/view/6662-19559 [hereinafter Taylor Trial Judgment].

[18] Liberian President Taylor Steps Down, THE GUARDIAN (Aug. 11, 2003), https://www.theguardian.com/world/2003/aug/11/westafrica.

[19] Coalition for Int'l Justice, *Following Taylor's Money: A Path of War and Destruction*, ALLAFRICA (2005), https://allafrica.com/download/resource/main/main/idatcs/00010642:e0bc9e66f665f2c7b2fb8a942ff328ea.pdf.

Taylor's involvement in Sierra Leone's conflict was driven by a mix of personal vendetta, political strategy, and economic greed.[20] He held a grudge against the Sierra Leonean President Joseph Momoh for providing a military base for West African peacekeeping forces that countered his rebellion.[21] More consequentially, Taylor saw the destabilization of Sierra Leone as an opportunity to plunder its alluvial diamond fields, using the revolutionary United Front (RUF) rebel group as a proxy.[22] The leader of the RUF, Foday Sankoh, received guerrilla training together with Taylor in Libya.[23] Acting as the RUF's primary sponsor, Taylor provided weapons, training, and camps in Liberia in exchange for diamonds, which fueled his war machine and personal wealth.[24]

However, other African leaders were also implicated in the Sierra Leonean conflicts. The then-President of Burkina Faso, Blaise Compaoré, and Libya's former leader, Colonel Muammar Gaddafi, were likewise accused of participating in the same transnational war network.[25] Notably, however, only Charles Taylor was indicted by the SCSL.[26] This decision led to accusations that the Court was engaging in selective justice.[27] Defenders of the Court argued that its mandate was to prosecute those who bore the "greatest responsibility,"[28] and that Taylor's considerable influence over the RUF and its leader, Foday Sankoh, made him the rebellion's chief collaborator.[29]

In the author's view, both positions have merit. Yet a third perspective may also be considered: prosecuting three sitting African heads of state for atrocities in

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[20] *See* Jalloh, *Law and Politics*, *supra* note 13, at 1.
[21] Sierra Leone. Truth and Reconciliation Commission, *Witness to truth: Rep. of the Sierra Leone Truth and Reconciliation Comm'n* 97, LIB/MM/INTL/1/14 (2004) [hereinafter SIERRA LEONE TRC REPORT].
[22] Coalition for Int'l Justice, *supra* note 19.
[23] SIERRA LEONE TRC REPORT.
[24] JOE A. D. ALIE, SIERRA LEONE SINCE INDEPENDENCE: HISTORY OF A POSTCOLONIAL STATE 147–48 (2015).
[25] DAVID M. CRANE, EVERY LIVING THING: FACING DOWN TERRORISTS, WARLORDS, AND THUGS IN WEST AFRICA — A STORY OF JUSTICE 7 (2020).
[26] *Id.*
[27] Charles C. Jalloh, *The Law and Politics of the Charles Taylor Case*, 43 *Denv. J. Int'l L. & Pol'y* 229 (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524366.
[28] Statute of the Special Court for Sierra Leone art. 1, Jan. 16, 2002, 2178 U.N.T.S. 138, available at: https://www.rscsl.org/Documents/scsl-statute.pdf; Crane, *supra* note 25, at 12.
[29] *Charles Taylor* (*Liberian Politician*), EBSCO RSCH. STARTERS, https://www.ebsco.com/research-starters/biography/charles-taylor-liberian-politician (last visited Dec. 31, 2025).

Sierra Leone would have posed an extremely heavy burden for the tribunal. Targeting the principal collaborator may therefore have been seen as a more prudent and politically feasible strategy.

1. *The Origin of the Sierra Leonean Civil War*

The Sierra Leone Civil War (1991–2002) was a devastating conflict notorious for its extreme brutality and its financing through "blood diamonds."[30] It resulted in approximately two million casualties, including deaths and widespread displacement, mutilation, rape, and amputation.[31] However, the amputation sadly became its horrific global signature.[32] The conflict was also infamous for the recruitment of child soldiers and the practice of forced marriage, whereby victims were referred to as "bush wives."[33]

On 23 March 1991, the RUF initiated the war by launching its first attack from Liberia against the All Peoples' Congress (APC) government of President Joseph Saidu Momoh.[34] The initial onslaught targeted Bomaru Village in Sierra Leone's Kailahun District, an eastern region that shares a border with Liberia.[35] Their leader, Foday Sankoh, was a former military corporal who had served a seven-year prison sentence for attempting to overthrow President Momoh's predecessor;[36] he later prepared for the rebellion mission by undergoing guerrilla training in Libya.[37]

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[30] PETER PENFOLD, ATROCITIES, DIAMONDS, AND DIPLOMACY: THE INSIDE STORY OF THE CONFLICT IN SIERRA LEONE 7, 184 (2013); See *Press Briefing*, AMNESTY INT'L AFR 51/006/2010, at 1 (Aug. 4, 2010), https://www.amnesty.org/en/wp-content/uploads/2021/07/afr510062010en.pdf (last visited Dec. 14, 2025).

[31] *Id.*

[32] *WNT: Sierra Leone Amputees,* ABC NEWS (Dec. 15, 2000), https://abcnews.go.com/WNT/story?id=131404.

[33] *10 Facts About Child Soldiers in Sierra Leone*, THE BORGEN PROJECT, https://borgenproject.org/10-facts-about-child-soldiers-in-sierra-leone/ (last visited Nov. 14, 2025); Rachel Slater, *Gender Violence or Violence Against Women? The Treatment of Forced Marriage in the Special Court for Sierra Leone*, MELBOURNE LAW SCHOOL 1 (2011), https://law.unimelb.edu.au/__data/assets/pdf_file/0010/1687384/Slater.pdf.

[34] SIERRA LEONE TRC REPORT.

[35] *Id.*

[36] *Id.*

[37] *Id.*

Although Sankoh claimed to be fighting the bad governance that had crippled Sierra Leone since 1961,[38] his RUF rebellion primarily victimized and terrorized the very civilians it claimed to liberate, from its initial attack to its final moments.[39] I hold the view that, while Sankoh cited decades of post-independence maladministration as justification for the war, this rationale is substantially flawed. Scholars such as the historian Joe A.D. Alie, who similarly attribute the conflict solely to the failures of post-colonial leaders, overlook a critical historical imbalance:[40] British colonial rule lasted for 151 years,[41] whereas the period of self-rule at the war's outset was only 31 years.[42] This does not absolve the failures of post-independence governments. However, I am convinced that the backward state of the nation must also be traced directly to colonialism, which endured far longer than self-rule. At independence, the British provided no foundation for sustainable governance or accountability.[43] Therefore, any declaration of war's blame should be directed in significant part toward the legacy of British misrule.

As mentioned above, the conflict was fueled by the country's diamond wealth, with the RUF seizing mines in the mineral-rich Eastern Province to fund its rebellion.[44] As highlighted above, the RUF received crucial support from a transnational network, most significantly from Liberian President Charles Taylor, who provided arms and resources in exchange for diamonds.[45]

Sierra Leone's government became more unstable after a 1992 coup by the National Provisional Ruling Council (NPRC).[46] The junta hired foreign mercenary groups, including the Gurkha Security Guard and Executive Outcomes, to combat the RUF and protect diamond interests, as it relied on diamond exports to fund

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38 M. Zubairu Wai, *Understanding Contemporary Conflicts in Africa: The Sierra Leone Civil War and its Challenge to the Dominant Representations of African Conflicts*, IDRC Doctoral Res. Award No. 103342-9990675-067, Tech. Rep. (July 12, 2008) https://idl-bnc-idrc.dspacedirect.org/server/api/core/bitstreams/faa857f4-35f8-471d-b29f-ae9ccf523c74/content.

39 Michael Chege, *Sierra Leone: The State that Came Back from the Dead*, 25 WASH. Q. 147 (2002), https://ciaotest.cc.columbia.edu/olj/twq/sum2002/twq_sum2002b.pdf (last visited Dec. 10, 2025).

40 Alie, *supra* note 24, at 48.

41 *Id.* at 1-27.

42 *Id.* at 48.

43 *Id.*

44 *Id*, at 147-48.

45 Crane, *supra* note 25, at 7.

46 ABDULAI O. CONTEH, ESSAYS ON THE SIERRA LEONE CONSTITUTION 1991 31 (2001).

the state administration, including the war against the rebellion.[47] Likewise, the rebels also employed mercenary fighters from Burkina Faso, Libya, and primarily Liberia in their quest to control the diamond mines.[48] Internationally, diamonds mined by the RUF were traded through networks involving figures like Taylor, Libya's Gaddafi, and Burkina Faso's Compaoré, reaching Western markets.[49] The United Nations eventually imposed a diamond certification scheme (Resolution 1306) to curb this trade,[50] a measure that Peter Penfold, then the British High Commissioner to Sierra Leone, credited with helping to end the war.[51]

During the decade-long civil war, the combatants formed three main factions based on their cooperation and alliances: first, the official Sierra Leone Army (SLA) alongside the Armed Forces Revolutionary Council (AFRC), a breakaway group of soldiers that overthrew President Tejan Kabbah's government in 1997, one year after his election; second, the Revolutionary United Front (RUF), which started the conflict; and third, the Civil Defence Forces (CDF),[52] largely made up of the "Kamajors" tribal militia.[53]

It is crucial to note that even before his overthrow, President Kabbah's government increasingly relied on the Kamajors for national security rather than the official army, due to a profound distrust of the Sierra Leone Army's (SLA) loyalty and suspicions that many soldiers were collaborating with rebels.[54] This widespread suspicion earned such soldiers the nickname "Sobel"—soldiers by day, rebels by night.[55] This distrust directly contributed to the 1997 coup, which established a junta alliance between the Armed Forces Revolutionary Council (AFRC) and the RUF, led by Major Johnny Paul Koroma.[56] However, Koroma was imprisoned at the time of the coup by the Kabbah administration for attempting a coup in 1996.[57] The AFRC/RUF junta remained in power until its removal in 1998

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[47] AHMAD TEJAN KABBAH, COMING FROM THE BRINK IN SIERRA LEONE 41-42 (2010).
[48] SIERRA LEONE TRC REPORT.
[49] Crane, *supra* note 25, at xi.
[50] S.C. Res. 1306 (Jul. 5, 2000).
[51] Penfold, *supra* note 30, at 184.
[52] SIERRA LEONE TRC REPORT.
[53] Fighters, drawn from the Mende tribe in the Southern and Eastern provinces of Sierra Leone, SIERRA LEONE TRC REPORT.
[54] Taylor Trial Judgment, ¶¶ 23, 25.
[55] SIERRA LEONE TRC REPORT, at 198.
[56] Taylor Trial Judgment, ¶¶ 23, 25.
[57] *Id.*

by ECOWAS's military wing, the Economic Community of West African States Monitoring Group (ECOMOG).[58]

In its aftermath, the Truth and Reconciliation Commission (TRC) attributed the recorded atrocities among the factions as follows: the RUF was responsible for 60%, the SLA and AFRC for 16%, and the CDF for 6%.[59] Accordingly, the Special Court for Sierra Leone (SCSL) prosecuted the principal political and military leaders from each of these warring factions.[60]

2. *End of the Sierra Leone Civil War* (*Di Wah Dohn Dohn*)

The Lomé Peace Accord of 1999 ultimately ended Sierra Leone's prolonged civil war, something the Abidjan Accord of 1996 and the Guinea Peace Plan failed to achieve.[61] President Kabbah signed on behalf of the government, and Foday Sankoh represented the RUF.[62] The agreement was facilitated by the international community, principally through the UN and the ECOWAS.[63]

In a bid to secure peace, the accord established a power-sharing National Unity Government.[64] The political incentives granted to the RUF were substantial: its leader, Foday Sankoh, was appointed Co-Vice President and was also given control of a newly formed Mineral Commission responsible for the country's mineral resources.[65] This placed the rebels in direct control of the very resources that had fueled the conflict. As such, Charles Jalloh, an international law expert,

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[58] *Id.*
[59] SIERRA LEONE TRC REPORT.
[60] Crane, *supra* note 25m, at 32.
[61] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-RUF, Nov. 30, 1996, U.N. Doc. S/1996/1034. [hereinafter Abidjan Peace Accord]; Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-RUF, Apr. 22, 1998. [hereinafter Guinea Peace Accord]; Joe A. D. Alie, *Sierra Leone Since Independence: History of a Postcolonial State* 209-232 (2015).
[62] Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-RUF, July 7, 1999 [hereinafter Lomé Peace Agreement].
[63] Alie, *supra* note 24, at xi.
[64] *Id.*
[65] Lomé Peace Agreement, art. V.

described this action as akin to "putting the bank robber in charge of the vault."[66] Additionally, the RUF received a share of four ministerial and deputy positions.[67]

The most controversial provision was the blanket amnesty for all atrocities committed by RUF combatants and their collaborators.[68] While the government defended the compromise as necessary to save lives and end the violence, this amnesty faced significant opposition.[69] The United Nations, serving as one of the moral guarantors of the accord, entered a formal reservation stating it would not recognize immunity for serious war crimes and crimes against humanity.[70] This pivotal objection is widely viewed as the legal foundation that later enabled the SCSL to bypass the amnesty and prosecute perpetrators.[71] It is interesting to note that the amnesty provision was not a novelty in the country's peace proposals.[72] The earlier agreements of the Abidjan Accord and the Guinea Peace Plan contained similar amnesty clauses,[73] yet the United Nations raised no objection at the time.[74] This change in stance can likely be attributed to mounting pressure from international human rights groups, which increasingly emphasized the need to end impunity for war crimes and crimes against humanity.[75]

Though the war formally ended with President Kabbah's symbolic Krio declaration, "*Di wah dohn dohn*" ("The war is over"), in January 2002,[76] the peace came at a high human cost and arguably too late. As noted by President Kabbah in his memoir, the nation had been devastated, and the ambitious terms granted to the RUF have been heavily criticized.[77] I argue that the government, facing a

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[66] Jalloh, *Law and Politics*, *supra* note 13, at 229.
[67] Lomé Peace Agreement, art. V.
[68] *Id*, art IX.
[69] Jalloh, *Law and Politics*, *supra* note 13, at 43.
[70] U.N. Secretary-General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, ¶ 22, U.N. Doc. S/200/915 (Oct. 4, 2000).
[71] Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 67, 88 (Mar. 13, 2004).
[72] Jalloh, *Law and Politics*, *supra* note 13, at 229.
[73] Abidjan Peace Accord, art 14; Guinea Peace Plan, art 14.
[74] Peter Penfold, *International Community Expectations of the Sierra Leone Special Court: The Sierra Leone Special Court and its Legacy*, *in* THE IMPACT OF THE SIERRA LEONE SPECIAL COURT ON INTERNATIONAL CRIMINAL LAW 24 (Charles C. Jalloh ed., 2014).
[75] AHMAD TEJAN KABBAH, COMING FROM THE BRINK IN SIERRA LEONE: A MEMOIR 163–64 (2010).
[76] *Id.* at 174.
[77] *Id.* at 165–210.

failed state, had its hands forced and prioritized an immediate end to hostilities through dialogue over the contentious terms of the agreement.

B. The Special Court for Sierra Leone: A Hybrid Innovation

The SCSL was established on 16 January 2002, by a bilateral treaty between the government of Sierra Leone and the United Nations.[78] It became the third modern ad hoc tribunal, following the International Criminal Tribunal for the Former Yugoslavia (ICTY, 1993)[79] and the International Criminal Tribunal for Rwanda (ICTR, 1994),[80] both of which were influenced by the precedent of the International Military Tribunal at Nuremberg.[81]

However, the SCSL was groundbreaking as the first hybrid tribunal, deriving its legal authority from both international criminal law and Sierra Leonean domestic law.[82] Its mandate was to prosecute those bearing the "greatest responsibility" for atrocity crimes,[83] a narrower scope than the "most responsible" standard of the ICTY and ICTR.[84] Notably, the SCSL was the first tribunal since

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[78] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 2178 U.N.T.S. 137 (Jan. 16, 2002) [hereinafter SCSL Statute]; The Statute is appended to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915 (Oct. 4, 2000).
[79] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, U.N. Security Council Resolution 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].
[80] Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 Nov. 8, 1994 [hereinafter ICTR Statute].
[81] *See Challenges to Criminal Justice System: The Lasting Impact of Nuremberg on International Criminal Justice*, THE LAW INSTITUTE (Nov. 30, 2023), https://thelaw.institute/challenges-to-criminal-justice-system/lasting-impact-nuremberg-international-criminal-justice/ (last visited Dec 20, 2025).
[82] Abdul Tejan-Cole, *The Special Court for Sierra Leone: Conceptual Concerns and Alternatives*, 1 AFR. HUM. RTS. L.J. 1 (2001), https://www.ahrlj.up.ac.za/tejan-cole-a (last visited Dec. 30, 2025).
[83] According to David Crane in his memoir Every Living Thing: Facing Down Terrorists, Warlords, and Thugs in West Africa—A Story of Justice, the SCSL's Founding Chief Prosecutor, the mandate to prosecute only those bearing the 'greatest responsibility' was what made the tribunal's work achievable. He explained that shifting the standard from "most responsible" to "greatest responsibility" narrowed the pool of potential indictees from roughly one hundred to about two dozen. SCSL Statute art 1.
[84] Vincent O. Nmehielle & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone,* 30 FLETCHER F. WORLD AFF. 170, 75-76 (2020) [hereinafter *Legacy*].

Nuremberg to prosecute and convict a serving head of state,[85] and, like Nuremberg, it was situated within the territory where the atrocities occurred.[86] In contrast, the ICTY and ICTR were based in The Hague, Netherlands, and Arusha, Tanzania, respectively.[87]

The court's creation came by a decisive shift in President Kabbah's stance toward accountability.[88] Initially supportive of reconciliation, however, Kabbah moved toward judicial justice due to three key events:[89] the killing of twenty-one peaceful protesters at Sankoh's residence in May 2000, who were protesting the RUF's violation of the Accord; the RUF's abduction of roughly 500 UN peacekeepers (during this period, Sierra Leone had the largest peacekeeping force in the world);[90] and the resulting intensification of domestic and international demands to override the Accord's amnesty provision due to the foregoing reasons.[91] Yielding to this pressure, Kabbah formally requested UN assistance in prosecuting the RUF and its collaborators.[92]

This move drew mixed reactions. Observers like Charles Jalloh interpreted President Kabbah's request that the court have a limited personal jurisdiction focused on those "most responsible violators and the leadership of the RUF" as potentially amounting to a form of victor's justice.[93] In practice, the broad prosecutorial approach, which included cases against all warring factions, even government officials, undermined the criticism of victor's justice.[94]

As a hybrid tribunal, the SCSL introduced several novel features.[95] It was the first tribunal established by a bilateral treaty (the Government of Sierra Leone

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[85] Lansana Gberie, *The Special Court for Sierra Leone Rests—For Good*, AFRICA RENEWAL (Mar. 24, 2014), https://africarenewal.un.org/en/magazine/special-court-sierra-leone-rests-good.
[86] Nmehielle & Jalloh, *Legacy*, *supra* note 84, at 339.
[87] Press Release, International Criminal Tribunal for the former Yugoslavia, Registrars of ICTY and ICTR Sign Statement of Co-operation (Sept. 21, 2001), https://www.icty.org/en/press/registrars-icty-and-ictr-sign-statement-co-operation. (last visited Nov. 3, 2025).
[88] Jalloh, *Law and Politics*, supra note 13, at 229.
[89] Kabbah, *supra* note 47, at 163-64 & 325–31.
[90] *Id.* at 157-64.
[91] *Id.*
[92] *Id.* at 332-31.
[93] Nmehielle & Jalloh, *Legacy*, *supra* note 84, at 74-75.
[94] Penfold, *supra* note 30, at 188-89.
[95] Nmehielle & Jalloh, *Legacy, supra* note 84, at 55.

and the UN) rather than a UN Security Council resolution under Chapter VII, like the ICTY and ICTR.[96] In this light, its statute provided it with jurisdiction over crimes under international criminal law and Sierra Leonean criminal law.[97] Furthermore, its mixed composition allowed the Sierra Leonean government to appoint judges and senior officials, a power the Rwandan and Yugoslavian governments did not exercise.[98] It was also the first modern international tribunal, since Nuremberg, to be situated at the site of the atrocities, a symbolic choice that enabled victims to witness justice being done.[99] Furthermore, the tribunal operated concurrently with, though independently of, the national Truth and Reconciliation Commission (TRC).[100] This differed from the South African approach after apartheid, where a TRC was created without an accompanying court.

The SCSL also advanced new legal theories, advancing jurisprudence on head-of-state immunity, crimes against women, and the use of child soldiers.[101] As a result, it made history as the first international criminal tribunal to convict an African head of state for war crimes.[102] This was only the second conviction of a head of state by an international court since the post-World War II Nuremberg trials, which convicted Germany's Admiral Karl Dönitz.[103] Additionally, the SCSL became the first tribunal to issue a conviction for the recruitment and use of child soldiers against the three leaders of the AFRC, Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.[104] The court also issued the first-ever conviction for forced marriage, recognizing it as a separate crime against

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[96] *Id.* at 338.
[97] SCSL Statute art 3-5.
[98] Nmehielle & Jalloh, *Legacy, supra* note 84, at 60.
[99] *Id* at 57.
[100] Crane, *supra* note 25, at 14.
[101] Tejan-Cole, *supra* note 82, at 1.
[102] Gberie, *supra* note 85.
[103] *Id.*
[104] *Sierra Leone: Landmark Convictions for Use of Child Soldiers,* HUMAN RIGHTS WATCH (June 20, 2007), https://www.hrw.org/news/2007/06/20/sierra-leone-landmark-convictions-use-child-soldiers.

humanity distinct from sexual slavery.[105] Finally, the SCSL became the first modern international tribunal to complete its mandate and transition to a residual court.[106]

The SCSL derived its mandate from the bilateral treaty and its annexed Statute.[107] Like the ICTY and ICTR, the SCSL exercised subject matter (*ratione materiae*), personal (*ratione personae*), temporal, and territorial (*ratione loci*) jurisdiction.[108]

As mentioned above, the SCSL's subject matter jurisdiction covered crimes under both international and Sierra Leonean law.[109] International crimes included crimes against humanity, violations of Common Article 3 to the Geneva Conventions and Additional Protocol II (constituting war crimes), and other serious breaches of international humanitarian law.[110] Domestic offenses under Sierra Leonean law concerned the abuse of girls under fourteen and the wanton destruction of property.[111] In practice, however, the Prosecutor relied solely on international law for the indictments, rendering the domestic provisions functionally redundant.[112] It is worth noting that the SCSL's incorporation of national law later influenced the Special Tribunal for Lebanon (STL), which was mandated to prosecute crimes under Lebanese domestic law.[113]

The personal jurisdiction of the SCSL differed from that of the ICTY, ICTR, and STL in several modes. It was the first tribunal to prosecute individuals bearing the "greatest responsibility" for atrocities, a narrower and more demanding standard than the "most responsible" threshold used by the earlier tribunals.[114]

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[105] Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL2004-16-A, Judgment, ¶ 202 (Feb. 22, 2008) [hereinafter AFRC Appeals Chamber Judgment]; *See* Jennifer Gong-Gershowitz, *Forced Marriage: A "New" Crime Against Humanity?*, 8 NW. J. INT'L HUM. RTS. 2008 (Fall 2009), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1093&context=njihr.

[106] Residual Special Court for Sierra Leone, *Fact Sheet* (last visited Mar. 5, 2025), https://rscsl.org/.

[107] Nmehielle & Jalloh, *Legacy supra* note 84, at 73; Tejan-Cole, *supra* note 82, at 1.

[108] *Id.*

[109] *Id.*

[110] SCSL Statute art 3. & 4.

[111] *Id.* art 5.

[112] Nmehielle & Jalloh, *Legacy supra* note 84, at 73.

[113] Statute of the Special Tribunal for Lebanon art. 1-2, S.C. Res. 1757, annex (May 30, 2007). [hereinafter Lebanon Statute].

[114] Nmehielle & Jalloh, *Legacy supra* note 84, at 73-81.

Furthermore, unlike the statutes of the ICTY and ICTR, the SCSL Statute was not expressly limited to "natural persons," leaving open the theoretical possibility of prosecuting corporate entities involved in crimes such as the blood diamond trade.[115] However, no corporation was prosecuted. The Statute also contained a unique exception for peacekeepers and related personnel: primary jurisdiction for any crimes they committed rested with their home state,[116] but the SCSL could seek UN Security Council authorization to prosecute if that state proved unwilling.[117] Although this caveat is not novel to other peacekeeping agreements, its inclusion is significant;[118] this means the Court failed to fulfill its core mandate of accountability, regardless of the perpetrator's status.[119] Particularly, until the end of the Court's mandate in 2013,[120] there was no public record of peacekeeping force personnel being prosecuted by their home countries for alleged atrocities in the Sierra Leone civil war, allegations that the TRC also documented.[121] The Court's temporal jurisdiction was limited to atrocities committed after 30 November 1996,[122] rather than the war's start on 23 March 1991.[123] This shortness attracted significant criticism.[124] Prominent figures, such as then-Attorney General (and future Vice President) Solomon Berewa and the prominent Sierra Leonean lawyer Abdul Tejan-Cole, argued that excluding the war's first five years was a missed opportunity for accountability and created a selective historical record.[125] Some critics suggested this limitation revealed a bias toward atrocities in the Western Area at the expense of the eastern provinces, where the war began.[126] In defense of the restriction, the Office of the UN Secretary-General stated that a 1991 start date would have overstretched the Court's capacity and undermined its achievable mandate.[127]

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[115] WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS 139 (2006).
[116] SCSL Statute art 1(2).
[117] *Id.*
[118] Nmehielle & Jalloh, *Legacy supra* note 84, at 80.
[119] SCSL Statute art 1(2).c
[120] Residual Special Court for Sierra Leone, *Fact Sheet* (last visited Mar. 5, 2025), https://rscsl.org/.
[121] SIERRA LEONE TRC REPORT.
[122] SCSL Statute art 1; Jalloh, *Legacy supra* note 84, at 73; Tejan-Cole, *supra* note 82, at 1.
[123] Nmehielle & Jalloh, *Legacy supra* note 84, at 81.
[124] *Id.* at 83-84.
[125] *Id.* at 84.
[126] *Id.* at 83-84.
[127] U. N. Secretary-General, Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, ¶ 48, U.N. Doc. S/2001/857 (Sep. 7, 2001).

Finally, the SCSL's territorial jurisdiction (*ratione loci*) was defined by Article I of its Statute as covering the territory of Sierra Leone.[128] Chapter VII of the Statute refers to the established boundaries of the country under international law.[129] In this respect, it was similar to the ICTY, whose jurisdiction was confined to the territory of the former Yugoslavia, and unlike the ICTR, which could prosecute crimes committed by Rwandans in neighboring states.[130]

II. Legal Precedent: The Immunity Challenge and the SCSL's Landmark Ruling

A. *Doctrine of Head of State Immunity*

The Head-of-State immunity principle, also known as sovereign immunity, is an extraordinary procedural rule that attaches to the official capacity of an officeholder under customary international law.[131] It bars a court from exercising jurisdiction over such a person.[132] Its contemporary form is a fundamental principle of sovereignty, dating back to the Westphalian Treaty of 1648, which allows sovereign states to deploy emissaries without fear of foreign criminal or civil jurisdiction.[133] This concept underpins the sovereign equality of member states under Article 2 (1) of the UN Charter.[134]

Proponents of this view, therefore, argue that a Head of State and certain top officials, like foreign ministers, should enjoy full immunity for acts or omissions committed in office–immunity categorized as either functional or personal.[135] Subjecting a foreign state's official acts to another state's domestic law could elevate the latter over the former.[136] The rationale is that this promotes

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[128] SCSL Statute art 1.
[129] *Id.* at Chapter VII.
[130] Nmehielle & Jalloh, *Legacy supra* note 84, at 85-86.
[131] Aya Tochigi, Note, *Removing Head of State Immunity: Utilizing Domestic Courts to Promote Access to Justice*, Student Works 27 (2012), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1026&context=student_scholarship.
[132] *Id.*
[133] ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 540 (2014).
[134] U.N. Charter art. 2, ¶ 1.
[135] William S. Dodge, *A Primer on Foreign Official Immunity*, TRANSNAT'L LITIG. BLOG (May 23, 2022), https://tlblog.org/foreign-official-immunity/.
[136] *Id.*

international stability and peace. As a matter of customary international norm, these high-level officials are granted a cloak of immunity.[137] Against this backdrop, Charles Taylor's defense team challenged the SCSL's jurisdiction.

On the other hand, commentators such as Professor Leila Sadat advocate for piercing the veil of Head-of-State immunity to hold individuals responsible for atrocity crimes, crimes against humanity, and war crimes.[138]

They base this claim on the statutes of international *ad hoc* tribunals, the ICC Statute, relevant case law, and conventions.[139] From the Nuremberg and Tokyo tribunals to the ICTY, ICTR, and SCSL, their statutes confirm that a Head of State cannot claim immunity from the court's jurisdiction.[140] Similar to the SCSL, the ICC is treaty-based, but unlike the *ad hoc* tribunals, it is permanent.[141] Article 27 of the ICC Statute states that immunities attached to an official position are no bar to the Court's exercise of jurisdiction.[142] The Nuremberg Tribunal adopted this position, ruling under Article 7 of its Statute that authors of international crimes cannot shield themselves behind their official position to escape punishment—a concept now known as the Nuremberg Principles,[143] also enshrined in Article IV of the Genocide Convention of 1948.[144] The rationale is that since immunity is created

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[137] Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 815 (2010), https://doi.org/10.1093/ejil/chq080.
[138] Leila Nadya Sadat, *Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues*, *in* THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT (Margaret M. deGuzman & Valerie Oosterveld eds., 2020).
[139] *Id.*
[140] Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284; Charter of the International Military Tribunal for the Far East art. 6, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, ¶ 2, *annexed to* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda art. 6, ¶ 2, *annexed to* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court art. 27, ¶ 2, July 17, 1998, 2187 U.N.T.S. 90; SCSL Statute art 6 ¶ 2.
[141] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1, Jan. 16, 2002, 2178 U.N.T.S. 138; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.
[142] Rome Statute art. 27.
[143] I.M.T. Charter art. 7.
[144] Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Dec. 9, 1948, 78 U.N.T.S. 277; Milena Sterio, *The 'End of Immunity' for Leaders Who Commit International*

by international law, it can be limited and deemed inapplicable to war crimes, crimes against humanity, crimes against peace, and genocide.[145]

B. Tribunals' Treatment of Sovereign Immunity Before Taylor

Since the twentieth century, a distinction has been made between proceedings before national and international courts regarding a sovereign immunity defense for serving heads of state accused of atrocity crimes. International criminal courts have consistently held that serving heads of state cannot rely on such immunity.[146]

At the Nuremberg Trials, Grand Admiral Karl Dönitz, appointed head of state of Germany after Adolf Hitler's suicide, was the first former head of state tried for war crimes after World War II. Although in power only briefly, he was charged with crimes mainly committed before his presidency. The Tribunal found him guilty on two of three counts and sentenced him to ten years in prison.[147]

On 27 May 1999, the ICTY issued an indictment for Slobodan Milosevic, President of the Federal Republic of Yugoslavia, making him the first serving head of state charged with war crimes.[148] He was charged with three counts of murder, persecution, and deportation related to conflicts in Bosnia and Herzegovina, Croatia, and Kosovo.[149] After his arrest and transfer in 2002, Milosevic argued the ICTY lacked jurisdiction over him as a former president.[150] The Trial Chamber

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Crimes?, LAWFARE (Nov. 21, 2025, 2:00 PM), https://www.lawfaremedia.org/article/the--end-of-immunity--for-leaders-who-commit-international-crimes.

[145] Sadat, *supra* note 138, at 96 .

[146] Sterio, *supra* note 144.

[147] United States v. Doenitz, 22 I.M.T. 589, Judgment, 589 (1946), https://avalon.law.yale.edu /imt/juddoeni.asp; Lansana Gberie, *The Special Court for Sierra Leone Rests—For Good,* AFRICA RENEWAL (Mar. 24, 2014), https://africarenewal.un.org/en/magazine/special-court-sierra-leone-rests-good.

[148] Prosecutor v. Milosevic Case Nos. ICTY-99-37-1 Warrant of Arrest Order of Surrender, para 1-4, (May. 24, 1999) [hereinafter Milosevic Warrant of Arrest].

[149] Prosecutor v. Milošević, Case No. IT-99-37-I, Amended Indictment, ¶¶ 1-5 (Int'l Crim. Trib. for the Former Yugoslavia May 22, 1999), https://www.icty.org/x/cases/slobodan_milosevic /ind/en/mil-ai010629e.htm.

[150] Prosecutor v. Milosevic, Case No. ICTY-99-37-PT.2, Decision on Preliminary Motions, ¶¶ 26-34 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 8, 2001) [hereinafter Milosevic Preliminary Motions].

rejected this, holding that Article 7(2) of the ICTY Statute—stating that official position does not exempt from criminal responsibility as reflected in customary international law.[151]

The *Pinochet* Case No. 3 in the English House of Lords established that former heads of state could be held responsible before a foreign national court for international law violations committed in office.[152] In 1998, General Augusto Pinochet was arrested in England on a Spanish Court request concerning human rights violations in Chile during his rule (1974–1990). His defense argued for absolute immunity for official acts, even if they constituted international crimes.[153] The plaintiffs argued that such grave crimes concerned all nations, invoking universal jurisdiction where no state immunity applies. The majority held that crimes like torture are international crimes against humanity and cannot be classified as official acts; therefore, former heads of state are not immune from prosecution for them.[154]

Conversely, the International Court of Justice (ICJ) in the *Arrest Warrant* case (*Democratic Republic of the Congo v. Belgium*) shielded a foreign minister from foreign domestic jurisdiction,[155] a decision that restricted the universal jurisdiction for serious international crimes.[156] However, the ruling maintains the exception that sovereign immunity is not a bar to prosecution for such crimes in an international court.[157]

The case concerned an arrest warrant issued by Belgium against the Congolese Foreign Minister, Abdoulaye Yerodia Ndombasi, for alleged violations of international humanitarian law. The ICJ ruled that certain high-ranking

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[151] *Id.*

[152] R. v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3) [2000] 1 A.C. 147 (H.L.) (U.K.).

[153] *Id.*

[154] *Id.*

[155] Arrest Warrant, *supra* note 9.

[156] Sarah C. Rispin, *Implications of Democratic Republic of the Congo v. Belgium on the Pinochet Precedent: A Setback for International Human Rights Litigation?*, 3 CHI. J. INT'L L. 425 (2002), https://chicagounbound.uchicago.edu/cjil/vol3/iss2/23.

[157] Arrest Warrant, *supra* note 9; Lori Fisler Damrosch, *The Sources of Immunity Law – Between International and Domestic Law*, Columbia L. Sch. Pub. L. Working Paper, Paper No. 19-74 2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=5288&context=faculty_scholarship.

officials, including heads of state and foreign ministers, enjoy full immunity from criminal jurisdiction in other states' courts while in office.[158] The Court's rationale was to ensure the smooth operation of international relations.[159]

During Taylor's immunity hearing before the SCSL Appeals Chamber, both parties referenced the *Yerodia* judgment.[160] Although not binding on the SCSL, ICJ rulings are persuasive authority in international law,[161] including before the SCSL.[162]

C. Taylor Claimed Sovereign Immunity from Prosecution at SCSL

Charles Taylor was the second serving head of state indicted by a war crimes tribunal after Milosevic.[163] Like Milosevic, Taylor challenged his indictment on sovereign immunity grounds, but he did so while still serving as President of Liberia.[164]

On 23 July 2003, Taylor's lawyer filed a motion challenging the indictment and the approved arrest warrant.[165] However, the Appeals Chamber, rather than

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158 Arrest Warrant, *supra* note 9.
159 Damrosch, *supra* note 157.
160 Prosecutor v. Taylor, *supra* note 11.
161 Jessica Betancourt, *Who Has the Final Say in International Law? An Examination of Judicial Review and UNSC Supremacy*, COLUM. J. TRANSNAT'L L.: BULLETIN BLOG (Oct. 16, 2023), https://www.jtl.columbia.edu/bulletin-blog/who-has-the-final-say-in-international-law-an-examination-of-judicial-review-and-unsc-supremacy.
162 SCSL Statute art 20 (3).
163 Lisa Gambone, *Delay in Trying a Head of State: Charles Taylor*, Foreign Pol'y Ass'n (Mar. 16, 2012), https://fpa.org/delay-in-trying-a-head-of-state-charles-taylor/.
164 Micaela Frulli, *Piercing the Veil of Head-of-State Immunity: The Taylor Trial and Beyond*, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW 325 (Charles C. Jalloh ed., 2014).
165 Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Defence Preliminary Motion Based on Lack of Jurisdiction (Immunity from Prosecution), ¶¶ 1-50 (July 23, 2003); "applicants motion made under protest and without waiving of immunity accorded to a Head of State President Charles Ghankay Taylor requesting that the Trial Chamber do quash the said approved indictment of 7th March 2023 of Judge Bankole Thompson and that she aforesaid purported Warrant of Arrest and Order for transfer and detention of other consequential and related ORDER(S) granted thereafter by either the said Judge Bankole Thompson OR Judge Pierre Boutet on 12th June 2003 against the person of the said President Charles Ghankay Taylor be declared null and void, invalid at their inception and that they be accordingly cancelled and/OR set aside as a matter of Law, (July 23, 2003)" Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone* 249 (2020).

the Trial Chamber, ultimately decided the motion following a referral by the Trial Chamber under Rule 72(E) of the Court's Procedure.[166] Had the Appeals Chamber ruled in his favor, as it did for the Applicants in *Yerodia's* case, the case might have been dismissed without a trial.[167] However, the verdict against him legitimized his arrest warrant and paved the way for prosecution, obligating states to arrest him under international law.[168]

Taylor's defense made three principal arguments in their motion: the indictment violated customary international law, the principle of sovereign equality, and mischaracterized the SCSL's foundational status.[169]

First, citing the ICJ's *Yerodia* ruling, the defense argued that Taylor, as a serving head of state, enjoyed absolute immunity from criminal prosecution.[170] The defense argued that the indictment violated customary international law, as established in the ICJ's *Yerodia* ruling.[171] As mentioned above, in that case, the ICJ held that the practice of states grants personal immunity to heads of state and other high-ranking officials to preserve international peace and cooperation.[172] Consequently, the defense contended that this personal immunity must prevail over competing values, including individual criminal responsibility for atrocity crimes.[173] They framed this immunity as a procedural bar that shielded Taylor from the SCSL's jurisdiction altogether, regardless of whether the alleged crimes occurred. The defense maintained that as an incumbent President of Liberia, neither his official nor his private acts were subject to the Court's jurisdiction.[174] Therefore, even if the acts were proven, Taylor could not be held criminally responsible for actions considered to be official in character.[175]

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166 Rule 72(E) provides: "Preliminary motions made in the Trial Chamber prior to the Prosecutor's opening statement which raise a serious issue relating to jurisdiction shall be referred to a bench of at least three Appeals Chamber Judges, where they will proceed to a determination as soon as practicable.

167 Crane, *supra* note 25, 151-52.

168 *Id.*

169 Taylor, Motion to Quash Indictment based on Immunity.

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

Second, the defense argued that the indictment violated the principle of sovereign equality, which prohibits the court of one sovereign state from exercising authority over the head of state of another.[176] Consequently, they contended that the SCSL would require an immunity waiver from Liberia to legitimately exercise jurisdiction over President Taylor.[177] This argument fundamentally rested on the defense's characterization of the SCSL as a domestic court of Sierra Leone rather than a truly international tribunal.[178] From this premise, they asserted that the act of unsealing the indictment and attempting to serve an arrest warrant in Ghana, while Taylor was on official duty, constituted an infringement on the sovereignty of both Liberia and Ghana.[179] On this specific point, Professor Philippe Sands, in his *Amici Curiae* submission, offered a nuanced view: while the Special Court did not violate Ghana's sovereignty by transmitting the warrant, Ghana was under no obligation to enforce it.[180]

The defense's third argument directly challenged the foundational status of the SCSL, asserting it was a national court of Sierra Leone rather than an international tribunal.[181] This characterization might have drawn explicit inspiration from the *Yerodia* ruling's central distinction between national and international forums for immunity purposes.[182] While conceding that UN Security Council Resolution 1315 provided the initial mandate for the Court's creation, the defense underscored a critical structural difference: unlike the ICTY and ICTR, the SCSL was established via a bilateral agreement wherein the UN merely provided technical support to a domestic Sierra Leonean process.[183] They pointed to the constitutive national legislation, the Special Court Agreement 2002 (Ratification) Act No. 9 of 2002, as proof that it was not created by a direct UN Security Council or UN General Assembly resolution.[184] Consequently, while acknowledging that a UN Security Council's Chapter VII resolution could override personal immunity,

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[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Submission of the Amicus Curiae on Head of State Immunity, (Oct. 23, 2003), https://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-039.pdf.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*

the defense contended the SCSL lacked this privileged authority, having been established outside the Chapter VII framework.[185]

The Prosecution responded to the Defense's motion with both procedural and substantive counterarguments.[186] On procedural grounds, they first argued for the removal of the Government of Liberia from the motion, as it was not a party to the proceedings before the SCSL.[187] They contended that its inclusion was irrelevant and that its submissions should be excluded.[188] The Trial Chamber agreed, striking the joint claim brought by the Liberian Government.[189]

The Prosecution also argued that Taylor's motion was procedurally defective as it was both premature and substantively insufficient to qualify as a proper preliminary objection.[190] They reasoned that, at the time the motion was filed, Taylor had not yet appeared before the Tribunal nor entered a plea.[191] Consequently, they contended he should be denied the procedural right to challenge the court's jurisdiction at that stage.[192]

On substantive grounds, the Prosecution countered that the SCSL could not be categorized as exercising Sierra Leone's domestic judicial power.[193] They asserted that the Tribunal was not a national court but one that existed and functioned under international law.[194] As mentioned above, this characterization was crucial to distinguish the case from the ICJ's *Yerodia* ruling, which concerned immunity before foreign domestic courts.[195] The prosecution argued that the customary international law exception to immunity applies specifically

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[185] *Id.*
[186] Prosecutor v. Taylor, Case No. SCSL-2003-01-1, Prosecution Response to Defence Motion to Quash the Indictment Against Charles Ghankay Taylor, ¶ 1-50 (July 28, 2003), https://www.rscsl.org/Documents/Decisions/Taylor/024/SCSC-03-01-I-016.pdf.
[187] *Id.*
[188] *Id.*
[189] Quash the Indictment and to Declare the Warrant of Arrest and all Other Consequential Orders Null and Void (Sept 19. 2003), https://www.rscsl.org/Documents/Decisions/Taylor/024/SCSL-03-01-I-024.pdf.
[190] Prosecutor v. Taylor, *supra* note 186.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] Arrest Warrant, *supra* note 9.

to international tribunals.[196] This principle, they contended, was explicitly codified in Article 6(2) of the SCSL Statute, which waives immunity for any official irrespective of status.[197]

Addressing the defense's claim that SCSL lacked Chapter VII authority, the prosecution submitted that a tribunal does not require such a specific mandate to exercise the customary law exception. They cited the International Criminal Court (ICC) as a key precedent, a treaty-based tribunal that holds such jurisdiction without a direct root in the UN Charter.[198] To further bolster this point, they referenced the trials of President Slobodan Milosevic before the ICTY and Prime Minister Jean Kambanda before the ICTR as direct demonstrations of the exception applying to international courts.[199]

The prosecution further grounded the SCSL's authority in its creation by the international community, enacted through the UN Secretary-General under Security Council direction rather than Sierra Leonean law alone.[200] They argued that as a treaty-based institution meeting international convention standards, the SCSL possessed competence and jurisdiction analogous to the ICTY, ICTR, and ICC.[201] Finally, they noted that Taylor was indicted for crimes committed on Sierra Leonean territory under Article 1(1) of its Statute.[202] Therefore, transmitting the indictment to Ghana did not violate Ghana's sovereignty, as no immunity barred the proceeding under customary international law.[203]

The Appeals Chamber's Ruling

The Appeals Chamber ruled that Taylor possessed no immunity from prosecution. Its analysis focused on two core issues: whether the SCSL constituted

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[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*

an international tribunal, and whether customary international law granted Taylor immunity before such a body.[204]

The Chamber established that the decisive factor in determining a tribunal's power to displace immunity was the degree of international community involvement in its creation.[205] It began by examining the SCSL's legal basis, noting its formation through a bilateral treaty between Sierra Leone and the United Nations, with a mandate to prosecute those who bear the greatest responsibility for atrocity crimes within Sierra Leone.[206]

The analysis then centered on the international community's role, particularly that of the UN Security Council and the Secretary-General.[207] The Chamber reasoned that since immunities exist to foster international cooperation, they may only be waived in pursuit of broader international objectives, such as upholding law and order, not the interests of a single state.[208] It found that the international community, acting through the UN Secretary-General, created the SCSL. The foundational treaty was concluded pursuant to UNSC Resolution 1315, which the Council adopted under its UN Charter mandate to address threats to international peace and security (Articles 1 and 24). Therefore, the Chamber concluded that the SCSL was an international court. It must be noted that had the SCSL been classified as a national court, the *Yerodia* doctrine would have applied and barred its jurisdiction.

Regarding the second issue of Taylor's immunity under customary law, the Chamber assessed whether Article 6(2) of the SCSL Statute was consistent with peremptory norms.[209] It conducted a comparative analysis of the statutes of earlier international tribunals and found an identical principle of immunity waiver for serious international crimes in Article 7(2) of the ICTY Statute, Article 6(2) of the ICTR Statute, and Article 27(2) of the ICC Statute, all of which derive from Article

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[204] Prosecutor v. Taylor, Case No. SCSL-2003-01-I-A, Appeals Chamber, Decision on Immunity from Jurisdiction, ¶¶ 1-60 (May 31, 2004), https://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*

7 of the Nuremberg (IMT) Charter.[210] The Chamber declared the SCSL an international tribunal authorized to exercise jurisdiction over Taylor for war crimes.[211]

Based on this analysis, the Appeals Chamber definitively declared the SCSL an international tribunal authorized to exercise jurisdiction over heads of state. I agree with the ruling on two grounds: first, the SCSL's creation involved a high level of international involvement via a UN treaty involving over 100 member states, which perfectly ties with the exemption in *Yerodia*'s case; second, the historical practice of immunity waivers in prior *ad hoc* tribunals and the *Milosevic* precedent demonstrated customary international law.

It is important to note that the SCSL's jurisdiction was also challenged on the grounds of the Lomé Peace Accord's controversial amnesty provision.[212] Defendants Morris Kallon and Brima Bazzy Kamara argued that Article IX of the Lomé Agreement, which granted blanket amnesty to the warring factions, legally barred their trial.[213] The Appeals Chamber rejected this motion, ruling that Article 10 of the SCSL Statute explicitly prohibited the Tribunal from recognizing any amnesty for the international crimes under its jurisdiction.[214] This writer notes that, had this motion succeeded, Charles Taylor would likely have been shielded from prosecution as well, given that the amnesty's broad language specifically included "collaborators."

III. The Path to Conviction and the Jurisprudential Legacy

A. *From Exile to Conviction*

Although the immunity ruling was precedential, it did not immediately bring Taylor to court. While his earlier arrest warrant contributed to his removal

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[210] *Id.*
[211] *Id.*
[212] Leila Nadya Sadat, *The Lomé Amnesty Decision of the Special Court for Sierra Leone*, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW 311 (Charles C. Jalloh ed., 2014).
[213] Prosecutor v. Kallon & Kamara, Case No. SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 1-93 (Mar. 13, 2004), https://www.worldcourts.com/scsl/eng/decisions/2004.03.13_Prosecutor_v_Kallon_4.pdf.
[214] *Id.*

from power in 2003,[215] he remained in exile in Nigeria for nearly three years.[216] His eventual arrest in March 2006, while attempting to flee across the Cameroonian border, was the result of intense international pressure and a change of political will in Nigeria and Liberia.[217] His transfer to the SCSL and the subsequent decision to hold his trial in The Hague for security reasons underscored that legal rulings require political enforcement.[218]

The trial of Taylor, now a former President of Liberia, commenced on 4 June 2007, on eleven counts of war crimes, crimes against humanity, and other serious violations.[219] The prosecution presented extensive evidence from 100 witnesses.[220] In his defense, Taylor claimed his prosecution was politically motivated and that he acted as a peacemaker.[221] The Trial Chamber eventually found him guilty on all counts for aiding and abetting the RUF, but rejected the prosecution's claim of his effective control over the rebel group, sentencing him to 50 years' imprisonment.[222]

Both sides appealed the verdict.[223] The prosecution challenged the legal findings on liability and sentencing, while the defense raised 42 grounds, alleging factual errors, procedural irregularities, and an unreasonable sentence.[224] The Appeals Chamber rejected these arguments, upholding both the conviction and the 50-year sentence as fair and reasonable.[225]

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[215] Crane, *supra* note 25, at 131-49.
[216] *Id.* at 277-304.
[217] *Id.*
[218] *Id.*
[219] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶¶ 1-5 (May 18, 2012), https://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf.
[220] *Id.*
[221] *Id.*
[222] Id.
[223] *The Trial of Charles Taylor before the Special Court for Sierra Leone: the Appeal Judgment*, OPEN SOC'Y JUST. INITIATIVE (Sep. 2013), https://www.justiceinitiative.org/publications/trial-charles-taylor-special-court-sierra-leone-appeal-judgment.
[224] Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgement (Sept. 26, 2013), https://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf.
[225] Id.

B. Cementing the Precedent: From SCSL to ICC and Beyond

The Taylor immunity decision's greatest impact lies in its incorporation into contemporary international law, notably at the ICC.[226] The Appeals Chamber ruling on Taylor's indictment significantly advanced the jurisprudence on customary law exceptions to immunity under international law.[227] This area of law is now well-settled following the ICC Appeals Chamber ruling in the Omar al-Bashir case.[228] The ICC issued an indictment and arrest warrant for al-Bashir while he was the sitting Head of State of Sudan for war crimes in Darfur.[229] Relying on the Taylor precedent, its Appeals Chamber subsequently ruled that states like Malawi and Jordan were obligated under international law to arrest him during his visits.[230]

Since then, the ICC has continued to pursue accountability against heads of state. This trajectory is marked by the recent arrest in March 20225, of former Philippine President Rodrigo Duterte for crimes against humanity related to his "war on drugs."[231] Also, in March 2023, the Court issued an arrest warrant for Russian President Vladimir Putin for war crimes against humanity related to the invasion of Ukraine.[232]

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[226] Harmen van der Wilt, *Immunities and the International Criminal Court*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 595 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

[227] *Id.*

[228] *Id.*

[229] Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF.

[230] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Republic of Malawi Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶ 43 (Nov. 14, 2014).

[231] Prosecutor v. Rodrigo Roa Duterte, Case No. ICC-01/21-01/25, Public Redacted Version of "Prosecution's Application for a Warrant of Arrest for Rodrigo Roa Duterte" (Nov. 14, 2025), https://www.icc-cpi.int/sites/default/files/2025-11/DuterteEng.pdf.

[232] *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT'L CRIM. CT. (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

Before this, several African leaders—including former Ivorian President Laurent Gbagbo,[233] former Kenyan President Uhuru Kenyatta,[234] and former Kenyan Deputy President William Ruto[235]—have appeared before the ICC for crimes related to election violence.

IV. Weighing Its Criticism and Enduring Dilemmas

Although the Taylor immunity trial is a landmark legal success, it is entangled in complex political and practical challenges that merit critical examination.

A. The Exile Dilemma: Peace Without Justice in Liberia Versus Peace with Justice in Sierra Leone

In the context of Liberia, the use of exile as a political tool to remove Charles Taylor, which led to his arrest and conviction by the SCSL,[236] presents a complex dilemma in balancing peace and justice. While exile proved an effective strategy to end the country's second civil war in 2003,[237] justice for the Liberian war's victims remains "largely elusive."[238] Neither Liberia nor the ICC has held perpetrators accountable. However, renewed hope emerged in 2024 with President Joseph Boakai's signing of an executive order to establish a war crimes tribunal.[239] On this note, I foresee a groundbreaking development in international law. Should Liberia establish this tribunal, Taylor would likely be a person of interest, considering his role in the civil war.[240] He could and should face trial for crimes committed in Liberia, distinct from his Sierra Leone convictions, without

[233] Prosecutor v. Gbagbo & Blé Goudé, Case No. ICC-02/11-01/15.
[234] Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11 (Int'l Crim. Ct.).
[235] Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11 (Int'l Crim. Ct.).
[236] Crane, *supra* note 25.
[237] Accra Comprehensive Peace Agreement, Liberia, Aug. 18, 2003, available at: https://peaceaccords.nd.edu/accord/accra-peace-agreement.
[238] Ayen Deng Bior, *Liberia's Civil War Ended in 2003. Now It Wants to Try Its War Criminals*, CHRISTIAN SCI. MONITOR (Aug. 14, 2024, 2:28 p.m. ET), https://www.csmonitor.com/World/Africa/2024/0814/war-crimes-court-planned-for-Liberia.
[239] *Liberia: Renew Mandate to Establish War Crimes Court,* HUM. RTS. WATCH (Apr. 28, 2025), https://www.hrw.org/news/2025/04/28/liberia-renew-mandate-establish-war-crimes-court.
[240] Jalloh, *Law and Politics*, *supra* note 13, at 43.

constituting double jeopardy, as the offenses involve different victims and locations. If this occurs, Taylor will establish another profound legal precedent.

In contrast, Sierra Leone achieved both peace and a measure of justice through Taylor's exile.[241] His removal from power and subsequent prosecution became the SCSL's most significant success, which Thierry Cruvellier termed 'the crown jewel' of the Court.[242] In summary, while Taylor's exile helped end violence in both Liberia and Sierra Leone, it provided only a political solution for Liberia, leaving justice deferred. For Sierra Leone, it enabled a landmark legal success, highlighting the uneven outcomes when exile precedes accountability.

B. The African Union's Selective Justice Criticism

The application of the Taylor precedent in the al-Bashir case fueled growing tensions between the African Union (AU) and the ICC.[243] The AU accused the Court of undermining African sovereignty by disproportionately targeting its leaders, a criticism amplified by the prosecutions of Gbagbo, Kenyatta, and Ruto, which prompted threats of withdrawal from the Rome Statute.[244] Even this boycott did not materialize in a wholesale fashion. Since then, four African countries have formally withdrawn from the ICC. This process began with Burundi in October 2017,[245] followed by the collective withdrawal announced in September 2025 by three members of the Alliance of Sahel States—Mali, Burkina Faso, and Niger.[246] However, according to Article 127 of the Rome Statute, a withdrawal takes effect one year after official notification.[247] Therefore, the withdrawal for these three states is scheduled to take effect in September 2026.

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[241] Crane, *supra* note 25.
[242] Thierry Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test* 1,INT'L CTR. FOR TRANSITIONAL JUST. & SIERRA LEONE CT. MONITORING PROGRAMME (2009), https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Taylor-Trial-2009-English.pdf.
[243] Christa-Gaye Kerr, *Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined*, 41 MICH. J. INT'L L. 195, (2020).
[244] *Id.*
[245] *Situation in the Republic of Burundi*, INT'L CRIM. CT., https://www.icc-cpi.int/situations/burundi.
[246] *Mali, Burkina Faso and Niger Announce Exit from International Criminal Court*, REUTERS (Sept. 23, 2025, 3:36 AM EDT), https://www.reuters.com/world/africa/mali-burkina-faso-niger-announce-exit-international-criminal-court-2025-09-23/.
[247] Rome Statute of the International Criminal Court art. 127, July 17, 1998, 2187 U.N.T.S. 90.

To counter the perception of regional bias, one can point to the ICC's recent actions beyond Africa. These include the Prosecutor's 2025 application for an arrest warrant against former Philippine President Rodrigo Duterte[248] and the 2023 warrant issued for Russian President Vladimir Putin, which together are cited to demonstrate the Court's expanding global focus.[249] While this expansive approach to sovereign accountability for serious international crimes is commendable, I contend it is too early to deem the shift proportionate, considering the long list of African heads of state who have faced the force of the Court.

C. The Persistent Enforcement Gap

While the Taylor decision resolved the legal question of the admissibility of head-of-state accountability before international courts for breach of serious international crimes, it did not solve the operational problem of enforcement.[250] As the ICC's struggles to secure the arrest of President Putin demonstrate, the ability of an international tribunal to apprehend a sitting head of state remains wholly dependent on the political will of states and international coalitions.[251] This political challenge persists even for former presidents, as seen in the case of al-Bashir, who has evaded arrest for years despite being removed from office in 2019.[252] In this sense, the law provides the authority, but politics dictates its efficacy on the international plane.[253] As discussed above, Taylor's own arrest required a shift in regional politics and sustained Western pressure.[254] This enforcement gap

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[248] Prosecutor v. Duterte, *supra* note 231.

[249] Situation in Ukraine, *supra* note 232.

[250] Chile Eboe-Osuji, *The Absolute Clarity of International Legal Practice's Rejection of Immunity Before International Criminal Courts*, Just Security (Dec. 8, 2022), https://www.justsecurity.org/84416/the-absolute-clarity-of-international-legal-practices-rejection-of-immunity-before-international-criminal-courts/.

[251] Tabitha Stuart, *The Enforcement Crisis of International Criminal Law: The Case of the Putin Arrest Warrant*, St. Andrews L. Rev. (Nov. 27, 2025), https://www.standrewslawreview.com/post/the-enforcement-crisis-of-international-criminal-law-the-case-of-the-putin-arrest-warrant-1.

[252] *Removal of President Omar al-Bashir and the Continued Pursuit of Justice*, U.S. HOLOCAUST MEM'L MUSEUM, https://www.ushmm.org/genocide-prevention/countries/sudan/removal-of-president-omar-al-bashir (last visited Jan. 10, 2026).

[253] Monica Hakimi, *Why Should We Care About International Law?*, 118 MICH. L. REV. 1283 (2020), https://repository.law.umich.edu/mlr/vol118/iss6/17/.

[254] *See* Crane, *supra* note 25.

reveals the limits of judicial pronouncements in the absence of a supranational enforcement mechanism.

Conclusion

The prosecution of Charles Taylor before the SLSC represents a pivotal moment in the development of individual accountability in international criminal law. The SCSL Appeals Chamber's 2004 ruling, which rejected head-of-state immunity for core international crimes, served as the critical jurisprudential link. It transformed the principle established at Nuremberg into a functional precedent for the modern era, providing the authoritative reasoning later adopted by the International Criminal Court in the *Al-Bashir* case and possibly beyond.

However, this landmark legal victory also illustrated a profound and enduring dilemma. While the Taylor decision resolved the legal question of admissibility, it could not solve the operational problem of enforcement. The subsequent struggles to arrest heads of state, such as former President Omar al-Bashir and sitting President Vladimir Putin, demonstrate that the efficacy of international justice remains intimately dependent on the political will of states. Law provides authority, but geopolitics dictates its practical force. This enforcement gap, coupled with the contentious use of exile and persistent accusations of selective justice from the African Union, reveals the complex interplay between legal norms and political reality.

Finally, the Taylor legacy is one of both profound achievement and solid limitation. It strengthened a transformative legal principle that heads-of-state immunity should not shield perpetrators of atrocity crimes, advancing the need for individual accountability. However, it also exposed the structural constraints of a legal system built on state cooperation, reminding us that the victory of law over impunity is an ongoing project, negotiated at the contentious intersection of justice, sovereignty, and power.

WHERE WILL THEY GO: CASE STUDY ON THE APPLICATION OF THE NON-REFOULEMENT PRINCIPLE DURING THE COVID-19 PANDEMIC*

Justine Kaye O. Solano**

I. International Status of Refugees and Asylum Seekers

A. *1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees*

War has ancient origins—and where there is war, there are survivors fleeing for their lives. Fortunately, the right to asylum and refugee protection has existed alongside wars, owing to the perceived moral responsibility of individuals to protect those whose fundamental human rights are threatened or violated.[1] Over the years, states have enacted domestic refugee laws, but the recognition of refugees and asylum seekers as an international concern came only after the First World War. In 1950, after the Second World War, the United Nations High Commissioner for Refugees (UNHCR) was founded.[2] It deals with humanitarian, social, and non-political matters. It also supervises the implementation of conventions protecting the rights of refugees and asylum seekers.[3]

The 1951 Convention Relating to the Status of Refugees (1951 Convention) recognizes the uneven burden of the refugee crisis on different states and the need for international cooperation and a collective solution.[4] However, the 1951 Convention applies only to those displaced before 1 January 1951 and to European

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[1] Paul Tiedemann, *Are There Moral Duties toward Refugees? Considerations in Legal Ethics*, 10 LAWS 4 (2021), https://doi.org/10.3390/laws10010004.

[2] Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary*, (1990), https://www.refworld.org/reference/research/unhcr/1990/100962,at 4.

[3] *Id.*

[4] *Id.*

refugees.[5] The 1967 Protocol Relating to the Status of Refugees (1967 Protocol), leveled the field by providing equal status to all refugees without discrimination.

B. The Refugees and Asylum Seekers

The expanded and inclusive definition of refugees ensures their equal status. Now, they are those who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[6]

The 1951 Convention also provides a comprehensive list of disqualifications to balance the interests of the Receiving States and better allocate their resources meant for qualified refugees. Meanwhile, an asylum seeker is "someone whose request for sanctuary has yet to be processed."[7] Each state has its asylum system, based on the framework set in the 1951 Convention and 1967 Protocol, to determine those qualified for international protection.[8]

C. State Parties and Scope of Case Study

As of April 2015, there are 145 state parties to the 1951 Convention and 146 state parties to the 1967 Protocol.[9] This case study covers the following states: Turkey, Germany, and the United States of America (US). These states have been selected to juxtapose the key roles they generally play in refugee protection as

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[5] The 1967 Protocol, pmbl., 04 October 1967.
[6] The 1951 Convention, art. 1(A)(2), 28 July 1951; The 1967 Protocol, art. 1, 31 January 1967.
[7] UNHCR, *Asylum-seekers*, UNHCR.ORG, https://www.unhcr.org/asylum-seekers#:~:text=An%20asylum%2Dseeker%20is%20someone,protect%20those%20who%20need%20it (last visited on 12 February 2023).
[8] The 1951 Convention, art. 35(2)(C), 28 July 1951.
[9] UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR.ORG, https://www.unhcr.org/sites/default/files/legacy-pdf/3b73b0d63.pdf.

against their response during critical events such as the Coronavirus Disease 2019 (COVID-19) pandemic.

Turkey ratified the 1951 Convention, and on 31 July 1968, it acceded to the 1967 Protocol.[10] Its unique geographical location, with Europe to the west and the Middle East to the east, positions it as a crucial player in managing refugee flows. It is one of the leading refugee-hosting states in the world.[11] On 1 December 1953, Germany ratified the 1951 Convention, and on 5 November 1969, it acceded to the 1967 Protocol. [12] It is the leading hosting state in the European Union (EU) and the second-largest donor to the UNHCR.[13] Lastly, the United States of America did not ratify the 1951 Convention but acceded to the 1967 Protocol on 1 November 1968. [14] It is the largest donor to the UNHCR. Moreover, it has been a member of the UNHCR Advisory Committee since 1951 and a founding member of the UNHCR Executive Committee since 1959. [15]

II. The Non-Refoulement Principle

The non-refoulement principle is paramount for refugees and asylum seekers. It is enshrined in Article 33(1) of the 1951 Convention:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[16]

As aptly put by the Human Rights Committee, "the turning back of a refugee to the frontiers of a country where his life or freedom would be threatened

[10] *Id.*
[11] UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR.ORG, https://www.unhcr.org/sites/default/files/legacy-pdf/3b73b0d63.pdf (last visited on 12 February 2023).
[12] UNHCR, *supra* note 10.
[13] UNHCR*, Germany as a donor*, UNHCR.ORG, https://reporting.unhcr.org/donors/germany (last visited on 12 February 2023).
[14] UNHCR, *supra* note 10.
[15] UNHCR, *United States of America as a donor,* UNHCR.ORG, https://reporting.unhcr.org/donors/united-states- america (last visited on 12 February 2023).
[16] The 1951 Convention, art. 33(1), 28 July 1951.

on account of his race, religion, nationality or political opinion would be tantamount to delivering him into the hands of his persecutors."[17] The non-refoulement principle is embodied in several international instruments and is considered a *jus cogens* norm. As opined by UNHCR:

> The principle of non-refoulement as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State. It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion. As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures. (citations omitted)[18]

Under Article 14(1) of the Universal Declaration of Human Rights, "everyone has the right to seek and to enjoy in other countries asylum from persecution."[19] Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that, "no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[20] Finally, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[21] Article 4(2) emphasizes the non-derogability of this provision, even in times of public emergencies.[22] Rodolfo

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[17] Weis, *supra* note 2, at 233.

[18] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, (Jan. 26, 2007), https://www.refworld.org/pdfid/45f17a1a4.pdf, ¶ 3.

[19] UDHR, art. 14, 10 December 1948.

[20] U.N. CAT, art. 3(1), 4 February 1985.

[21] ICCPR, art. 7, 16 December 1966.

[22] ICCPR, art. 4(2), 16 December 1966.

Marques, a refugee law expert, argued that:

> In this regard, according to the ICCPR, it is forbidden to expel an individual to a territory where he may be submitted to those ill treatments. In this case, the prohibition on refoulement is inferred as a component of the absolute prohibition of torture as well as inhuman and degrading treatments.[23]

Per UNHCR Executive Committee Resolution No. 79, "the principle of non-refoulement is not subject to derogation."[24] The Committee Against Torture, in its General Comment No. 4, further stated that "the principle of 'non-refoulement' of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is similarly absolute."[25] These instruments effectively affirmed the status of the non-refoulement principle as a *jus cogens* norm.[26]

The non-refoulement principle covers at least two situations. First is the territorial application, or when an asylum seeker is within the territory of the Receiving State. Here, the violation is often through deportation. However, a distinction should be made between refouling deportation and legal deportation. Refouling deportation happens when authorities forcibly return an asylum seeker to their Origin State without following established legal processes, thereby exposing them to persecution or serious harm. In contrast, legal deportation entails adhering to established legal processes and criteria, including conducting a fair and thorough assessment of the application of the asylum seeker.

The second situation is extra-territorial application, or when an asylum seeker is at the frontier or border. This situation is covered by the phrase "in any manner whatsoever" in Article 33(1). The UNHCR stated that the prohibition

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[23] Rodolfo Marques, *Non-Refoulement Under the Inter-American Human Rights System*, SSRN JOURNAL (2017), http://dx.doi.org/10.2139/ssrn.2992709.

[24] UNHCR Exec. Comm., *General Conclusion on International Protection No. 79*, UNHCR.ORG (Oct. 11, 1996), https://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html.

[25] U.N. CAT, *General Comment No. 4 on the implementation of Article 3 of the Convention in the context of Article 22*, (Feb. 29, 2018), https://www.refworld.org/docid/5a903dc84.html.

[26] Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INTERNATIONAL JOURNAL OF REFUGEE LAW 533 (2001), https://doi.org/10.1093/ijrl/13.4.533.

extends to the frontier of a Receiving State and to the high seas. Applying the rules of construction outlined in Article 31 of the 1969 Vienna Convention on the Law of Treaties[27] (VCLT), it clarified that:

> The ordinary meaning of "return" includes "to send back" or "to bring, send, or put back to a former or proper place[."] The English translations of "refouler" "include words like 'repulse', 'repel', 'drive back'." It is difficult to conceive that these words are limited to refugees who have already entered the territory of a Contracting State. The ordinary meaning of the terms "return" and "refouler" does not support an interpretation which would restrict its scope to conduct within the territory of the state concerned, nor is there any indication that these terms were understood by the drafters of the 1951 Convention to be limited in this way. [28]

Article 26 of the VCLT emphasizes that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Under Article 27, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[29] The non-refoulement principle binds both state and non-state parties of the 1951 Convention and 1967 Protocol as it is a non-derogatory norm. It is worth emphasizing that customary international law, especially *jus cogens* norms, is binding even on dissenting states—"The dissentient minority of States is as much bound by the formulated rule as those who actively participated in its creation."[30] Overall, States are required to observe the non-refoulement principle in good faith. They cannot simply invoke their internal law for non-compliance with their obligations. If a case of refoulement is attributable to them, they could be held responsible for their internationally wrongful act,[31] either

[27] Article 31(1) of the 1969 Vienna Convention provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31(3) states that, in interpreting a treaty: "… there shall be taken into account, together with the context, … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between parties."

[28] UDHR, *supra* note 19, ¶ 27.

[29] VCLOT, art. 27, 23 May 1969.

[30] MERLIN MAGALLONA, PROBLEMS AND PROSPECTS IN INTERNATIONAL LAW (2019).

[31] ARSIWA, art. 2, 3 August 2001.

through the International Court of Justice, if those involved are state parties,[32] or other elected dispute settlement mechanisms, in the case of non-state parties.

III. Refoulement During the COVID-19 Pandemic

Article 9 of the 1951 Convention permits certain provisional measures during exceptional circumstances when a person is a threat to national security:

> Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.[33]

At first glance, this exception seems to be dependent on every Receiving State, particularly during the early stages of the COVID-19 pandemic—when the nature of the disease was barely understood. With infection rates exponentially rising and death rates increasing, the imposition of stringent measures on the entry and exit of individuals in territories was deemed a critical aspect of protecting the population. Moreover, despite previous pandemics, such as the Spanish Flu of 1918, Asian Flu of 1957, Hong Kong Flu of 1968, and Swine Flu of 2009, there is still a scarcity of precedent in relation to asylum seekers, leaving states without clear guidance on navigating the latest pandemic. Data from the International Organization for Migration shows that by 24 August 2020, 219 states or territories issued 85,034 travel restrictions, with a significant number implementing radical and unilateral border closures.[34]

Dennis McNamara (McNamara), Director of International Protection at UNHCR, in his 1951 Convention Commentary, underscored the importance of applying good faith when states decide to take provisional measures against a

[32] The 1951 Convention, art. 38, 28 July 1951.

[33] The 1951 Convention, art. 9, 28 July 1951.

[34] IOM, *Global Mobility Restriction Overview Bi-Weekly Update*, (Aug. 24, 2020), https://dtm.iom.int/sites/g/files/tmzbdl1461/files/reports/DTM-Covid19%20Global%20Overview%20Output%2024.08.2020%20Final.pdf?iframe=true.

person for national security.[35] He also defined what "national security" is in the context of Article 9:

> "National security" is a rather well-defined term. It is used in a number of international agreements, e.g., the 1933 and 1938 Conventions and the European Convention on Establishment. The term and its equivalent ("sécurité nationale", "Staatsicherheit", "rikets sikkerhet" etc.) are also used in municipal laws and touched upon in decisions by international as well as national tribunals.
>
> Anything which threatens a country's sovereignty, independence, territorial integrity, constitution, government, external peace, war potential, armed forces or military installations may be construed as a threat to "national security."[36]

McNamara also discussed the rationale of the decision of the Drafting Committee to limit the applicability of Article 9 to individuals instead of groups:

> The Committee felt that the first alternative was drafted in too wide terms, and it decided in favor of a provision more along the lines of the second alternative. The expression "a refugee" was changed into "any person", which in turn was amended by the Conference to "a particular person", the meaning clearly being to restrict the applicability of provisional measures to individual persons, thus ruling out large scale measures against groups of refugees.[37]

The careful considerations and delineations made during the drafting and discussions of the 1951 Convention show the nuanced applicability of Article 9 and the need for a judicious application of provisional measures in protecting national security while respecting the human rights of individuals. Overall, the complexities of balancing national security and human rights call for a thoughtful

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[35] UNHCR, *Commentary on the Refugee Convention 1951 Articles 2-11, 13-17,* (1997), https://www.refworld.org/reference/research/unhcr/1997/en/72739, at 28.
[36] *Id.*
[37] *Id.*

and context-specific approach in the face of an unforeseen challenge like the COVID-19 pandemic.

Nevertheless, asserting that Article 9 provides a permissive provision to suspend asylum procedures during COVID-19 would not only be absurd but also perilous. Such an interpretation could significantly compromise the rights of refugees and asylum seekers escaping persecution. While states have the duty to protect their citizens, it is crucial to emphasize their concurrent international obligation to safeguard the rights and well-being of asylum seekers, reinforcing the importance of upholding humanitarian values even amid pressing public health concerns. If states are permitted to completely close their doors to refugees and asylum seekers during a pandemic, *where will they go?*

IV. Case Study

The following case study of Turkey, Germany, and the United States will assess their compliance with the non-refoulement principle during the COVID-19 pandemic, from 2020 to 2022, through the lens of territorial application and extra-territorial application.

A. Turkey

Turkey reserved its obligation under the 1951 Convention and 1967 Protocol to the acceptance of persons from Europe only. Therefore, strictly speaking, it can only legally recognize European asylum seekers as refugees. However, this has been liberally construed. Turkey grants non-European asylum seekers limited protection through "conditional refugee status," "humanitarian residence permit," or temporary protection. This allows them to stay in Turkey until a long-term place of settlement in another state is found for them. More recently, Syrians have been placed under temporary protection, while non-Syrian and non-European applicants may apply to the UNHCR for refugee status determination.[38]

1. *Territorial Application*

[38] UNHCR, *Temporary protection in Türkiye*, UNHCR.ORG, https://help.unhcr.org/turkiye/information-for-syrians/temporary-protection-in-turkey/(last visited on 12 February 2023).

Asylum seekers have the right to stay in Turkey throughout their application procedure, save for some exceptions. While Law No. 6458, or the 2013 Law on Foreigners and International Protection, recognizes the non-refoulement principle, it also provides for an entry ban or deportation for reasons of public order, public security, or public health.[39] Law No. 7070, enacted in 2018, related to the regulation of emergency provisions, provides that a deportation decision "may be taken at any time during the international protection proceedings" against an applicant due to leadership, membership, or support of a terrorist organization or a benefit-oriented criminal group; threat to public order or public health; or relation to terrorist organizations.[40] Fear of being deported is not unreasonable considering that public health is one of the exceptions to their right to stay. [41]

Pre-pandemic, Human Rights Watch reported that Turkey is not a safe country for Syrian asylum seekers because of the risk of forcible transfer to Syria. They documented several cases of Syrians who were arbitrarily detained in refugee deportation centers and coerced into signing voluntary return forms under threats of physical violence or transfer to the war-torn Idlib. This has been corroborated by reports from Amnesty International, the Istanbul Bar Association, and the Syrian Center for Media and Freedom of Expression. [42]

Between March and August 2020, Turkey implemented a suspension of deportation proceedings in response to the pandemic, leading to the release of individuals who would have otherwise faced deportation from removal centers. Upon the resumption of these proceedings, a report from Advancing Alternative Migration Governance (ADMIGOV) highlighted a significant decline in both voluntary returns and deportations, as determined by their lawyer-informants. Routine checks by security forces and subsequent apprehensions also decreased. ADMIGOV suggested that challenges in organizing charter flights for collective deportations or voluntary returns contributed to the inevitable decrease in detentions and deportations. However, the report also underscored the heightened difficulty in accessing legal assistance crucial for navigating

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[39] Turkey Law 6458 (2013), art. 4, 9.

[40] Turkey Law 7070 (2018).

[41] Derya Ozkul, *Governing Migration and Asylum Amid COVID-19 and Legal Precarity in Turkey*, 14 MIDDLE EAST LAW GOV. 141 (2022), https://doi.org/10.1163/18763375-14010006.

[42] *Journey of Death to Europe and the Challenges Syrian Refugees Face in Greek Camps*, (2021), https://scm.bz/en/the-challenges-syrian-refugees-face-in-greek-camps/.

deportation proceedings.[43]

2. *Extra-territorial Application*

In the controversial 2016 EU-Turkey Agreement (the Agreement), Turkey committed to accepting asylum seekers unable to enter Greece via its territory in exchange for substantial funding to support refugees and asylum seekers, visa liberalization for its citizens, and renewed negotiations for EU accession.[44]

However, following the unfulfilled commitments of the EU, Turkey lifted its border controls in 2020. This resulted in an influx of 3.6 million asylum seekers at the borders of Europe. Remarkably, Turkey facilitated this movement by providing transportation to the European borders. Nonetheless, recognizing that European voters were inclined to support stringent measures to restrict the entry of asylum seekers amid the pandemic, EU governments adopted a firm stance, even if it meant "letting refugees drown in the Aegean." Turkey eventually changed its approach and resealed its western land borders after its first COVID-19 fatality.[45]

To recall, the non-refoulement principle prohibits any state from expelling or returning a refugee or asylum seeker in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion. It is not limited to the return or pushback of a refugee or asylum seeker in the Origin State. By utilizing vulnerable asylum seekers within its territory as leverage against the EU, Turkey knowingly exposed them to perilous conditions at the European borders. This deliberate strategy not only undermined the sanctity of humanitarian protections but also unequivocally constitutes a violation of the non-refoulement principle.

B. Germany

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[43] Sibel Karadağ & Aysen Üstübici, Protection during Pre-Pandemic and COVID-19 Periods in Turkey, ADMIGOV Deliverable 4.2 (2023), https://admigov.eu/upload/Deliverable_42_Karadag_Protection_Turkey.pdf.

[44] Akyan Edimir, *Coronavirus Pandemic Impacts Turkey's Approach to Displaced Syrians*, International Peace Institute (Mar. 30, 2020), https://reliefweb.int/report/turkey/coronavirus-pandemic-impacts-turkey-s-approach-displaced-syrians (last visited on 12 February 2023).

[45] *Id.*

Asylum seekers in Germany encounter legal barriers to "asylum protection".[46] and residing therein. Article 16(a) of the German Constitution limits refugee status to those not coming from a "safe third country," encompassing EU Member States, Norway, Switzerland, and neighboring states of Germany.[47] Political persecution requires state involvement. Should it come from a non-state actor, asylum seekers will be recognized only if the Origin State suppresses the non-state actor or the Origin State fails to protect its citizens adequately. Thus, asylum seekers fleeing war or natural disasters are excluded. Finally, refugee status is denied if a "secure region" exists in their Origin State. Once refugee status is granted, a residence permit, valid for three years, is issued, subject to renewal if the conditions in the Origin State persist.[48]

1. *Territorial Application*

Pre-pandemic, the German policies for asylum and residency had been described as both restricted and liberalized—i.e., there was a greater chance of being granted residency, but so were attempts to deport unwanted asylum seekers as delinquents. In 2015, during the European Refugee Crisis, some EU states opened a humanitarian corridor for people arriving in Greece to travel to Germany. Moreover, a significant share of applications was accepted. Nonetheless, in the same year, the Residence Act entered into force. It entailed changes to facilitate and accelerate the enforcement of deportations, including the reinstallation of custody procedures. Two months later, the Asylum Procedure Acceleration Act was passed. This classified Albania, Kosovo, and Montenegro as “safe countries of origin.” Asylum seekers arriving from these states would have to stay in initial reception centers until the end of their asylum application process or until their departure in the case that their claim was rejected. This law also reduced the time for complaints or appeals against asylum decisions.[49]

In March 2020, a general suspension of deportation was implemented due

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[46] The German nomenclature for recognition of status as a refugee.

[47] GERMAN CONST., art, 16(a).

[48] UNHCR, Forms of Asylum and Refugee Protection, https://help. unhcr.org/germany/asylum- in-germany/forms-of-asylum-and-refugee-protection/ (last visited on 12 February 2023).

[49] Maren Kirchhoff & David Lorenz, *Between Illegalization, Toleration, and Recognition: Contested Asylum and Deportation Policies in Germany*, *in* PROTEST MOVEMENTS IN ASYLUM AND DEPORTATION 49 (2018), https://doi.org/10.1007/978-3-319-74696-8_3.

to the logistical challenges posed by the COVID-19 pandemic.[50] However, the exact duration of this suspension was unclear. Moreover, the asylum procedures were not suspended. They were instead modified to ensure social distancing. For asylum seekers flagged for security concerns, hearings continued through mobile teams, and notifications were sent via mail.[51] A critical issue that warrants attention was the stringent documentary requirements during asylum procedures. In 2021, *Deutsche Welle*, a German news network, highlighted the case of "Toure," who was required to present a passport to German authorities for identity verification. Regrettably, the Guinean Embassy in Berlin did not issue passports, necessitating his return to Guinea to apply for one. However, that was unthinkable for him, given the torture he endured in his Origin State. Applicants like him, lacking essential documentation, were at risk of deportation, and obtaining official documents during the pandemic was evidently challenging.[52]

The case of Germany underscores the need for a comprehensive assessment of the commitment of a state to the non-refoulement principle that goes beyond a mere scrutiny of its adherence to institutionalized asylum procedures. It is imperative to broaden the perspective to include practical considerations, recognizing the myriad challenges confronted by asylum seekers as they navigate the complex asylum process, often constrained by limited resources.

2. *Extra-territorial Application*

As mentioned above, the 2015 European Refugee Crisis best reflects the significant shift in the attitude of Germany towards refugees and asylum seekers. With the number of asylum seekers increasing, Germany suddenly ordered temporary border restrictions in 2015, including spot checks on vehicles trying to cross the border. As noted by The New York Times:

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[50] Danni Reches, *Complying with International and Regional Law during the Pandemic - Asylum Seekers and COVID-19 Emergency Measures in EU Member States Germany and Greece*, 6 SOCIAL SCIENCES & HUMANITIES OPEN 100370 (2022), https://doi.org/10.1016/j.ssaho.2022.100370.
[51] *Id.*
[52] Daniel Pelz, *Germany Keeps up Deportations despite COVID*, DW.COM (Mar. 26, 2021), https://www.dw.com/en/germany-presses-on-with-deportations-despite-covid-pandemic/a-57011088, https://www.dw.com/en/germany-presses-on-with-deportations-despite-covid-pandemic/a-57011088 (last visited on 12 February 2023).

> The restrictions put in place by Chancellor Angela Merkel's government were seen as a strong sign—if not an outright message—to other European Union members that Germany was growing weary of shouldering so much of the burden in Europe's largest humanitarian crisis in decades without more help and cooperation from other nations.[53]

To recall, Greece closed its borders to asylum seekers in 2020. This action was supported by Germany. Through tweets sent by the German interior ministry in Arabic, Farsi, English, and German, asylum seekers were sternly warned that "Europe's borders are not open for [refugees] from [Turkey], and neither are our German borders."[54] Nonetheless, the situation on the border is less harrowing than the rhetoric. Instead of border closures, stringent border controls were implemented. In 2022, border control authorities recorded a total of 34,731 persons entering Germany irregularly and seeking asylum. Out of these, 34,061 were referred to the Federal Office for Migration and Refugees. By June 2022, all remaining entry restrictions and COVID-19-related border controls were lifted, excluding countries designated as "virus variant areas."[55]

Parenthetically, on 26 April 2022, the Court of Justice of the EU held that border controls cannot exceed a duration of six months unless there is a new threat justifying a renewed introduction of controls for another six months maximum. Nonetheless, Germany continued to impose prolonged border controls, although no longer related to COVID-19. This extension had been criticized by non-government organizations who argue that the control leads to refusal of entry and shifts to other land borders.[56]

C. The United States of America

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[53] Melissa Eddy, Rick Lyman & Alison Smale, *Germany Orders Curbs at Border in Migrant Crisis*, NEW YORK TIMES (Sept. 12, 2015), https://www.nytimes.com/2015/09/14/world/europe/germany-emergency-measures-european-migrant-crisis.html (last visited on 12 February 2023).

[54] Philip Oltermann, *Germany tweets to deter Syrian refugees, fearing 'repeat of 2015',* THE GUARDIAN (Mar. 4, 2020), https://www.theguardian.com/world/2020/mar/04/germany- tweets-to-deter-syrian-refugees-fearing-repeat-of-2015 (last visited on 12 February 2023).

[55] Paula Hoffmeyer-Zlotnik and Marlene Stiller, Access to the Territory and Push Backs: Germany, ASYLUM INFORMATION DATABASE (June 4, 2023), https://asylumineurope.org/reports/country/germany/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/ (last visited on 12 February 2023).

[56] *Id.*

Dany Bahar succinctly highlights the vulnerability of the US asylum seeker policy – "without a robust institutional binding framework in place to administer global migration flows, any future president could do and undo as he or she pleases."[57] The deportation of immigrants, including refugees and asylum seekers, is ingrained in US history. During the Great Depression, Herbert Hoover enforced large-scale deportation of Mexican laborers and families, driven by the "American jobs for real Americans" principle. Despite attempts by George Bush and Barack Obama to ease immigration policies, deportation rates remained high. Obama even earned the title "deporter in chief" for surpassing other presidents in historic deportation numbers, including Trump.[58] As to pushbacks, the US turned away at least 200,000 Jewish asylum seekers who fled the Nazis during the Second World War. In the 1980s, when many Central American asylum seekers came to the US, primarily due to US-backed brutality, Ronald Reagan and George Bush labeled them as "economic migrants," and less than 3% were granted protection.[59]

1. *Territorial Application*

The Trump administration used the COVID-19 pandemic as a justification for modifying established immigration policies. The deportations and pushbacks of asylum seekers stemmed from the Department of Health and Human Services (DHHS) interim guidelines, which were based on Section 265, Title 42 of the US Code (Title 42):

> Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General,

[57] Maxwell Newsome, *A Constitutional Right to Asylum? A Comparative Analysis Could Ground the Design of Better Protection for Asylum Seekers*, 48 UNIVERSITY OF DAYTON LAW REVIEW (2022), https://ecommons.udayton.edu/udlr/vol48/iss1/6.
[58] Anthony W. Fontes, *The Long, Bipartisan History of Dealing with Immigrants Harshly*, THE CONVERSATION (July 9, 2019), https://theconversation.com/the-long-bipartisan-history-of-dealing-with-immigrants-harshly-119523 (last visited on 12 February 2023).
[59] *Id.*

> in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.[60]

These interim guidelines were used as a basis by the Centers for Disease Control and Prevention (CDC) for its 20 March 2020 Order that suspended entry from the Canadian and Mexican borders, with exceptions for US citizens, residents, immediate family members, military personnel, and those with valid travel documents.[61] The Department of Homeland Security took swift action to shut down the southern border, promptly deporting any intercepted migrants, including asylum seekers and children, to Mexico or Central America, through the Immigration and Customs Enforcement (ICE).[62] On 11 September 2020, the DHHS finalized its interim regulation. Here, it acknowledged for the first time that its order was used to turn away refugees and asylum seekers and declared its belief that doing so was legal. Nonetheless, the new CDC Order issued in October 2020 was almost the same as the March Order.[63]

This case illustrates refoulement deportation. The US has violated the non-refoulement principle by indiscriminately applying the 20 March 2020 Order against migrants, without consideration for the established legal processes for asylum seekers, thereby exposing them to persecution or serious harm. Even without explicit admission from the DHHS regarding the use of its order to turn away refugees and asylum seekers, the swift interception and conspicuous absence of a fair assessment of an asylum seeker serve as compelling indicators of the violation at hand.

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[60] U.S. Code (1789), § 265, Title 42.
[61] Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists (2020), https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf.
[62] Holly Ventura Miller et al., *Immigration Policy and Justice in the Era of COVID-19*, 45 AM J CRIM JUST 793 (2020), https://doi.org/10.1007/s12103-020-09544-2.
[63] American Immigration Council, *A Guide to Title 42 Expulsions at the Border*, AMERICAN IMMIGRATION COUNCIL, https://www.americanimmigrationcouncil.org/fact-sheet/guide-title-42-expulsions-border/ (last visited on 12 February 2023); To note, on 11 May 2023, DHHS terminated the COVID-19 public health emergency in the US. In effect, it also ended the use of Title 42 as a border policy.

2. *Extra-territorial Application*

The 20 March 2020 Order was also used as a basis to stop migrants arriving at the US border, even if they expressed fear of persecution in their Origin State.[64] The US government data shows over 400,000 migrant pushbacks on the southern border from February through December 2020. Moreover, pushbacks were coupled with abuse of power, including physical cruelty, verbal harassment, and misrepresentation. For instance, when two Honduran transgender women tried to cross the border, Customs and Border Patrol (CBP) agents threatened them with guns, ridiculed them, and told them to return to Mexico, where they had already suffered assaults.[65] In 2021, CBP agents dismantled a Haitian camp and forcibly pushed the migrants back across the border.[66]

The UNHCR emphasized that when a state is not prepared to grant asylum to persons who are seeking international protection on its territory, it must at least adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger. Generally, this entails at least giving asylum seekers access to its territory, as well as a fair and efficient asylum procedure.[67] The pushback described above by the US, through its CBP agents, was a blatant violation of the non-refoulement principle, as they failed to provide even a modicum of a fair legal process for the asylum seekers at their border.

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[64] National Immigration Forum, *Immigration-Related Executive Actions During the COVID-19 Pandemic*, FORUM TOGETHER.ORG (Nov. 18, 2020), https://forumtogether.org/article/immigration-related-executive-actions-during-the-covid-19-pandemic/ (last visited on 12 February 2023).

[65] Kino Border Initiative and Red Jesuita con Migrantes – Centro América y Norte América, *Pushback Practices at the US/Mexico Border*, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/Franciscans_International_SubmissionI.pdf (last visited on 12 February 2023).

[66] Emily McConville, *An Old Illness: How the United States Uses Racist and Xenophobic Ideas About Disease to Exclude Haitian Migrants During the Covid-19 Pandemic*, 11 IND. J.L. & SOC. EQUAL, 360 (2023).

[67] UNHCR, *supra* note 18.

V. Conclusion

Overall, the cases above illustrate how states, despite their commitment to protect asylum seekers, could still violate the non-refoulement principle during uncertain times, such as the COVID-19 pandemic, when the interests of their citizens are at stake and there is a scarcity of clear guidelines on navigating the situation. Nonetheless, the non-refoulement principle is the cornerstone of asylum and international refugee law. Every person has the right to seek asylum. This right is undermined when Receiving States push back or deport refugees and asylum seekers to where the threat of persecution, danger, or even death lies. Until the 1951 Convention and 1967 Protocol cease to apply, Receiving States are duty-bound to comply with their obligations under international law. Public health and human rights are not incompatible. In fact, they strengthen each other. Receiving States must delicately strike a balance between the needs of their citizens on the one hand and their international obligations to refugees and asylum seekers on the other. States must not use the pandemic to evade the principle. During the pandemic, refugees and asylum seekers should not be narrowly seen as hosts of the disease because of their precarious circumstances. Instead, they should be seen as a sector that has become even more vulnerable, desperate for security and safety, and in dire need of support and assistance.

ESSAYS

REFLECTIONS ON EDSA AND ACCESS RIGHTS IN ENVIRONMENTAL LAW

Cecilia Therese "Niner" Guiao[*] & Jurella Guiahara D. Santos[**]

EDSA was a turning point for democratic environmental governance in the Philippines. The People Power Revolution, creating an alliance between anti-Marcos elites, NGOs, religious organizations, and labor groups, ushered in a new government and constitution.

The movement was part of the global push for democratization across Latin America, Asia, and Africa from the mid-1970s to the 1990s.[1] In this period, post-authoritarian constitutions sought to make the state more accountable, representative, and participatory. Through an expanded declaration of principles and state policies and provisions on social justice and human rights, the 1987 Constitution aimed to restructure political, social, and economic relations.

Most notably, EDSA and the 1987 Constitution have a long-lasting effect on access rights in international and domestic environmental law.

Principle 10 of the Rio Declaration

Access rights in international environmental law are defined in Principle 10 of the Rio Declaration on Environment and Development.[2] Adopted in 1992, this soft law instrument states that:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information

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[1] Surabhi Chopra, *The Constitution of the Philippines and Transformative Constitutionalism*, 10 GLOB. CON. 307 (2021), https://doi.org/10.1017/S2045381721000174.

[2] UN Environment Programme, *UNEP - Principle 10 and the Bali Guideline*, https://www.unep.org/civil-society-engagement/partnerships/principle-10.

> concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

From this Principle, the three fundamental access rights are laid out: access to information, access to public participation, and access to justice. These rights are deemed important in promoting "transparent, inclusive and accountable environmental governance."

Although Principle 10 was promulgated five years after the adoption of the 1987 Constitution, the Philippine Constitution had already provided for these procedural rights.

The 1987 Constitution and Access Rights

Article II of the 1987 Constitution was significantly expanded from the previous iterations in the 1935 and 1973 Constitutions. In contrast to earlier charters, the 1987 Constitution more firmly embedded access rights within the constitutional framework.

From a single mention of the right to information under Article III in the 1973 Constitution and none at all in the 1935 Constitution, the right of the people to information and its vital role in nation-building were reiterated under Section 7 of Article III and Section 24 of Article II.

Likewise, the people's right to organize and to form unions, associations, or societies, which was heavily controlled during the martial law period, is recognized under Section 23 of Article II and Section 8 of Article III of the 1987 Constitution.

Most significant is the new provision on the right of the people to a balanced and healthful ecology under Article II, Section 16. As stated by the Court in *Oposa v. Factoran*,[3] the right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. Coupled with the Bill of Rights, this provision has empowered and continues to empower the right of access of people to environmental justice. In 2010, the Rules of Procedure for Environmental Cases[4] was promulgated by the Supreme Court in order "to protect and advance the constitutional right of the people to a balanced and healthful ecology."

Importance of Access Rights to Environmental Governance

The importance of these access rights for environmental governance cannot be understated. In her article "*Objectives of Public Participation in International Environmental Decision-Making*"[5] (2023), Sharman notes the multi-functional purpose of public participation and indicates that observance of these rights fulfills substantive, instrumental, and normative objectives.

Through its substantive objective, proponents have noted that public participation improves the quality of decision-making through the integration of additional knowledge and perspectives in deliberation. Environmental interests, which would otherwise be neglected, could be addressed.

The instrumental objective is achieved by obtaining stakeholder buy-in through public participation. Through the exercise of these access rights, public trust in institutions is sustained, and a sense of stakeholder ownership over environmental policies is fostered.

Lastly, the normative objective states that public participation fulfills fundamental democratic rights or principles based on notions of fairness and justice. Citizen empowerment is considered an ideological end in itself regardless of outcome.

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[3] *Oposa v. Factoran*, G.R. No.101083, 224 SCRA 792 (1993).
[4] RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC, https://sc.judiciary.gov.ph/wp-content/uploads/2023/05/A.m.No_.09-6-8-SC_Rules_of_Procedure_for_Envi_Cases.pdf.
[5] Nicola Sharman, *Objectives of Public Participation in International Environmental Decision-Making*, 72 ICLQ 333 (2023), https://doi.org/10.1017/S0020589323000088.

The Access Rights Post-EDSA

The environmental laws passed after the People Power Revolution reflected the reforms aspired to in the 1987 Constitution. Laws such as the *Philippine Clean Air Act of 1999,*[6] the *Ecological Solid Waste Management Act of 2000,*[7] and the *Indigenous Peoples' Rights Act of 1997*[8] provided for provisions on access to justice. The *Procedural Manual for the Philippine Environmental Impact Statement System,*[9] a Marcos-era Presidential Decree, includes the participation of the public in the process of undertaking environmental impact assessments. Not least of all, the Constitution granted the Supreme Court rule-making powers, allowing the Court to promulgate the Rules of Procedure on Environmental Cases. It is clear that access rights are heavily considered in domestic environmental governance.

In the international sphere, the Philippines, through government and civil society representatives, plays an active part in several multilateral environmental negotiations. The recently passed *ASEAN Declaration on the Right to a Safe, Clean, Healthy and Sustainable Environment*[10] "promotes and fosters access to information, meaningful public participation and access to justice, in the implementation of the right to a safe, clean, healthy and sustainable environment, including for people in vulnerable situations." Other significant instruments on

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[6] An Act Providing for a Comprehensive Air Pollution Control Policy and for Other Purposes, Rep. Act No. 8749 (1999) (Phil.), https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/6028.

[7] An Act Providing for an Ecological Solid Waste Management Program, Creating the Necessary Institutional Mechanisms and Incentives, Declaring Certain Acts Prohibited and Providing Penalties, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 9003 (Jan. 26, 2001) (Phil.), available at: https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/4800.

[8] An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, Republic Act No. 8371 (Oct. 29, 1997) (Phil.), https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/2562.

[9] Environmental Management Bureau – Department of Environment and Natural Resources, Revised Procedural Manual for DENR Administrative Order No. 30 Series of 2003 (DAO 03-30), (Aug. 2007) (Phil.), https://eia.emb.gov.ph/wp-content/uploads/2016/06/Revised-Procedural-Manual-DAO-03-30.pdf.

[10] Association of Southeast Asian Nations, *ASEAN Declaration on the Right to a Safe, Clean, Healthy and Sustainable Environment*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, 28 October 2025, https://asean.org/asean-declaration-on-the-right-to-a-safe-clean-healthy-and-sustainable-environment/.

access rights include the *Aarhus Convention* (1998) and the *Escazú Agreement* (2018). Though the Philippines is not a party to these, the legal instruments have been influential in shaping regional and domestic policies.

Forty Years On

25 February 2026 marks forty years since EDSA. Much has changed in environmental governance, with access to information, access to public participation, and access to justice now firmly embedded in law. Yet the deeper struggle remains the same: access rights are meaningful only if those who exercise them are safe. The Philippines has recently been declared the worst in Asia[11] for killings of environmental human rights defenders. Practices such as red-tagging, harassment of community leaders, and attacks against journalists further shrink civic space and undermine meaningful participation. At the same time, new avenues are being explored to attain environmental justice. Climate litigation is reshaping courts into arenas of democratic accountability, offering communities another path to demand transparency and state responsibility. Four decades after People Power, the enduring lesson is clear: environmental democracy depends not only on rights written on paper, but on ensuring the safe and peaceful observance of these rights.

[11] Human Rights Watch, *Philippines: Worst in Asia for Killings of Environmental Defenders*, 12 September 2024, https://www.hrw.org/news/2024/09/12/philippines-worst-asia-killings-environmental-defenders.

CONSIDERING 'PEOPLE POWER' THROUGH THE IDEA OF REVOLUTIONS UNDER INTERNATIONAL LAW

Ruby Rosselle L. Tugade*

In *David v. Macapagal-Arroyo*[1], the Philippine Supreme Court referenced an oft-quoted phrase usually invoked in debates on defining terrorism: "One country's terrorist is another country's freedom fighter." What follows is an inventory of contexts- and individuals who have been dubbed by state authorities as terrorists, when they have been remembered more widely as revolutionaries or freedom fighters. The list includes Nelson Mandela, who was incarcerated for his anti-apartheid activism before becoming the first democratically elected president of South Africa. Today, Mandela's imprint on international law is undeniable; the "soft law" instrument known as the Nelson Mandela Rules[2] prescribe the minimum standards for the treatment of persons deprived of liberty.

The Philippines' democratic politics in the last forty years have been framed by the political legacy of EDSA or the People Power Revolution of 1986. Whichever nomenclature is used, the word 'revolution' appears as a description of what transpired when the brutal regime of Ferdinand Marcos Sr. was toppled by popular action. The mode of regime change that happened in the People Power Revolution is always described as "peaceful" or "non-aggressive"[3] as it did not involve armed hostilities.

"Revolution" is a word that we find in the realm of politics and a term undefined by law. Academic studies of revolutions are mainly found in political

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[1] *David v. Arroyo*, G.R. No. 171396, 3 May 2006 (Phil.), available at: https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/41473.

[2] UNGA Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 17 December 2015, available at: https://www.un.org/en/events/mandeladay/mandela_rules.shtml.

[3] Fernando Gonzaga, "People Power as Immanent Collectivity: Re-Imagining the Miracle of the 1986 EDSA Revolution as Divine Justice", *Kritika Kultura*, Vol. 12, No. 12, 2009, available at: https://doi.org/10.13185/1656-152x.1055.

science[4] and have been a central preoccupation of political theory, from Karl Marx to Hannah Arendt.[5] This lack of a definition inheres in the concept of revolutions itself: revolutions signal change and reconstitution of the social and political order. In these moments of rupture, law itself is in the process of profound transformation. A product of this re-constitutive action is the 1987 Constitution, ratified after the People Power Revolution. Yet despite the lack of a legal definition of revolutions, it is a significant concept that intersects with more recognizable ideas and doctrines of international law.

The "legal notion of recognition"[6] is one such concept. Newly declared states, especially those that fought against regimes of occupation or colonization, have sought recognition as a way to become subjects of international law formally. Historically, revolutions or wars were seen as ineffective ways of conferring titles to such entities without the imprimatur of the former colonial power. People Power was not such an instance. Instead, the Supreme Court itself characterizes it as an "extra constitutional"[7] overthrow of a government. The court concedes the extraordinary circumstances of 1986, and on those parameters, ascribed it the nomenclature of a revolution.

From the scholarly tradition of critical approaches to international law, conceived broadly, political and legal categories must be examined in terms of how they intersect with history and politics. In the work *Revolutions in International Law*,[8] various scholars contend with the far-reaching implications of two events in 1917: the Bolshevik Revolution and the adoption of the revolutionary constitution in Mexico. They likewise take these revolutionary moments as

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[4] Raymond Tanter and Manus Midlarsky, "A Theory of Revolution", *Journal of Conflict Resolution*, Vol. 11, 1967, p. 264, available at: https://backend.production.deepblue-documents.lib.umich.edu/server/api/core/bitstreams/f8567776-b67a-4331-98b2-22eb12789b8f/content.

[5] Kathleen B. Jones, "On Revolution", *Amor Mundi*, 8 July 2013, available at: https://hac.bard.edu/amor-mundi/on-revolution-2013-07-08.

[6] Jochen A. Frowein, "Recognition", in *Max Planck Encyclopedia of Public International Law*, December 2010, available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1086.

[7] *Estrada v. Desierto*, G.R. No. 146710-15, 2 March 2001 (Phil.), available at: https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/50524.

[8] Kathryn Greenman et al. (eds), *Revolutions in International Law: The Legacies of 1917*, Cambridge University Press, Cambridge, 2021, available at: https://www.cambridge.org/core/books/revolutions-in-international-law/34C7110EDAFB049BD5E9D0F11A47BB29.

instances of profound, radical change. While international law does not regulate the term "revolutions," these scholars scrutinize the implicit ways in which international law establishes "authorized" ways of enacting radical change. In this vein, membership in the international community must comply with "acceptable parameters," to the exclusion of other forms of revolutionary struggle. The "unfinished" project of decolonization and enduring struggles against the lingering effects of colonial rule are complicated by this idea. Relatedly, the content of the right to self-determination becomes a zone for negotiating the idea of such acceptable parameters for profound social change. The right to self-determination—a legal articulation of a powerful idea tied to human freedom—becomes subject to forces that narrow its scope.

When analyzed against the matrix of "acceptable parameters," People Power could visibly fit the allowable modes of regime change. People Power is remembered as a peaceful event, with a civilian government installed shortly after. However, People Power itself did not occur out of a vacuum. The Philippines experienced years of brutal dictatorship, prompting political struggle through various means, including armed revolutionary action. Under conditions of political oppression, peaceful regime change becomes increasingly challenging to pursue.

In our contemporary landscape, some of these forms of struggle have been legally foreclosed and instead dangerously labelled as acts of terrorism or wanton violence. And while the current regime of counterterrorism has mostly passed the scrutiny of the Supreme Court—even partially through reasoning based on international law—foundational questions remain on how we view acts that aspire to fundamental social change.

THE GOOD, THE BAD, THE UGLY: MYTHS AND REALITIES OF PHILIPPINE TRADE AND ECONOMY DURING THE MARCOS REGIME

Samantha Tirthdas van der Kleij[*]

The past few election cycles in the Philippines have seen a resurgence in popularity of rhetoric hailing the regime of Ferdinand Marcos Sr. as the "golden years of the Philippine economy." While this exaltation of the Marcos Sr economic legacy is perhaps most apparent on social media platforms in a torrent of disinformation,[1] there are also economists (albeit in the minority) who still hold a generally positive view of the regime's economic legacy, including in terms of its trade reforms (for example, see generally the work of economist and Marcos-era technocrat Gerardo P. Sicat, 2011).[2]

Supporters of this view often point to the GDP growth during specific years of the regime. The 'best economic performance' years of the regime were from 1973 to 1981, during which debt-driven spending led to an average of 3.48% growth in GDP per capita.[3] The reality, though, was that even though this was already the best economic growth during the Marcos era, it was still lagging behind our Southeast Asian neighbours, and this peak was followed by a period of economic collapse from 1982 to 1985.[4]

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[1] Max Walden, "The Marcos Makeover: How History Was Rewritten to Place a Dictator's Son on the Cusp of Power", *ABC News*, 5 May 2022, available at: https://www.abc.net.au/news/2022-05-05/bongbong-marcos-philippines-election-social-media/101035620.

[2] Gerardo P. Sicat, *The Economic Legacy of Marcos*, UPSE Discussion Paper No. 2011-11, University of the Philippines School of Economics, Quezon City, 2011, available at: https://www.econstor.eu/bitstream/10419/93568/1/672723204.pdf.

[3] Ma. Cielo Amor C. Griño and Lemuel D. Teh, *Evaluating the Economic Costs of Martial Law in the Philippines: A Synthetic Control Method Approach*, September 2024, available at: https://www.researchgate.net/publication/384452805_Evaluating_the_economics_costs_of_martial_law_in_the_Philippines_A_synthetic_control_method_approach.

[4] Emmanuel S. de Dios, Maria Socorro Gochoco-Bautista and Jan Carlo Punongbayan, *Martial Law and the Philippine Economy*, UPSE Discussion Paper No. 2021-07, University of the Philippines School of Economics, Quezon City, November 2021, available at: https://pre.econ.upd.edu.ph/upsedp/index.php/dp/article/view/1543/1027.

The regime of Marcos Sr. coincided with several years during the period in which international trade law principles were just beginning to emerge and crystallise. While the theory of international trade and commercial policy had long been a branch of economic thought, international trade law as a field of law was quite new at the time. It was not until 1 January 1995 that the World Trade Organization was founded,[5] but some of the agreements on which its rules and principles are based were formed a bit earlier; the 1947 General Agreement on Tariffs and Trade (GATT) entered into force on 1 January 1948 and was updated in the 1994 GATT[6] (this was annexed to the Marrakesh Agreement,[7] which created the WTO). While advocates of the Marcos Sr. regime claim the success of its implementation of tariff rationalisation and trade liberalization (which were, at least in theory, in line with emerging international trade law principles), in the end, it failed to achieve its policy objectives and failed to make substantive progress on the Philippines' tariff regime.

Trade and industrial policy in the early years

During his first term as elected president, Marcos Sr. maintained a largely protectionist trade policy, as with the previous administration. The president reintroduced import controls on several manufactured goods that were also domestically manufactured, showing that during his first term, trade reform was not on the president's agenda—this was largely as a result of pushback from the domestic manufacturing sectors that would be most affected by the decontrol of imports.[8]

The trade and industrial policies adopted by the previous administration in the 1950s and the policies that followed during the first term of Marcos Sr. in the 1960s both created an incentive system that encouraged the growth of capital-intensive industries rather than labour-intensive manufacturing that would have

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[5] "Fiftieth Anniversary of the Multilateral", available at: https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm#:~:text=There%20was%20no%20commitment%2C%20however,1948%2C%20GATT%20entered%20into%20force.

[6] *Ibid.*

[7] Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 3, 15 April 1994 (entered into force 1 January 1995), available at: https://www.wto.org/english/docs_e/legal_e/marag_e.htm.

[8] E. C. Lallana, "The Political Economy of Philippine Tariff Reform", Philippine Political Science Journal, Vol. 18, No. 1-2, 1994, available at: https://doi.org/10.1163/2165025X-01801002002.

better utilised the Philippines' labour surplus. During the 1950s "import control period," it was due to the conferment of private benefits on the importation of machinery and equipment; while during the 1960s "import decontrol period," the low tariff rates on imported capital equipment had the same effect.[9] This was coupled with an unrealistically low interest policy on industrial loans, which effectively discriminated against industrial labour use.[10]

Also, during the 1960s, the president pursued a highly expansionary monetary and fiscal policy motivated by a large increase in debt-driven government spending, which resulted in large deficits on the trade balance, the current account, and a fall in foreign exchange reserves, which put pressure on the peso exchange rate.[11]

The battle of the technocrats and the nationalist business elite

The 1970s saw an increased pursuit of trade liberalization championed by Marcos' technocrats, led by Cesar E. A. Virata (some of whom had undergone training with the World Bank and the International Monetary Fund). During the pre-martial law years, nationalist politico-business elites in Congress and the Marcos technocrats butted heads over the passing of the 1967 Investment Incentives Act.[12] The nationalist business elites in Congress insisted on more protections for their industries, and this prevented the Virata-led Marcos technocrats from pursuing the General Agreement on Tariffs and Trade (GATT) during its Kennedy Round.[13] In the pre-martial law period, despite general support from Marcos Sr., the technocrat-dominated Program Implementation Agency

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[9] Romeo M. Bautista et al., Industrial Promotion Policies in the Philippines, Philippine Institute for Development Studies, Makati, 1979, available at: https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsbk79-indprmtn.pdf.

[10] *Ibid.*

[11] E. S. de Dios, M. S. Gochoco-Bautista and J. C. Punongbayan, above note 4, p. 70.

[12] *Republic Act No. 5186: An Act Prescribing Incentives and Guarantees to Investments in the Philippines, Creating a Board of Investments, Appropriating the Necessary Funds Therefor and for Other Purposes*, 16 September 1967 (Phil.), available at: https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/19296#:~:text=H.,3913%20%28April%2021%2C%201969%29.

[13] Teresa S. Encarnacion Tadem, "Philippine Technocracy and the Politics of Economic Decision-Making: A Comparison of the Martial Law and Post-Martial Law Periods", *Southeast Asian Studies*, Vol. 3, No. 2, August 2014, available at: https://www.jstage.jst.go.jp/article/seas/3/2/3_KJ00009345779/_pdf/-char/ja.

(PIA) had to contend with the nationalist politico-business elite and the traditionally nationalistic National Economic Council (NEC).[14]

Following the declaration of martial law in 1972 and the subsequent abolition of Congress in 1973, the Marcos technocrats no longer had to bother with consent-building and negotiations in Congress. While Virata himself did not deem martial law necessary, he nonetheless believed that martial law was advantageous for not subjecting their technocratic economic policies to debates in Congress.[15] Though on its face Marcos and his technocrats may have appeared to achieve victory over the oligarchy of the nationalist business elite, the reality was that the authoritarian regime merely replaced it with a new oligarchy of Marcos and his cronies who came to dominate many of our economic sectors.[16]

The failed promise of the Marcos export-oriented industrialisation policy

On its face, it seemed that Marcos Sr. had adopted the export-oriented industrialisation policy advocated for by his technocrats. This new export-oriented strategy brought with it the promise of opening global markets to Philippine trade and of weakening the power of land-based elites that stood in the way of the modernization of the Philippine economy; however, this promise failed to materialise.[17]

Pre-martial law, we saw the passing of the 1967 Investments Incentives Act,[18] which created the Board of Investments (BOI) and promoted instruments of industrial planning through fiscal incentives like a tax credit on import taxes that would enable exporters to acquire imported inputs at global prices, a tax credit that provided a modest subsidy for the use of local materials, and tax deductions

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[14] *Ibid.*

[15] *Ibid.*

[16] Emmanuel S. de Dios and Paul D. Hutchcroft, "Political Economy", in Arsenio M. Balisacan and Hal Hill (eds), *The Philippine Economy: Development, Policies, and Challenges*, Oxford University Press, New York, 2003, available at: https://doi.org/10.1093/0195158989.001.0001.

[17] Walden Bello, "The Political Economy of Martial Law Revisited (Part I)", *The GUIDON*, 23 August 2023, available at: https://theguidon.com/2023/08/the-political-economy-of-martial-law-revisited-i/.

[18] *Republic Act No. 5186*, above note 12, p. 72.

for export-related marketing and shipping expenses.[19] Also, pre-martial law, the legislature passed the 1970 Export Incentives Act[20] that provided fiscal incentives to operators in new industries,[21] including subsidies through tax deductions based on the amount of use of direct domestic labour and local raw materials.

After he declared martial law, President Marcos Sr. promulgated Presidential Decree (P.D.) 34[22] which created a tariff code that was supposed to be a rationalization of the tariff structure, reducing many columns to only 6 rates ranging from 10% to 100%. It very well could have been, and indeed it was being presented as, a step towards tariff reform (with the highest tariff rates above 100% removed and in some instances going as low as 0%). There was, on the other hand, a much less publicized conscious realignment of tariff rates with the Central Bank commodity classification for controlling imports to make protective instruments more consistent.[23] The president also decreed P.D. 66[24] which created the Export Processing Zone Authority for the purpose of establishing the Bataan Export Processing Zone and other similar export processing zones.

However, despite these highly visible efforts towards supposed tariff rationalisation and trade liberalization, in the end, it failed to achieve its policy objectives. The tariff rationalization program did not actually change the basic protective structure of the Philippine tariff system. The results of tariff-based

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[19] Florian Alburo and Geoffrey Shepherd, *Trade Liberalization Experience in the Philippines, 1960-84*, Report, The Institute of Development Studies and Partner Organisations, 1985, available at: https://hdl.handle.net/20.500.12413/3635.
[20] Republic Act No. 6135: An Act to Invigorate the Country's Export Trade as a Means of Accelerating Economic Growth by Granting Certain Incentives and Exemptions to Registered Export Producers, Export Traders, and Service Exporters, Repealing Export Incentives Granted under Republic Act Numbered Fifty-One Hundred Eighty-Six, and for Other Purposes, 31 August 1970 (Phil.), available at: https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/2/6494#:~:text=themselves%2C%20constitute%20processing.-,SEC.,profitability%20to%20the%20national%20economy.
[21] E. S. de Dios, M. S. Gochoco-Bautista and J. C. Punongbayan, above note 4, p. 70.
[22] Presidential Decree No. 34, *Amending the Tariff and Customs Code of the Philippines*, 27 October 1972 (Phil.), available at: https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/26/25716.
[23] F. Alburo and G. Shepherd, above note 19, p. [Y].
[24] Presidential Decree No. 66, Creating the Export Processing Zone Authority and Revising Republic Act No. 5490, 20 November 1972 (Phil.), available at: https://lawphil.net/statutes/presdecs/pd1972/pd_66_1972.html.

effective protection studies show that from 1965 to 1974, there was no significant difference in the high effective protection levels of consumption goods.[25]

Besides, between 1974 and 1980, many of the ad hoc tariff exemptions were reintroduced anyway, and as a result, the ratio of duty exemptions to actual duties paid on all imports rose from 9% in 1973 to at least 22% from 1976 to 1980.[26] Despite the highly publicized desire to create robust export-oriented industries, domestic industries that were significant exporters were penalised relative to their foreign competitors, as indicated by their negative effective protection rates (ERPs), and domestic industries that did not export to any significant extent were heavily protected and had the highest ERPs.[27]

Additionally, the protectionist effects were only further bolstered by more restrictive non-tariff barriers.[28] Although tariffs were being lowered, new non-tariff import restrictions (many administered by the Central Bank) were introduced, and as such, the protectionist bent of policy was preserved by import regulations that offset the effects of tariff rationalisation.[29]

Despite claims by Marcos Sr. and his technocrats of dismantling the oligarchy of the nationalist business elite, any gains in manufactured exports did little but create another revenue stream for favoured family conglomerates to pursue.[30] Likewise, the championed non-traditional exports were not only dominated by family conglomerate cronies, but they were also so highly import-dependent that their existence did not create a clear new constituency demanding an end to the longstanding overvaluation of the peso.[31]

Although by 1980 the support initiatives from the World Bank and the International Monetary Fund (IMF) attempted to address both tariffs (tariff rationalisation) and import restrictions (trade liberalisation), any modest success

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[25] Erlinda M. Medalla et al., Catching Up with Asia's Tigers, Vol. 2, Philippine Institute for Development Studies, Makati, 1996, available at: https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsbk96-catching2.pdf.
[26] F. Alburo and G. Shepherd, above note 19, p. 73.
[27] R. Bautista et al., above note 9, p. 71.
[28] E. C. Lallana, above note 8, p 71.
[29] E. S. de Dios, M. S. Gochoco-Bautista and J. C. Punongbayan, above note 4, p. 70.
[30] E. de Dios and P. Hutchcroft, above note 16, p. 73.
[31] *Ibid.*

from these was short-lived since by 1982, the surfacing of the debt crisis resulted in increased balance of payments difficulties that made the re-imposition of many import controls necessary.[32] The foreign loans that fuelled the debt-driven growth of the 1970s and were abused by Marcos Sr and his cronies had now come to roost, bringing with them the economic disaster of the early 1980s.[33]

The economic and trade ripples that followed the Marcos era

Any attempts (even those made in earnest) at promoting the 'export-oriented industrialisation strategy' were instead frustrated by Marcos Sr.'s consistent pursuit of crony capitalism.[34]

For all of the adulation by the supporters of President Marcos Sr. of his trade liberalisation policies, it was only during the term of President Cory Aquino (who ousted Marcos through the EDSA revolution) that efforts toward trade liberalisation were carried out in earnest.[35] Despite this, the economic scars left by Marcos Sr.'s regime continued to be one of the hurdles to realising the promises of economic progress through international trade.

Rather than meaningful reform, the real economic legacies of Marcos Sr. were the servicing of the debt he had accumulated for the Philippines and the institutionalisation of structural adjustment.[36] During the regime, the external debt of the Philippines had ballooned between 1962 and 1986 from 355 million USD to 28.3 billion USD.[37] Following the ousting of Marcos Sr., the new president, Corazon Aquino, was faced with mounting pressure from the World Bank, IMF, and foreign private creditors to commit itself to repaying the approximately 26 billion USD debt that the regime had accumulated—a debt that would take a substantial part (20–45%) of the annual government budget of succeeding administrations for nearly two decades thereafter.[38]

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[32] E. S. de Dios, M. S. Gochoco-Bautista and J. C. Punongbayan, above note 4, p. 70.
[33] E. de Dios and P. Hutchcroft, above note 16, p. 73.
[34] E. S. de Dios, M. S. Gochoco-Bautista and J. C. Punongbayan, above note 4, p. 70.
[35] *Ibid.*
[36] W. Bello, above note 17, p. 73.
[37] James K. Boyce, *The Political Economy of External Indebtedness: A Case Study on the Philippines,* Philippine Institute for Development Studies, available at: https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsms90-12.pdf.
[38] W. Bello, above note 17, p. 73.

The Marcos Sr. regime left the import-substituting industrial sector substantially decimated; production cuts in several industries were as high as 80%.[39] With a cumulative nominal outflow of 4 billion USD that is estimated to have fled from the Philippines from 1976 to 1986, capital flight through mechanisms such as false invoicing of exports and imports, "kickbacks" on import contracts, and interbank transfers, which circumvented capital controls limiting outflows of foreign exchange, also presented another set of problems.[40]

In sum, while indeed there were efforts towards export-oriented trade liberalisation during the regime of President Marcos Sr., these did little to actually achieve tariff rationalisation or trade liberalisation, and they likewise did not achieve the objectives of the "export-oriented industrialisation policy" advocated for by his technocrats. Instead, what the Marcos Sr. regime had left behind were economic scars whose effects continued to impact successive administrations for decades thereafter.

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[39] Robert S. Dohner and Ponciano Intal, Jr., "The Aquino Government and Prospects for the Economy", *in* Jeffrey D. Sachs and Susan M. Collins (eds), *Developing Country Debt and Economic Performance, Volume 3: Country Studies - Indonesia, Korea, Philippines, Turkey,* Vol. 3, University of Chicago Press, Chicago, IL, 1989, pp. 558–593, available at: http://www.nber.org/chapters/c9054.
[40] J.K. Boyce, above note 37, p. 76.

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