

Soldiers of Semipalatinsk: Seeking a Theory and Forum for Legal Remedy*

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I. INTRODUCTION

Nuclear testing performed by the former Soviet Union in the decades following World War II resulted in a host of global problems. The effects of testing and its international legal ramifications were revealed more completely after the dissolution of the Soviet Union in 1989.¹ In a

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1. This is due in large part to the efforts of journalists and international regulatory

unique political climate, as newly independent nations struggled with premier issues of governance and adjustment to sovereignty, the process of identifying damage from the fallout of nuclear testing began. Shortly thereafter, wide-scale toxic damage was found in many parts of the former Soviet Union,² transforming a Cold War defense issue into one of international environmental and humanitarian concern.

No one could appreciate the scope and magnitude of damage in the first years following the formation of the Commonwealth of Independent States. The international implications of environmental hazards created by Soviet nuclear waste remained buried due to Russian insistence that the new independent states handle nuclear waste and reactor safety domestically.³ This tendency to stifle problems of nuclear waste left the stories of a generation of “atomic soldiers”⁴ who had direct contact with nuclear materials untold. The ever-unfolding stories of their offspring, suffering from abnormally increased genetic mutation rates, physical deformation and disease, remained untold. The stories of an estimated 1.5 million Kazakhstan citizens, many of who were ordered to watch the nuclear testing from dangerously close locations, also remained untold.⁵

A host of legal scholarship addresses various issues stemming from toxic environmental damage created by the former Soviet Union.⁶ Legal analysts have paid scant attention, however, to the human dimension that

agencies. Russian officials still seem unwilling to acknowledge the extent and severity of the damage from nuclear testing and, in fact, have never released complete documentation of their nuclear program in terms of its environmental effects. For a thorough treatment of this issue by Western journalists, see Robert Elegant, *Fallout: In Kazakhstan, the Human Wreckage of Soviet Nuclear Tests*, NAT'L REV., Sept. 2, 2002, at 30 (discussing Russia's deliberate exposure of Kazakhstan civilians and soldiers to radiation that spanned decades); Steve Raymer, *Nuclear Pollution Plagues Former Soviet Union*, L.A. TIMES, Mar. 15, 1992, at A30.

2. For a detailed description of toxic damage found in the former republics of the Soviet Union, see *CIA World Factbook*, at <http://www.cia.gov/cia/publications/factbook/geos.html> (last visited Jan. 3, 2003).

3. Robert K. Temple, *Regulation of Nuclear Waste and Reactor Safety Within the Commonwealth of Independent States: Toward a Workable Model*, 69 CHI.-KENT L. REV. 1071, 1073 (1994).

4. Elegant, *supra* note 1, at 30.

5. *Id.* See generally Sue Lloyd-Roberts, *Nuclear Nightmare Revealed: Babies Born With Deformities are Often Abandoned*, BBC News, July 29, 2000, at <http://news.bbc.co.uk/2/hi/europe/295161.stm> (on file with author) (discussing some of these stories).

6. See generally Linda A. Malone, *Discussion in the Security Council on Environmental Intervention in Ukraine*, 27 LOY. L.A. L. REV. 893 (1994) (discussing the Chernobyl tragedy in a legal context); Temple, *supra* note 3, at 1071; Jon L. Woodward, *Rivers in Peril: An Examination of International Law and Land-based Nuclear Pollution in the Former Soviet Union*, 11 GEO. INT'L ENVTL. L. REV. 741 (1999); Katherine M. Harman-Stokes, note, *Community Right-To-Know in the Newly Independent States of the Former Soviet Union: Ending the Culture of Secrecy Surrounding the Environmental Crisis*, 15 VA. ENVTL. L.J. 77 (1995).

inevitably exists when environmental damage occurs. Kazakhstan is just one of the many states now home to both environmental disaster and personal injury caused by Soviet nuclear testing from 1949 to 1989.⁷ A subset of the Kazakhstan population has been afflicted with a wide range of diseases and malformation due to nuclear testing and its residue.⁸

This comment will address the unique dilemma of individuals in Kazakhstan whose health has been compromised by the former Soviet Union's 40-year period of nuclear testing on what is now Kazakhstan soil. The principal legal analysis of this comment will focus on the availability of remedies (in the form of monetary damages available through legal resolution) to the citizens and/or state of Kazakhstan, and potential judicial forums in which to seek those remedies.

Particular attention will be paid to the comparative likelihood of successful remedial legal action if pursued by a private class of Kazakhstan citizens versus action pursued by the state of Kazakhstan in its public capacity. This comment will propose that potential success in finding a satisfactory remedy hinges on the justice systems in which plaintiff characterization would require litigation to take place. Specifically, this comment will present four separate justice systems and then discuss their likely effect on an opportunity for a legal remedy for the citizens of Kazakhstan: the Russian Court System, the Kazakhstan judicial branch, the International Court of Justice [hereinafter ICJ], and the Federal Court System of the United States.

The international legal concept of imputability will provide important theoretical guidance for the comment's analysis. This concept underlies support for a cause of action in the Kazakhstan case—regardless of plaintiff characterization—in Russian, Kazakhstan or United States courts, as well as the ICJ.⁹ Any of these potential courts would be asked

7. Although the focus of this comment will be the personal injury suffered by members of the Kazakhstan population, other former republics have been left with wide-scale damage as well. Perhaps the most notorious incident occurred in the Ukraine, home to the Chernobyl disaster in the 1980s. See, e.g., Malone, *supra* note 6.

8. Journalistic accounts of the widespread public health crisis in Kazakhstan are numerous; see, e.g., Richard Black, *Atomic Tests Caused Genetic Damage*, online transmission courtesy of the BBC, Feb. 7, 2002.

9. See Article 41 of the International Court of Justice Statutory code, which details international law precepts on which the court's decisions must be based by charter of the United Nations. See also 28 USC § 1350 (2003) (Alien's Action for Tort), which states that United States district courts will have jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

to determine whether the situation in Kazakhstan constitutes an actionable offense. In addition to applicable domestic legal concepts, courts would have to consider documented instruments of international law calling for humanitarian treatment of citizens throughout the world by all other states, making the Law of Nations central to a determination in any potential legal action.¹⁰

Each nation is called upon to treat populations of other nations as it would treat its own. The Law of Nations elevates the status of certain fundamental human rights to absolute principles of *jus cogens*. It also remains flexible, embracing an organic body of international law. This flexibility is important for reasons of practical application in continuously evolving situations. Because Russia and Kazakhstan now exist as independent sovereign states, any injuries or harm brought upon the Kazakhstan population or a sub-group of that population must be conceptualized and articulated in terms of the rights which have been violated under the Law of Nations.¹¹

The sections of the comment will proceed as follows: first, the remaining sub-sections of the introduction will present a brief history of damage caused in Kazakhstan by Soviet nuclear testing. This will be followed by a discussion of how that damage has transcended the environmental context to become a public health crisis manifesting itself in multiple forms of personal injury to a portion of the Kazakhstan. Next will be a summary of the applicability of modern tort theories of liability, both intentional and non-intentional, to the facts of the case given the political background of Kazakhstan and its people. An introduction will be given to the range of legal forums potentially available to Kazakhstan and its citizens, including the Russian court

10. For example, Principle 21 of the Stockholm Declaration states that nations have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction." *Report of the U.N. Conference on the Human Environment*, U.N. Doc.A/CONF. 48/14/rev/1, U.N. Sales No. E.73.1.A.14 (1972) (Stockholm Declaration). This is one example of the rights protected under international law that could be the basis for a legal cause of action on Kazakhstan's behalf. For other enumerations of these recognized rights, see *International Covenant on Civil and Political Rights*, adopted on December 19, 1966, 999 U.N. T.S. 171 [hereinafter *ICCPR*]; and *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter *ICESCR*].

11. Regardless of forum or plaintiff characterization, claims applicable in the situation presented here will be derived from the list of human rights protected by a consensus of nations and documented as such under international legal instruments. Western legal theories of liability are relevant for purposes of general explanatory power; however, the individual torts which have emerged from the United States and Great Britain will not provide the framework under which the cause of action will be litigated or termed. International law provides this guiding structure. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 883-84 (2d Cir. 1980).

system, Kazakhstan judicial branch, International Court of Justice, and the United States federal courts.

Part II of this comment will analyze various legal paths and remedial goals, and how each depends upon a determination of the plaintiff characterization problem. The key question shall be whether citizens of Kazakhstan pursuing a class action suit in a domestic legal system¹² stand a better chance of success than the state of Kazakhstan seeking restitution and damages from Russia in an international legal forum.¹³ Integral to this analysis will be such factors as the modern interpretation by United States federal courts of their jurisdiction over alien plaintiffs. The effect of the dissolution of the Soviet Union on the ability of Kazakhstan to support a public cause of action given the changes in sovereignty, nationality and geography that have taken place in its wake will be discussed. And pre-existing statutory attempts by the Russian government to compensate the people living in the Semipalatinsk area of Kazakhstan shall be detailed in brief.

Part III of this comment will focus on analysis of legal remedies available to the Kazakhstan population by delving into the modern application of the United States Alien Torts Claims Act of 1789,¹⁴ and how this act is interpreted by United States District Courts today.¹⁵ Use of the Act to gain jurisdiction over claims resulting from the toxification of Semipalatinsk might mean that of the four legal forums potentially available to Kazakhstan, the United States is the best choice if the Kazakhstan population ever stands to reap the benefit of legal compensation.¹⁶ This section of the comment will briefly introduce a range of procedural obstacles that may present themselves if Kazakhstan chooses the United States federal courts as the preferred legal forum.

Finally, Part IV of the comment will summarize potential for legal recourse on behalf of the injured citizens of Kazakhstan. The concluding

12. A plaintiff characterized as a private individual or class of private individuals would necessarily preclude the jurisdiction of the International Court of Justice. See Statute of the International Court of Justice, art. 34, available at <http://www.icj-cij.org> (last visited Oct. 4, 2003).

13. A plaintiff characterized as a public sovereign has the reverse implications, in that the International Court of Justice would most likely become the only potential jurisdiction in which Kazakhstan could bring its case before a court, for reasons expanded upon later in this comment.

14. 28 U.S.C. § 1350.

15. See, e.g., *Filartiga v. Pena-Irala*, at 885–89.

16. See Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 549 (2000).

discussion will compare possibilities for legal redress in the United States depending on nationality of the atomic soldier. Individuals suffering in Kazakhstan may have a chance that American soldiers from the same era, exposed to the same toxins, do not.

A. Nuclear Waste in Kazakhstan

Kazakhstan gained independence from the Soviet Union in 1991. Landlocked and with a semi-arid climate, the Kazakhstan terrain is comprised of only 11.23% arable land, which can create fierce competition for water with its surrounding neighbors.¹⁷ It shares more than half of its border with Russia, which continues to lease desert land for military operations.¹⁸

The recent history of Kazakhstan is profoundly marred by the Cold War operations of the Soviet Union. Semipalatinsk was the locus of these operations.¹⁹ The USSR maintained a major nuclear testing facility at this 7,000 square mile site in Kazakhstan, which ended nuclear testing in 1989.²⁰ Some 500 nuclear explosions were performed between 1949 and 1989 in an area inhabited by hundreds of thousands of soldiers and civilians.²¹

In addition to nuclear explosions, this area of Kazakhstan was home to multiple nuclear waste landfills and other nuclear/industrial complex facilities. Radioactive fallout from the 100 above-ground explosions has been described by scientists as equal to over 100 times the damage as that caused by the Chernobyl disaster.²²

The effect of this nuclear waste on the environment of Kazakhstan has been well noted on the international level. The CIA briefing on Kazakhstan describes the environmental issues faced by Kazakhstan with regard to the nuclear fallout:

[R]adioactive or toxic chemical sites associated with its former defense industries and test ranges throughout the country pose health risks for humans and animals; industrial pollution is severe in some cities because the two main rivers which flowed into the Aral Sea have been diverted for irrigation—it is drying up and leaving a harmful layer of chemical pesticides and natural salts; these substances are then picked up by the wind and blown into noxious dust storms.²³

17. See CIA, *The World Factbook*, at <http://www.cia.gov/cia/publications/factbook/index.html> (last modified Aug. 1, 2003).

18. Kazakhstan is landlocked and bordered by five countries: China (1533 km), Kyrgyzstan (1051 km), Russia (6846 km), Turkmenistan (379 km), and Uzbekistan (2203 km). *Id.*

19. Elegant, *supra* note 1, at 30.

20. *Id.* at 30–31.

21. See *id.*; Black, *supra* note 8.

22. Elegant, *supra* note 1, at 30.

23. CIA, *supra* note 17.

Since gaining its independence, Kazakhstan has become party to multiple international environmental agreements, but none of these has specifically targeted the impact of nuclear waste.²⁴ On a domestic level, the Kazakhstan government has attempted to address the issue of environmental degradation through an action program of "rational management," calling for improvement of environmental conditions through legislation and development of techniques to treat waste and drainage.²⁵ However, none of these plans have been implemented due to an economy unable to support any expansion of governmental control.²⁶ And while the environment continues to languish, so do the people living in the area surrounding the Semipalatinsk test site.

There is one key difference, however, in treatment of the environment. For the past several years, the Kazakhstan government has worked with other members of the international community to formulate a radically new approach to the governmental responsibility of saving a decimated environment.²⁷ Yet it has taken no similar legislative action to institutionalize a new plan to save the lives and health of the afflicted sub-groups of its population.²⁸

On first glance, this might seem to be a reasonable limitation of the Kazakhstan government; the cost of such a legislative initiative would be quite high, requiring a large government set-aside.²⁹ Such budgetary

24. As of 2002, Kazakhstan belongs to the following international agreements focusing on the environment: Air Pollution, Biodiversity, Climate Change, Desertification, Endangered Species, Ozone Layer Protection, and Ship Pollution. In addition, Kazakhstan signed the Kyoto Protocol on Climate Change which has yet to be ratified. Those agreements resulting from initial U.N. intervention in the area during the period 1992–1994 concerned the management of nuclear sites and the storage of waste, but not the impact of either endeavor on the environment or population. See The CIA World Factbook available at <http://www.cia.gov/cia/publications/factbook/geos/kz.html>.

25. For a complete outline of the Kazakhstan proposed plan in draft form see Maria A. Zhunusova, *Environmental Information Systems in Kazakhstan (Draft)*, Ministry of Ecology and Bioresources of the Republic of Kazakhstan, at http://www.grida.no/enrin/htmls/kazahst/Kazakh_e.htm (last modified Sept. 18, 1996)(including a complete outline of the proposed plan in draft form).

26. Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT'L ECON. L. 863, 907–08 (2001); see also Zhunusova, *supra* note 25.

27. See Yuliya Mitrofanskaya & Daulet Bideldinov, *Modernizing Environmental Protection in Kazakhstan*, 12 GEO. INT'L. ENVTL. L. REV. 177, 178 (1999) (discussing Russia's deliberate exposure of Kazakhstan civilians and soldiers to radiation that spanned decades).

28. *Id.* at 192.

29. In the author's opinion, this will most likely be in the form of pinpoint taxation or special subsidies on business owners.

constraints can risk crippling a developing economy. Small business owners would need additional tax shelters, and personal taxation would need reconsideration—elements of any economic decision-making by a democratic government that are normally routine, but become difficult when the former economic system in place stifled such diversification. The situation for Kazakhstan is further complicated because the communist economy also snuffed out any productivity from the natural resources that do exist in the area.³⁰ Thus, many different industries are still in the process of reform and revitalization.

Despite all the factors weighing against nationwide pollution regulation reform, ample scholarship has suggested that the government of Kazakhstan is more than willing to make the financial sacrifices necessary to get its environment back on track:

The environmental situation in Kazakhstan is so critical that in some areas the government has confessed that it is unable to halt continuing environmental degradation. Therefore, despite the dominance of the notion that environmental protection hinders economic development in Kazakhstan, the Kazakhstan government is reforming legislation on environmental protection and taking necessary steps to prevent complete environmental collapse.³¹

Assuming that the Kazakhstan government truly cannot afford to nurture its environment and people back to health, the environment offers the promise of being a lasting investment in the nation's natural resources in a practical way that nurturing aging soldiers and their middle-aged offspring does not.³² This makes pursuit of remedies for personal injury all the more important as conceptualized under the law of nations, either within the international legal system or in the courts of a domestic jurisdiction. In addition to being possibly the best chance for compensation, legal recourse may be the single possible path to compensation for the state or its people if the environment continues to garner all of the attention and all of the money in Kazakhstan.³³

B. Effects of Nuclear Waste on Kazakhstan's Human Capital

It is estimated that roughly 5,000 Kazakhstan troops performed daily operations and maintenance at Semipalatinsk.³⁴ In September of 2002,

30. Mitrofanskaya, *supra* note 27, at 178.

31. *Id.*

32. Over the last decade, 160,000 international environmental refugees fled the area because of the radiation saturation and fear of becoming ill. See Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 2001 COLO. J. INT'L ENVTL. L. & POL'Y 1, 1 (2001).

33. *Id.* at 550.

34. Elegant, *supra* note 1 at 30.

forty were reported to still be alive.³⁵ All these former soldiers are dying of radiation sickness. Direct effects of the nuclear testing are not surprising when interviews of the surviving soldiers recount the events that comprised the performance of those tests:

Soldiers and junior officers equipped with no protective gear except goggles and rubber gloves, which were useless, otherwise wearing only shirts and trousers, were ordered to ground zero to read instruments an hour or two after an explosion . . . A mobile shower-truck, hardly a common amenity of the Red Army, allowed them to wash off contamination. They were then ordered to re[dress with] the clothes they had been wearing.³⁶

The testing harmed the soldiers most dramatically, but the approximately one million civilians living around the test site have suffered the fall-out as well.³⁷ Scientists are aware of this, and have spent years conducting their own tests on the families that remain. An abnormally high rate of genetic mutation has been found to exist in the DNA of those exposed to the radiation either during the testing or through its aftermath in the environment.³⁸

Scientific testing is not needed, however, to detect that there is something highly abnormal about the population surrounding Semipalatinsk. Observation reveals that physical injury afflicts substantially large numbers of these individuals and their offspring. Physical mutations range from girls with six toes on each foot, to grown adults a meter tall, to children experiencing unusually high rates of leukemia.³⁹ Many citizens living in the area surrounding Semipalatinsk are unable to reproduce; many have committed suicide or are grossly disfigured due to tumors.⁴⁰

C. Why International Aid Is Not the Answer for Kazakhstan

The lack of domestic sources of financial support in Kazakhstan is

35. *Id.*

36. *Id.* at 31.

37. *Id.* For a general discussion of the Kazakhstan citizen's situation as viewed in terms of refugee status, see United Nations High Commissioner for Refugees, *The State of the World's Refugees*, at <http://www.unhcr.ch> (last visited Feb. 21, 2003).

38. Researchers have found a rate of genetic mutation almost double the normal rate in the population surrounding the Semipalatinsk site; the four explosions conducted between 1949 and 1956 are believed to have done most of the damage. Black, *supra* note 8.

39. Lloyd-Roberts, *supra* note 5.

40. *Id.*

finally thrusting the effects of Soviet nuclear testing onto the international agenda.⁴¹ In addition to helping Kazakhstan make constitutional and legislative changes aimed at environmental protection,⁴² the United States has become fiscally involved in several ways; however, the great majority of funding continues to go towards environmental clean-up as dictated by agreements with Russia.⁴³

This comes as no surprise—to fund the health care of those injured by radioactive waste from Soviet testing would further shift the attention onto Russian financial responsibility and would constitute an important additional documentation of recognition that there is an epidemic.⁴⁴ And although the plight of a domestic minority may not garner international attention, liability for disease and injuries of epidemic proportions surely would⁴⁵—and finally has.

At an international conference in late 2002, Kazakhstan officials finally attempted to bring their people's plight to the forefront of global concern. They planned to ask for fiscal support from the international community to aid their citizens living in the Semipalatinsk region—

41. Zhunusova, *supra* note 25.

42. American lawyers have been critical in the drafting of Kazakhstan's new system of environmental laws. Their participation in the law-making process was viewed as essential to the creation of a new government, cognizant of both global and local importance of dealing with pollution. This influence can be seen in the text of Kazakhstan's Constitution, which explicitly preserves the right of the people to have a healthy environment in which to live. Interestingly, so does the 1993 Russian Constitution. See Mitrofanskaya, *supra* note 27, at 187, 194; Neil A.F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and The Environment*, 27 COLUM. HUM. RTS. L. REV. 487, 504 (1996).

43. The United States is Kazakhstan's major investor and trading partner since gaining independence. Mitrofanskaya, *supra* note 27, at 179; Almaty Ekspress-K, *Kazakh Radioactive Waste Under Strict Controls, Kazakh Paper Says*, GLOBAL NEWS WIRE—ASIA AFRICA INTELLIGENCE WIRE, BBC, July 11, 2002.

44. Russia has officially recognized the citizens of Kazakhstan living in the Semipalatinsk area as equal in status to those former Soviet citizens who lived and worked at Chernobyl. See *Amendments and Addenda No 3 to RF State Tax Service Instruction No. 29 of April 17, 1995, On Application of the RF Land Charges Act. Letter No 29-3 of the RF State Tax Service*, RUSSICA INFORMATION INC., RUSDATA DIALINE, June 7, 1996.

45. One author has described "low-onset 'epidemics' such as industrial diseases caused by . . . environmental pollution" as a new category of what the public and international community considers "disasters." Making these types of events even more noticeable by the public, the author asserts, is their tendency to have no distinct ending:

[T]he nuclear reactor disasters at Chernobyl and Three Mile Island have disturbed the certainty of that particular aspect of disaster. While they had a beginning, their end was less easy to identify: they were invisible and lacked geographical containment. No environmental disaster, such as an earthquake or flood, respects political boundaries, but chemical or nuclear damage can present a challenge of a different scale.

Celia Wells, Derek Morgan & Oliver Quick, *International Torts: A Comparative Study: Disasters: A Challenge for the Law*, 39 WASHBURN L.J. 496, 497 (2000).

those whom they have termed "victims of the Cold War."⁴⁶

The demonstrated willingness of members of the international community to help Kazakhstan provides some hope of future financial relief. However, there are several reasons to doubt that any forthcoming relief will be sufficient. First, attempts at gaining United Nations' support for any concerted relief effort may be futile if the problem is defined as a domestic matter of the former Soviet Union.⁴⁷ The United Nations has declined in the past to become involved in the Ukraine's disputes with Russia over the issue of nuclear waste after the Chernobyl disaster, opting instead to spearhead inquiries and conferences on the matter.⁴⁸ Ukrainian officials have complained repeatedly that United Nations agencies which have offered assistance as part of the on-going monitoring and advisory functions they perform for all member states have not offered enough.⁴⁹

Secondly, the United States already has made significant financial contributions to the nuclear waste clean-up effort in the former Soviet Union.⁵⁰ U.S. government officials may balk at pledging more money in a separate deal with Kazakhstan that implicates misdeeds of the former Soviet Union, particularly since the United States' relationship with Russia remains a significant part of current foreign policy goals and the

46. Lloyd-Roberts, *supra* note 5.

47. See Malone, *supra* note 6, at 898. The United Nations has limited its involvement in the region to guidance and technical assistance, via the International Atomic Energy Agency, and health monitoring and waste storage by the World Health Organization. Temple, *supra* note 3, at 1086-88.

48. For example, the United Nations organized the International Conference on Chernobyl in Vienna, Austria in April of 1996, aimed at gaining a better understanding of the scientific impact of the disaster. Also, the United Nations Women's Guild hosted injured children who survived the disaster in the United States in March of 1998 so that they could seek better medical care. Press releases describing both of these events are available at <http://www.un.org/ha/chernobyl/press.htm>.

49. Following the Chernobyl disaster, the International Atomic Energy Agency (IAEA) began to provide assistance which has been described in a statement by the Ukrainian Minister for Environmental Protection as evidence that the IAEA workers are "disinterested observers or they oppose attempts to heal the nuclear wound on the body of [the Ukraine]." Yuriy Kostenko, *Ten Tonnes of Radioactive Death*, reprinted in *Ukraine: Ukrainian Minister on Chernobyl Project; Criticizes IAEA*, BBC MONITORING SERVICE, Aug. 6, 1993.

50. For example, in the period between 1993 and 1994 the United States gave the Ukraine over \$300 million in economic assistance related to the management of former nuclear test sites; Kazakhstan received guarantees of over \$70 million and was promised an additional \$14.5 million once it signed the Nuclear Non-proliferation Treaty. Malone, *supra* note 6, at 899.

national security interest.⁵¹

Finally, the heightened global terrorist threat may impede relief in one of two ways. Kazakhstan is now feared to be a virtual playground for terrorists seeking to construct “dirty bombs” due to the high levels of exposed and unregulated nuclear waste in its country.⁵² As a result, any donated funds may be channeled directly to environmental cleanup and away from the public health crisis in order to thwart the ability of terrorists to gather resources from the Kazakhstan waste. Or, Kazakhstan may become an international pariah before any significant, targeted monetary relief can be given—especially if any explicit terrorist groups are ever linked with the country in such a way as to threaten Russian national security as terrorist groups have done in Chechnya.⁵³

With the promise of future international aid far from certain, and a subgroup of the general population afflicted with genetic mutations and disease requiring expensive medical care for many years (perhaps generations) to come, scholars have begun to contemplate other avenues of fiscal relief.⁵⁴ A plethora of personal injuries resulted from the direct toxic effects of nuclear testing and residual radiation damage to the environment.⁵⁵ There is a possibility for legal redress against Russia for its wrongful acts against soldiers and civilians. Because the activities of the Soviet Union were committed on its own soil and were not in violation of any international agreements at the time of the testing, legal scholarship seems to be in agreement that criminal sanctions would not be available or even proper.⁵⁶ At the time the nuclear testing took place, the associated activities of the Soviet government and military did not constitute “serious breaches of international peace.”⁵⁷

Although the nuclear testing did injure the environment and harm human life, the magnitude of damage in Kazakhstan was largely unknown to the international community at the time the testing occurred.⁵⁸ United States intelligence on the matter was gathered solely for the purposes of American national security—not to catalogue potential degradation to Soviet land and population. Thus, most attention on this issue has focused on proving the perpetration of environmental toxic torts by the former Soviet Union, and examining whether tort causes of action such

51. Raymer, *supra* note 1, at A30.

52. Almaty Ekspress-K, *supra* note 43.

53. *See id.*

54. *See generally* Harman-Stokes, *supra* note 6; *see also* Mitrofanskaya, *supra* note 27.

55. *See generally* Elegant, *supra* note 1.

56. Temple, *supra* note 3, at 1112, 1117–19.

57. *Id.*

58. This is primarily due to what has become the former Soviet Union’s well-known penchant for secrecy inside its borders.

as nuisance or negligence would be successful if litigated in either the Russian or Kazakhstan court systems.⁵⁹ Comparatively, there is a dearth of legal scholarship addressing the possibility, or likely success, of tort-based causes of action for the personal injury aspect of the Kazakhstan situation.⁶⁰

Key to the foregoing analyses are the players. Since the fall of the USSR in 1989, Russia has been legally recognized by international organizations in which it maintains membership as the successor to the Soviet Union.⁶¹ Russia was the natural choice to be the headquarters for the Commonwealth of Independent States. Russia likewise inherited the Soviet nuclear arsenal and, most importantly, all of the responsibilities and liabilities that go with it.⁶² International law in the abstract seems to be in agreement; the doctrine of imputability holds that a state is only responsible for actions which are imputable or attributable to it.⁶³ This includes acts done by its officials within their official capacity acting under state authority.⁶⁴ As successor to the Soviet Union, the acts of Soviet military officials during the Cold War become attributable to Russia.

Before the legal remedies available to the injured citizens of Kazakhstan can be identified and the plaintiff takes on a specific form, the potential causes of action under which to hold Russia and/or its representative government officials must be determined. The facts generally necessary to plead a legally recognizable cause of action based on a tort theory of liability depend on what type of tort is being alleged and the forum in which it is being alleged, as well as the characterization of the plaintiff.⁶⁵ Just as in criminal law and most domestic civil tort law systems, the difference turns on questions of causation, and whether intentional

59. Mitrofanskaya, *supra* note 27, at 183–84.

60. The bulk of published studies, opinion pieces, and articles on nuclear waste issues in Kazakhstan have appeared in newspapers, international news wire reports, and magazines. The existing majority of law review and legal journal scholarship have concentrated on ways to redevelop domestic institutional structure in Kazakhstan to avoid prolonged public health crises.

61. See CIA, *supra* note 17.

62. For an in-depth overview of this arsenal, see the National Threat Initiative web-site, available at http://www.nti.org/e_research/profiles/Russia/.

63. See *Youmans v. United Mexican States*, 4 R.I.A.A. 110 (1926).

64. *Id.*

65. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

conduct has to be (or can be) proven.⁶⁶

Negligence is defined by the Second Restatement of Torts as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm” (Restatement § 282).⁶⁷ The standard of conduct would have to be identifiable either within the domestic statutory law of Russia or Kazakhstan, or would have to be determined within the conscripts of international law in order to establish a negligence cause of action.⁶⁸ However, characterization of the plaintiffs may be the most important determination if a negligence theory of liability is pursued.

Several possibilities exist. Injured members of the population of Kazakhstan may be considered a class of private individuals who were Soviet citizens at the time of the negligent event. They also may be considered in terms of their current nationality, in which case they are Kazakhstan citizens and therefore aliens upon whom Russia perpetrated its previous negligent activities.⁶⁹ Prior case law concerning state treatment of aliens has not required a showing of fault on the part of the defendant state, primarily because it is too difficult to attribute a lack of proper care to a state actor. In the alternative the equivalent of a *res ipsa loquitur* instruction has been applied.⁷⁰

Finally, if Kazakhstan pursues remedies through legal action as a state actor, the standard of care will be determined by the International Court of Justice—the sole forum for disputes between two sovereigns—as informed by the text of applicable international treaties and law on the subject.⁷¹

No such standard of care need be determined if a cause of action is pursued under a theory of intentional tort liability. According to the Second Restatement of Torts, intent requires “that the actor desires to cause consequences of the act, or that he believes that the consequences of the act are substantially certain to result from it” (Restatement §

66. *Id.* sec. 8, at 35 KEETON (noting *Garrat v. Daily*, which contains a discussion on the issue of intent).

67. RESTATEMENT (SECOND) OF TORTS § 282 (published by the American Law Institute 1965); KEETON, *supra* note 65.

68. See RoseMary Reed, Comment, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL'Y J. 399, 409–10 (2002).

69. This classification would also have a significant impact on any statute of limitations that may apply and when they began to run.

70. See *The Fulda Case*, 10 R.I.A.A. 384 (1903).

71. See generally Statute of the International Court of Justice, art 41, available at http://www.icj-cij.org/icjwww/icasess/inzf/inzf_ijudgment/inzf_ijudgment_19741220.pdf (last visited Oct. 5, 2003); see also *Nuclear Tests (N.Z. v. Fr.)* 1973 I.C.J. 135 (Interim Protection Order of June 22), available at www.icj.org (noting that New Zealand's rights may have been violated, and that France did take steps to prevent harming New Zealand).

8A).⁷² Intentional torts have comprised an expanding doctrine of law in domestic legal jurisdictions, introducing certain strategic benefits to their plaintiffs in advanced tort systems such as that of the United States by allowing for reward of punitive damages and disallowing defenses of contributory conduct.⁷³

Intentional torts occur in those situations where the plaintiff has been personally injured intentionally by the defendant, and can take the domestic form of assault, battery, intentional infliction of emotional distress, or government liability.⁷⁴ In an international context, they constitute conduct that, if found to violate an internationally recognized right of all people, may be considered a breach of the law of nations.⁷⁵

Finally, there is the possibility of holding Russia strictly liable for conducting the “ultrahazardous” activity of nuclear testing within range of a civilian population. This theory of tort liability requires neither proof of intent to harm, nor any proof of breach of duty to uphold some minimal standard of care,⁷⁶ but does require an initial judicial determination that nuclear testing is an activity that qualifies as abnormally dangerous.⁷⁷

D. A Factual Basis for Kazakhstan's Pursuit of Legal Remedies

Anecdotal evidence gathered by reporters and health care workers interviewing afflicted individuals in the Semipalatinsk area of Kazakhstan reveal a factual basis sufficient to support any of these three broad categorizations of liability. Torts that occurred as the result of intentional

72. RESTATEMENT (SECOND) OF TORTS, *supra* note 67, § 8A; *see also* KEETON, *supra* note 65, sec. 8, at 34.

73. For an example of recent case law applying this principle, *see* Clark v. Cantrell, 529 S.E.2d 528 (S.C. 2000).

74. *See generally* KEETON, *supra* note 65.

75. *See, e.g., Universal Declaration of Human Rights*, G.A. Res 217A, U.N. GAOR, 3rd Sess., 183rd plen. mtg. at 71–77, U.N. Doc. A/810 (1948).

76. For an overview of the theory and application of the strict liability for abnormally dangerous activities, *see* Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341 (1996).

77. The Second Restatement of Torts § 520 sets forth a balancing test to determine whether an activity is abnormally dangerous:

- a) whether the activity involves a high degree of risk of some harm to someone;
- b) whether the gravity of the harm is likely to be great if it occurs;
- c) whether the risk cannot be eliminated by the exercise of reasonable care;
- d) whether the activity is not a matter of common usage;
- e) whether the activity is inappropriate to the place where it is carried on; and
- f) the value of the activity to the community.

conduct would be the most difficult to prove, but substantial circumstantial evidence exists that supports both interpretations of intent offered by the Restatement. As recently reported in an American news magazine, "[t]he Soviets thus deliberately exposed soldiers and civilians to unchecked radiation in part because the apparatchiks running the show could not be bothered with precautions, but primarily because they were curious as to the effects of prolonged exposure on human beings."⁷⁸

Kazakhstan doctors admit to being forced by Soviet officials to diagnose patients suffering from radiation sickness as being malnourished rather than poisoned by the nuclear testing.⁷⁹ This kind of evidence would potentially support a finding of willful and malicious intent on the part of the Soviet Union to injure the citizens of Kazakhstan and its own Soviet soldiers.

However, even absent a showing of malicious intent, there is additional proof that the Soviets had knowledge of potentially destructive effects of their testing operations. The most telling reports are from the remaining living atomic soldiers who have recounted that as troops were sent straight into the fallout from a blast only hours after it had occurred, top-level officers in the Soviet army would travel near the explosion site only in lead-reinforced tanks.⁸⁰

In order to support a negligence theory of liability, it would first be necessary to delineate a reasonable standard for conducting nuclear testing.⁸¹ Second, proof would be needed to show that the former Soviet Union had fallen below this standard while conducting nuclear testing. Although the Soviets chose a very barren, arid location for the bulk of its testing, they did not choose an unpopulated area. This fact may itself constitute initial evidence that a standard of care was breached.⁸² In addition, the testimony of surviving members of that population can detail how they were ordered as children by Soviet military officials to leave their classrooms and watch the nuclear detonations outside from the school yards. Survivor tales of these forced displays of patriotism are supplemented by the physical evidence of their children, who have been born with a variety of debilitating conditions, including paralysis and mental illness.⁸³

78. Elegant, *supra* note 1, at 31.

79. *Id.*

80. *Id.*

81. Guidance on this topic comes from previous International Court of Justice and United States case law; both courts suggest that a standard similar to the one used for negligence would apply. *See Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135 (Interim Protection Order of June 22); *see also Maas v. United States*, 94 F.3d 291 (7th Cir. 1996).

82. If the reviewing court allows the theory of the industry-set standard to apply, then evidence could be introduced as to the United States' choice of detonation locations, all of which were completely or sparsely unpopulated.

83. Lloyd-Roberts, *supra* note 5.

Western legal analysis and case law as applied to the facts emerging from the Semipalatinsk region seem to support the applicability of a strict liability theory to the actions of the former Soviet Union. Most poignantly, the rule enunciated in the famous English case of *Fletcher v. Rylands* states:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.⁸⁴

Combining such a rule of law with the application of strict liability to ultrahazardous activities would seem to implicate Russia, particularly the American case law of 1975 that explicitly transforms *Fletcher* into an environmental doctrine.⁸⁵

Precedent exists in the United States for expanding the category of ultrahazardous activity to blasts and explosives, but not specifically to nuclear testing.⁸⁶ In addition, no international legal precedent exists to support the idea that states who own, produce, acquire and/or use nuclear materials should be held accountable for any damage resulting from the handling of those materials, regardless of how the damage occurs. Absent the establishment of a normative preference for the application of strict liability theory in the international context, such developments are unlikely to occur in an *ad hoc* manner.⁸⁷

Having presented an initial factual basis for the pursuit of legal remedy by those suffering from personal injury in Kazakhstan, the remainder of this comment will focus on the forum in which potential legal remedy should be sought. Several key factors are expected to

84. *Fletcher v. Rylands*, L.R. 1 Ex. 265, 279 (1866).

85. *See* *Cities Serv. Co. v. State*, 312 So. 2d 799, 801 (Fla. Dist. Ct. App. 1975); *see also* *State Dept. of Env'tl. Prot. v. Ventron Corp.*, 468 A.2d 150, 157 (N.J. 1983).

86. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 195 (5th ed. 1998). Nuclear testing has only been conducted on a large scale in the United States by the government and its independent contractors, who now enjoy the same immunity that the government itself does from civil suits initiated by former members of the U.S. military and their families. For the most recent applications of this circumstance, *see* *Maas et al v. United States*, 94 F.3d 291 (7th Cir. 1996) and *United States et al v. Stanley*, 483 U.S. 669 (1987).

87. There is reason to believe that the theory of strict liability for ultrahazardous activities would segue perfectly with international law's regard for human rights. An enumerated right in international documents is treated as absolute, and violation of these rights by any sovereign in the global community is not tolerated. Conceptualizing human rights in this way should generally result in automatic fault for their violation. *See generally* ICCPR, *supra* note 10; ICESCR, *supra* note 10.

guide the analysis, such as the likelihood of a recognizable cause of action; limitations on damage awards; and the effects of, and implications for, what form the plaintiff would take. The following section will discuss more thoroughly the legal implications of pursuing these various tort causes of action either as a public entity or a private class of individuals in one of four identifiable jurisdictions: Kazakhstan, Russia, the International Court of Justice, and the United States. Initial conclusions will be offered after a more detailed discussion of the United States Alien Tort Claims Act, and how this historical statute may make the American Federal Courts the preferable jurisdiction for any Kazakhstan claims, drawing upon comparable legal experiences of U.S. servicemen exposed to Cold War nuclear testing.⁸⁸

II. ANALYSIS: THE POTENTIAL FOR LEGAL RECOURSE

The inability of private citizens and smaller countries to garner attention on an international scale, or to find adequate relief in the form of international aid, has led those victimized by environmental damage to chart their own course in jurisdictions around the world.⁸⁹ These plaintiffs have chosen various paths. Some have filed grievances with the International Court of Justice,⁹⁰ some have brought suit in their own states against their own governments,⁹¹ and some have brought suit in the United States against their state governments or fellow citizens, American industry and business members, or transnational corporations guilty of causing the damage.⁹²

88. As part IV of this comment will discuss, the availability of legal recourse to American soldiers seeking compensation for injury and disease related to radiation exposure during the 1950s and 1960s provides a procedural model for any alien attempting to recover in the federal courts for similar injury. As one author has noted, several statutes render the Government and its contractors immune from suit, which prevents American servicemen's ability to proceed with their claims. See Nancy Hogan, *Shielded from Liability*, 80 A.B.A.J. 56 (May 1994).

89. Phil Mercer, *Islanders Press Bush on Global Warming*, BBC News, at <http://news.bbc.co.uk/2/hi/1496591.stm> (Aug. 17, 2001). Recent scholarship points to the experience of Pacific Rim island nations and their inability to fight the rising sea levels due to Greenhouse gas emissions. Because these small island nations cannot afford financially to choose any independent option to save their settlements, there has been academic speculation as to the choices these states may have in order to pursue legal action against American corporations responsible for production of the emissions. See, e.g., J. Chris Larson, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT'L L. 495 (2000).

90. See, e.g., *Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135 (Interim Protection Order of June 22).

91. Mitrofanskaya, *supra* note 27, at 201-02.

92. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (alleging torture of Ethiopian prisoners); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir.1995) (alleging torture, rape, and other abuses orchestrated by Serbian military leader); *In re Estate of Ferdinand*

All these options have abstract pros and cons; however, the key point here is what each type of approach could offer the injured citizens of Kazakhstan. Two threshold issues must be determined because of their implications regarding the jurisdictional context to choose:

- (1) What are the available causes of action that can or should be pursued? and
- (2) Should the state of Kazakhstan, acting on behalf of its injured citizens, seek compensation, or should citizens themselves pursue the cause?

The preferred cause of action to pursue will depend upon the plaintiff determination and the jurisdiction in which the claim is brought.

The state of existent tort law in each of the four jurisdictions under contemplation varies widely, from the most advanced in the world to the most meager. The International Court of Justice looks to its Charter and the text of international agreements, treaties and U.N. documents on point to resolve questions of substantive law. Because it is an intergovernmental entity, there is no formal civil system incorporated into the ICJ's charter, and thus no formal tort law to consult.⁹³ States who seek redress for their grievances before the Court must fashion their complaints so they fit properly into the international legal context. For Kazakhstan, this would mean alleging some form of international human rights violations against Russia for Soviet treatment of the original atomic soldiers and ongoing degradation of the lives of subsequent generations.⁹⁴

The United States, although it possesses the most advanced and comprehensive tort system in the world, would also use international law sources if presiding over a case involving a foreign plaintiff.⁹⁵ The applicable federal statute allowing foreigners to sue in the U.S. court

Marcos, 25 F.3d 1467 (9th Cir. 1994) (alleging torture and other abuses by former President of Philippines); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (alleging claims against Libya based on armed attack upon civilian bus in Israel); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (alleging torture by Paraguayan officials); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (alleging abuses by Guatemalan military forces).

93. See Statute of the International Court of Justice, June 26, 1945, art. 38, at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>.

94. Because the International Court of Justice looks to treaties and covenants for guidance, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights would provide guidance.

95. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (1980).

system is the Alien Tort Claims Act.⁹⁶ This act mandates, as a necessary element of filing suit, that the foreign Plaintiff suffered a violation of the laws of nations.⁹⁷ Therefore, Federal Courts hearing claims brought under the Alien Tort Claims Act must look beyond the domestic laws of those party to the suit to the canons of international law.⁹⁸ In those instances where more than one set of laws could reasonably govern the remedial outcome of the suit, the court must choose. This choice often leads to the application of international law, most of which has been integrated into the domestic law of the United States by providing statutorily defined remedies or at least judicial precedent.⁹⁹

Russia and Kazakhstan have justice systems that are of limited capability in the general adjudication of civil suits. Neither state has implemented a structure for tort liability that would recognize the potential causes of action in the Kazakhstan situation, much less be expected to award any worthwhile amount of damages were liability to be found.¹⁰⁰ The court systems in each of these countries contain political, cultural and institutional obstacles that prevent evolution into progressive, modernizing branches of government.¹⁰¹ Even in the case of Kazakhstan, Western influence over the creation and implementation of the new independent government was not strong enough to combat traditions of the Soviet system; Kazakhstan's courts are vestiges of their own former government.¹⁰²

A. Causes of Action

Public causes of action—remedies available to the state of Kazakhstan under the Law of Nations—will be similar in substance to private causes of action available to its individual citizens or a class of those citizens, but will be different in form and name. Any legal claims arising out of the personal injury aspects of the Semipalatinsk situation pursued by the

96. 28 U.S.C. § 1350 (2001).

97. *Id.*

98. As one author has nicely summarized, "Courts, when trying to determine if the tort in question is a violation of the Law of Nations, have looked to [U.S.] case law, Restatements, treatises, academic opinions, international agreements, United States law, and foreign law to determine if the violation is contrary to 'universal, definable, and obligatory' international norms." Rosemary Reed, *supra* note 68.

99. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (1980).

100. Several law review articles published in the past decade address inadequacy of the power of the courts in Russia and Kazakhstan as to compensate individuals for wrongful conduct of the government. See, e.g., Malone, *supra* note 6.

101. See Temple, *supra* note 3, at 1104–05.

102. For a fascinating inside look at the corruption that plagues the Kazakhstan court system, visit the web-site of "Transparency Kazakhstan," an organization that monitors corruption in many sectors of Kazakhstan's government and private industry, available at <http://www.transparencykazakhstan.org/english/projects/cwcpro.html>.

state of Kazakhstan are likely to be framed in terms of the environmental or human rights violations that resulted in the injuries, and must find legal roots in the body of existing international law.¹⁰³ This is not difficult, as there are multiple international instruments which explicitly detail the rights of all people, and the corresponding duty which each state has to its own citizens to uphold these rights.¹⁰⁴

The U.N. General Assembly has adopted several resolutions over the past fifty years which focus upon delineating the duty of care of all U.N. members to their own populations and to the populations of the other members.¹⁰⁵ Among these is the Universal Declaration of Human Rights, adopted in 1948, which enumerates several pertinent rights: the right to a particular standard of living and the right to the free development of people and their society.¹⁰⁶ The International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social, and Cultural Rights (both General Assembly resolutions, dating from 1966), declares the rights of all people to health, an improved environment, and an adequate standard of living.¹⁰⁷

These rights to general good health and lives free from torture and genocide segue appropriately with the right to a healthy environment and the duty under international law not to harm the environments of other nations. These rights are stated explicitly in several internationally recognized instruments, including the Stockholm Declaration¹⁰⁸ and the Rio Declaration.¹⁰⁹ Violations of these rights provide a sound legal basis

103. When two states in the international system become opposing parties in a case or controversy, it generally means that the applicable international law on the subject will be the source or guiding principle used in order to resolve the dispute peacefully. This necessarily becomes the case due to the reality that most states will not submit to their own jurisdiction (sovereign immunity principle), or to that of their opposing party, much less agree to liability for causes of action not recognized in their own jurisdiction. For a general discussion, see Reed, *supra* note 68, at 404–05.

104. *Universal Declaration of Human Rights*, G.A. Res 217A, U.N. Doc. A/810, at 71–76 (1948) [hereinafter G.A. Res 217A].

105. See generally *ICCPR*, *supra* note 10; *ICESCR*, *supra* note 10; G.A. Res 217A, *supra* note 104.

106. G.A. Res 217A, *supra* note 104.

107. See generally, *ICCPR*, *supra* note 10; *ICESCR*, *supra* note 10.

108. Principle 21 of the Stockholm Declaration states that nations have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.” *Report of the U.N. Conference on the Human Environment*, U.N. GAOR, Sess., U.N. Doc. A/CONF.48/14/rev/1 (1972) reprinted in 11 I.L.M. 1416 (Stockholm Declaration).

109. See *United Nations Conference on Environment and Development: Rio*

for pursuing a public claim. Placed in the context of negligence theory, the citizens and land of Kazakhstan were injured due to the failure of the former Soviet Union to meet its duty of care under international law as delineated by these treaties.¹¹⁰

Violations of internationally recognized rights—those held to be within the law of nations—automatically present a cause of action in the International Court of Justice for the state whose citizens suffered the detrimental treatment.¹¹¹ Because the health and environment of the citizens of Kazakhstan have suffered and continue to suffer from side effects acknowledged by both governments to be the result of fallout from nuclear testing, the state of Kazakhstan has a documented breach of duty by the current Russian government on the record.¹¹²

However, maintaining a public cause of action—the state of Kazakhstan against the state of Russia—becomes complex. This is partially because at the time the alleged violations occurred, the people and property harmed were in fact under the jurisdiction of only one sovereign—the Union of Soviet Socialist Republics. If the chosen jurisdiction decides that the claims must be analyzed within the framework of their origin, the parties to the dispute would be considered the Soviet government (as vested in the current Russian government) and Soviet citizens. Under these circumstances, there would only be one state actor officially a party to the dispute—Russia. Because the International Court of Justice requires that each party be a nation-state, legal redress in that forum would be unavailable to the atomic soldiers and citizens of Kazakhstan.¹¹³ This issue will be addressed below in a comparison of the International Court of Justice to other potential jurisdictions available for legal action.¹¹⁴

Declaration on Environment and Human Development, U. N. GAOR, 47th Sess., U.N. Doc. A/CONF.151/5 (1992).

110. Most importantly, that of the U.N. General Assembly Universal Declaration of Human Rights, which existed prior to the earliest tests conducted in the Semipalatinsk area. See G.A. Res 217A, *supra* note 104.

111. See Reed, *supra* note 68, at 405 (giving examples of the kind of claims that could be brought before the International Court of Justice).

112. See, “On Social Protection of Citizens Subjected to Radiation due to Nuclear Testing on Semipalatinskiy the River Techa,” Law of Russian Federation No. 149-FZ of 19 August 1995 *repealed by* Law of Russian Federation No. 2-FZ of 10 January 2002. Original law is available upon request from the San Diego International Law Journal.

113. See PHILIPPE SANDS ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS I* (1999).

114. The U.S.S.R. split into its representative republics after the 1989 events, including the fall of the Berlin Wall. For a thorough history of Kazakhstan’s development and the evolution of its sovereign identity since 1989, see the state’s official informational web site, <http://www.kazakhstan.com>.

B. Four Potential Forums for Adjudication: The Russian Court System

Bringing suit against Russia in the Russian court system, either by private individuals or by the state of Kazakhstan, does not offer much promise of a fair legal outcome.¹¹⁵ Russian officials continue to refuse to discuss liability outside of limited statutory admissions, or to release key documentation concerning the nuclear testing performed during the Cold War.¹¹⁶ In addition, Russian courts are vestiges of the Soviet system in place prior to 1989. The physical structure of the courts has been altered to take into account the smaller population and geographical area of their jurisdiction; however, their method of operation has not appreciably changed.¹¹⁷

Suggestive of the Russian attitude in general towards the nuclear waste problem is Russian legislation which mentions the condition of the people and environment that still remain in the Semipalatinsk region.¹¹⁸ In August 1995, the Russian Federation passed legislation extending certain "privileges" granted to Chernobyl survivors in 1991 to

115. As reported by the organization Transparency Kazakhstan, "The judicial system in Kazakhstan is substantially struck with corruption.

The President of Kazakhstan has noted at meeting on struggle with corruption held on April 19, 2000 that the practice of justice departure could be better. The level of courts' mistakes is great, there are cases of the judges' liberal attitude to criminal authorities and of forged results of forensic pathology. The judicial decisions of verdicts of regional courts are frequently cancelled by the Supreme Court and by General Office of Public Prosecutor. The most widespread phenomenon is a fact of red-tapery by consideration of proceeding actions. Among the judges there are persons who absolutely don't merit the high status of a judge, and when their responsibility is questioned, the corporate solidarity is shown. The work level of the Supreme Court on forming a unified judicial practice and analytic work leaves to wish best. The remedial legislation requires the further improvement." See Courts Without Corruption Research Project, project summary available at <http://www.transparencykazakhstan.org/english/projects/cwcpro.html>.

116. Elegant, *supra* note 1, at 30.

117. For a brief description of the Russian legal structure and what it means for those who seek to litigate within its framework, see the informational web site maintained by Baker & McKinsey LLP, an international law firm with extensive practice experience in Russia and Eastern Europe in general, available at <http://www.bakerinfo.com/BakerNet/default.htm> (last visited Feb. 21, 2003).

118. "On Social Protection of Citizens Subjected to Radiation Due to Chernobyl Nuclear Power Plant Disaster," Law of Russian Federation No. 1244-1 of 15 May 1991 amended by "Amendments and Addenda No 3 to RF State Tax Service Instruction No. 29 of April 17, 1995, On Application of the RF Land Charges Act. Letter No 29-3 of the RF State Tax Service" (June 7, 1996). These provisions were extended to the people of Semipalatinskiy subsequent to the adoption of "On Social Protection of Citizens Subjected to Radiation due to Nuclear Testing on Semipalatinskiy Testing Area." Law of Russian Federation No. 149-FZ of 19 August 1995.

certain categories of citizens of Kazakhstan still living in one of the “populated localities exposed to radiation due to nuclear testing on the Semipalatinsk testing area.”¹¹⁹ The specified categorizations included the following, which remain the sole statement of the Russian government on unfortunate nuclear effects on the people and environment in that region to the present day:

Citizens of special risk out of number servicemen and civilians employed under the contract in Armed Forces of USSR, troops and agencies of Committee of State Security of USSR, internal forces, railway troops and other forces units, officers and ranks of bodies of internal affairs, shall include: those [who] had taken the direct part in testing of nuclear weapon in the atmosphere. . . ; direct participants of underground testing of nuclear weapon under extraordinary radioactive environment. . . ; direct participants in liquidation of consequences of radiation accidents on nuclear installation ships. . . ; personnel of separate subdivisions on nuclear charges’ assembling out of servicemen; [and] direct participants in underground testing of nuclear weapon, carrying out and provision for work on collection and burial of radioactive materials.¹²⁰

These carefully described direct “participants” in the nuclear testing that took place in the region were awarded the privilege of being exempted from the land tax payment, conditional upon one non-negotiable requirement—that each eligible participant demonstrate proof of radioactive exposure totaling an effective dose exceeding 25 cZv (ber).¹²¹ As a baseline for comparison, normal background radiation in Washington, D.C. is .08 to .09 rems per year and a dental x-ray is .02 -.03 rems.¹²²

The legislation serves as a partial admission of liability, and an acknowledgment of the degraded state of the environment and the undermined health of the people living around the old nuclear testing grounds.¹²³ However, the legislation leaves out an essential category of affected people—any non-direct sufferers of radioactive materials, the subsequent generations of those who were in fact direct participants.¹²⁴ This leaves families and children of the atomic soldiers, even those of the few still alive, unacknowledged as harmed by the testing, an assertion

119. “On Social Protection of Citizens Subjected to Radiation due to Nuclear Testing on Semipalatinskiy Testing Area,” Law of Russian Federation No. 149-FZ of 19 August 1995, at 7.

120. *Id.* at 7–8.

121. *Id.* at 7.

122. See Hogan, *supra* note 88, at 60.

123. Where the term “admission” is not meant to refer to a legal admission. The utility of the statements contained in this piece of legislation would be determined by the court presiding over any litigation between the Russian government and the citizens or state of Kazakhstan.

124. “On Social Protection of Citizens Subjected to Radiation due to Nuclear Testing on Semipalatinskiy Testing Area,” Law of Russian Federation No. 149-FZ of 19 August 1995, at 7.

easily countered by observable fact and live witness testimony.¹²⁵ For meaningful recognition of and compensation for their injuries and degraded lifestyle due to nuclear waste and over-exposure to radiation, the citizens of Kazakhstan should pursue their claims in another jurisdiction.

C. The Kazakhstan Judiciary

The Russian courts have been described by one commentator as “characterized by lack of a rule of law, disrespect for the law, and unlimited government authority.”¹²⁶ Scholars who have spent their academic careers tracing the evolution of the Kazakhstan legal system and its ruling elite out of existing Soviet traditions assert that the courts are doomed to follow in the path of their Russian predecessors.¹²⁷ Pursuing a cause of action in the Kazakhstan court system thus poses its own unique set of problems.

The Kazakhstan government is plagued by corruption and its social institutions need rebuilding to navigate the international community.¹²⁸ Although private individuals would have no shortage of law firms to represent them,¹²⁹ the Kazakhstan government likely would have a hard time securing Russia’s compliance in a civil lawsuit in their own courts. Of course, this assumes that the Kazakhstan officials could first be bribed to entertain the claims—perhaps a harsh indictment of the existing justice system, but recognized as an accurate assessment by both the intelligence community and scholars.¹³⁰ Because most of these officials are former communist and comsomol leaders and loath to enforce administrative regulations, much less be part of a process that indicts their former comrades, this assumption is of doubtful applicability.¹³¹

125. Lloyd-Roberts, *supra* note 5.

126. See Hon. Thomas W. Hoya, *Russian and American Environmental Law*, 41 FED. B. NEWS & J. 126, 128 (1994).

127. See Vasilii Vasilenko, *Rehab. and Steady Growth of Kazakhstan is Impossible Without Observance of Ecological Priorities*, 1 NOOSPHERA 334, 335 (1996).

128. Philip M. Nichols, *The Fit Between Changes to the Int’l Corruption Regime And Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT’L ECON. L. 863, 907–08 (2001).

129. A quick search of the Internet reveals that there are a substantial number of law firms operating within Kazakhstan, both international firms with location offices as well as domestic firms.

130. See, e.g., Nichols, *supra* note 128.

131. See Vasilenko, *supra* note 127.

Aside from procedural issues, the Kazakhstan legal system simply does not operate under an expansionary or well-developed system of tort law such as that found in the United States. Thus, even if members of the judicial branch in Kazakhstan could be compelled to participate in the system by a more sympathetic (and financially strapped) executive, it is not a system structured to provide compensation for personal injuries stemming from toxic waste activities.¹³² This reality automatically places limits on the ability of Kazakhstan citizens to recover for their injuries, limits that would not exist in a Western-style legal forum.¹³³

D. The International Court of Justice

Perhaps one of the “friendliest” forums for adjudication is the International Court of Justice of the United Nations. Should the state of Kazakhstan seek to pursue a public cause of action against Russia on behalf of its citizens, this Court would provide an impartial legal forum with internationally recognized decision-making powers.¹³⁴ The ICJ has express jurisdiction over all disputes brought to it by states “for settlement in accord with international law.”¹³⁵ Its subject matter jurisdiction covers four sources of disputes, including: the interpretation of treaties, any questions of international law, fact finding with respect to alleged breaches of an international obligation, and the extent of reparations to be made for any breaches of obligation found to have occurred.¹³⁶ Thus, if Kazakhstan chose to submit its claims to the ICJ, the court would serve as factfinder and decisionmaker, as well as acting as final interpreter of the law and calculator of monetary damages.¹³⁷

A recent international case has addressed nuclear waste issues.¹³⁸ This growing body of case law includes a seminal advisory opinion in which the Court ruled that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable to armed conflict,

132. For a complete discussion of the system, *see id.*

133. For general discussions of the expansive American tort system *see, e.g., The American Law Institute Reporter's Study, Enterprise Responsibility for Personal Injury, Vol. II* (1991); D. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* (1991).

134. 6 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 195-96 (1998).

135. SANDS, *supra* note 113, at 4.

136. *See* Statute of the International Court of Justice, art. 36(2)-(3), *available at* <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> (last visited Sept. 30, 2003).

137. *See id.*

138. In a series of cases stemming from the New Zealand-France dispute, New Zealand demanded a moratorium on the testing of nuclear weapons by France in the South Pacific Ocean. The countries wound up resolving the dispute outside the ICJ's jurisdiction. *See, e.g., Nuclear Tests (N.Z. v. Fr.)*, 1973 I.C.J. 135 (Interim Protection Order June 22).

and in particular the principles and rules of humanitarian law.”¹³⁹ In addition, the ICJ by charter applies customary international law concerning international human rights violations, including but not limited to the recognition of international rights to life and a healthy environment.¹⁴⁰ The Court would have to expand its interpretations of international environmental law and international humanitarian law, and then determine how expansion of these bodies of law could combine to provide a newly recognizable claim within the context of nuclear weapons and their productive material.¹⁴¹

The key concern for Kazakhstan if it were to choose this path would be securing Russian acquiescence to an appearance before the Court; both states named as parties to an action must appear voluntarily and state their willingness to abide by the Court’s decision in the matter.¹⁴² The United States has refused to submit to the Court’s jurisdiction; it is not unreasonable to presume that Russia might do so as well.¹⁴³

E. The United States Federal Court System

A less obvious forum for legal action in this case is the United States. However, an expanding body of case law and accompanying legal analysis renders the United States federal court system a potentially more hospitable jurisdiction for the determination of legal remedies for the people of Kazakhstan than either the Russian or Kazakhstan court systems.¹⁴⁴

Individuals all over the world have begun to bring suit in the U.S. as

139. The court went on to hold, “However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defence, in which the very survival of a State would be at stake.” This seems to suggest that adjudication regarding the environmental and humanitarian impact of nuclear weapons use remains a continuing possibility for the ICJ, despite (or perhaps because) the Court has chosen to sidestep the issue of their legality under international law. *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226 (July 8).

140. See Statute of the International Court of Justice, *supra* note 136, art. 41.

141. See Deborah L. Houchins, *Extending the Application of the ICJ’s July 8, 1996, Advisory Opinion to Environment-Altering Weapons in General: What is the Role of International Environmental Law in Warfare?*, 22 J. LAND RESOURCES & ENV’T L. 463 (2002).

142. See Statute of the International Court of Justice, *supra* note 136.

143. Reed, *supra* note 68, at 405.

144. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

aliens for personal injury under the Alien Tort Claims Act of 1789, which will be detailed in the following section.¹⁴⁵ In brief, the Act allows aliens to sue civilly those who have committed a tort against the alien(s) in violation of the Law of Nations or a treaty of the United States.¹⁴⁶

One of the most recently filed decisions of this nature came before the U.S. District Court for the Southern District of New York in December 2002.¹⁴⁷ The plaintiffs in that case consisted of a class of citizens from the nation of Zimbabwe, claiming violations of their internationally guaranteed rights of political freedom.¹⁴⁸ The relevant defendant was a particular member of the Zimbabwe ruling class.¹⁴⁹ The District Court upheld a multi-million dollar award against the estate of the defendant for violations of both the Zimbabwe Constitution and the Law of Nations that resulted in a substantial segment of the population being disenfranchised, left without property rights, and subject to discriminate extra-judicial killings and torture.¹⁵⁰

Several aspects of this case are of extreme significance for the citizens of Kazakhstan. Almost as important as the amount of the award, which remained largely intact after appellate review, was the District Court's willingness to engage in two essential analytical exercises. The Court entertained questions of first impression in its circuit regarding the meaning of the Foreign Sovereign Immunities Act¹⁵¹ and the scope of the Alien Tort Claims Act,¹⁵² and resolved both issues in favor of the plaintiff class. Secondly, the Court engaged in a lengthy explanation of both of the acts and how they bear upon the inherit conflict of laws problem which is produced through their application, and drew from multiple sources of law in order to resolve the appeal in favor of the plaintiffs.¹⁵³

145. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876-87 & n.21 (2d Cir. 1980)(discussing the Federal Tort Claims Act's expansion so that the Act now empowers federal courts with the ability to exercise jurisdiction over claims filed by aliens who have been harmed outside the borders of the United States).

146. Alien Tort Claims Act of 1789, codified in modern form as 28 U.S.C. § 1350 (2001).

147. *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002).

148. See generally *ICCPR*, *supra* note 10.

149. *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 405 (S.D.N.Y. 2002).

150. *Id.* at 441.

151. 28 U.S.C. §§ 1330, 1602-11 (2001). This Act provides the only legal basis in the United States court system for obtaining subject matter jurisdiction over foreign states, their agents, and instrumentalities. See *Tachiona v. Mugabe*, 234 F. Supp. 2d, 401, 405 (S.D.N.Y. 2002).

152. 28 U.S.C. § 1350 (2001).

153. The Court used the local law of the state where the injuries occurred and the parties reside, international law, U.S. federal law and its embodiments of international law, and the foreign state's municipal and federal laws. See *Tachiona v. Mugabe*, 234 F. Supp. 2d, 401, 420-23 (S.D.N.Y. 2002).

In spite of this path-breaking case, and the extension of the Act in light of modern day circumstances, the entire body of law that has emerged from the federal court system does not provide a unified approach to the adjudication of tort claims brought under the Alien Tort Claims Act.¹⁵⁴

III. THE ALIEN TORT CLAIMS ACT

The Alien Tort Claims Act provides that the United States district courts will have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.¹⁵⁵ The constitutional minimum elements of standing for presenting a tort claim in federal court do not change under the Act. Three elements must be present: an injury in fact,¹⁵⁶ a casual connection between the injury and the conduct complained of,¹⁵⁷ and the potential that the injury will be redressed by a favorable decision.¹⁵⁸

The Act establishes a cause of action for violations of international law, but requires the district courts to perform a traditional choice of law analysis to determine the applicable rule in such a case. The courts generally consider three possible sources: international law, the law of the forum state, or the law of the state where events spawning the litigation occurred.¹⁵⁹ Jurisdiction over alleged causes of action occurs when certain wrongful conduct is deemed to have violated the law of nations, giving rise to a right to sue under the Act when the conduct and its violation offend norms that have become well-established and universally recognized.¹⁶⁰

In recent precedents, federal courts have adopted an ever-broadening interpretation of the Act to hold that when an alleged tortfeasor is located and served process by an alien within the United States, the

154. Compare *id.* at 401–02 (positive approach), with *Rodriguez v. The Republic of Costa Rica*, 297 F.3d 1 (1st Cir. 2002) (negative approach; jurisdiction denied and Costa Rica found immune from suit).

155. 28 U.S.C. § 1350 (2001).

156. An invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. See *Machain v. Sosa*, 266 F.3d 1045, 1050 (9th Cir. 2001).

157. The injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Id.*

158. *Id.*

159. *Tachiona v. Mugabe*, 216 F. Supp. 2d 401, 406 (S.D.N.Y. 2002).

160. 28 U.S.C. § 1350 (2001).

Alien Tort Claims Act provides for federal jurisdiction when there might otherwise be no alternative forum available.¹⁶¹ The Second Circuit broke new ground in 1980 when it chose to resurrect the Act.¹⁶² In this case, the family of a Paraguayan man brought suit in the United States against the police officer who tortured him to death. Although the events had taken place in Paraguay, and both men were native Paraguayans, the police officer was living in Brooklyn at the time of suit.¹⁶³ Although the district court dismissed the case for lack of jurisdiction, the Second Circuit reversed the decision and in so doing made two key determinations.¹⁶⁴

First, the court held that the defendant's acts constituted a violation of the law of nations—not simply a domestic tort violation. As a result, the court had subject matter jurisdiction over the suit under the Act.¹⁶⁵ Second, the court allowed the suit to go forward on the law of nations violation alone, abandoning the requirement that a tort cause of action be based on either U.S. or Paraguayan municipal law.¹⁶⁶

In the wake of the Second Circuit opinion, most courts dealing with issues under the Act have drawn upon the point that substantive principles of international law, including those involving human rights violations, are already codified in some manner by the United States.¹⁶⁷ This approach is consistent with federal statutory law allowing courts to examine and consider “any relevant material or source, including testimony, whether or not submitted by a party or admissible in court under the Rules of Evidence.”¹⁶⁸ Thus, for many plaintiffs the initial hurdle of convincing a federal court to hear a case based on international human rights violations has been removed.

A. Subject Matter Jurisdiction

Current court cases involving the Act have expanded its scope and application, but have not struggled specifically with the issue of nuclear waste within the context of an alien tort claim.¹⁶⁹ Various districts have heard cases based on claims of forced labor by a government through its

161. See, e.g. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887(2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162, 163 (D. Mass. 1995).

162. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887(2d Cir. 1980).

163. See *id.* at 878–79.

164. *Id.* at 880.

165. *Id.* at 887.

166. *Id.* at 886.

167. Either through the common law or the Constitution. See *Tachiona v. Mugabe*, 234 F. Supp. 2d, 401, 418–19 (S.D.N.Y. 2002).

168. FED. R. CIV. P. 44.1 (2003).

169. This is certainly not case with regard to domestic nuclear waste cases brought by U.S. citizens. See generally, *In re United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987).

collusion with transnational corporations doing business in the country¹⁷⁰ and the arbitrary detention of citizens,¹⁷¹ among others.¹⁷²

The injured citizens of Kazakhstan have been tortured by their diseases and by the experience of watching loved ones die painfully and prematurely. Plainly, the universal right to life that all individuals are guaranteed by the law of nations has been violated for those who have died due to the toxicity of the Semipalatinsk region.¹⁷³ The right to life has been broadly interpreted by the United Nations Human Rights Commission, also its foremost articulator.¹⁷⁴ Most importantly for those suffering in Kazakhstan, the Commission explicitly noted that the right encompasses harms to persons resulting from nuclear waste.¹⁷⁵

In addition, international human rights law recognizes a right to a healthy environment which provides an actionable cause for all those in the region who have not yet suffered from disease, or who may have trouble specifically linking the diseases they suffer to the nuclear residue.¹⁷⁶ Thus, two well-established precepts of international human rights support adjudication of the Kazakhstan citizens' case in U.S. federal court.

B. Proving Causation and Choice of Law

A court hearing the complaint of individuals from Semipalatinsk would be charged with the task of analyzing a toxic tort issue (injuries resulting from nuclear waste), while having to make a choice of law determination in order to do so. International law may provide greater guidance to courts in the area of nuclear waste than the U.S. domestic experience of toxic tort litigation.¹⁷⁷ The particular problems of proving

170. *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).

171. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997).

172. *See, e.g., Bigio v. Coca Cola*, 239 F.3d 440 (2000).

173. The right to life is recognized by the United Nations' International Convention on Civil and Political Rights, and is a universal right under the law of nations, thus giving the Act jurisdiction over cases in which it has been violated. *See* B.G. Ramcharan, *The Concept and Dimensions of the Right to Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* (B.G. Ramcharan ed., 1985).

174. *International Covenant on Civil and Political Rights*, U.N. GAOR Human Rights Comm., Sess., General Comment 6, at 5, U.N. Doc. CCPR/C/21/Rev.1 (1989).

175. U.N. Human Rights Comm., Communication No. 67/1980, in 2 Selected Decisions of the Human Rights Committee Under the Optional Protocol, at 20, U.N. Doc. CCPR/C/OP/2 (1980).

176. *See* Herz, *supra* note 16, at 591.

177. *See generally* Clifford Fisher, *The Role of Causation in Science as Law and*

causation in cases of toxic exposure are present: proving the plaintiff's injuries are a result of exposure to the toxic substance, and proving the defendant was the one responsible for substances that produced the alleged harms.¹⁷⁸ These problems have been addressed generally by Professor Ora Fred Harris, who opined that: "Causation problems are greatly compounded when applied to the field of toxic or hazardous exposure injury. A common, generally accurate, evaluation of humankind's understanding of the behavior of hazardous or toxic wastes and the effect of exposure on humans points to a vast amount of scientific uncertainty."¹⁷⁹

Of additional concern is the refusal of American courts to classify the handling of nuclear waste or its production as an ultrahazardous activity when the government is the handler or producer involved.¹⁸⁰ However, the courts may be able to avoid these technical difficulties due to the widespread nature of the environmental destruction in Kazakhstan and worldwide recognition of its existence and source.¹⁸¹ When combined with what scientists and judges already know about the effects of large quantity radiation doses on the human physique, specific causation may wind up elevated to the status of a presumption to be overcome by the defendants.

IV. CONCLUSION

If the United States can ultimately offer the greatest chance of legal recovery for Kazakhstan citizens who bring claims against Russia,¹⁸² it may be instructive in future scholarship to compare their plight to the legal trials and tribulations of similarly situated American citizens.¹⁸³ More than 220,000 American military personnel were exposed to nuclear testing as a result of serving in the armed forces after World War

Proposed Changes in the Current Common Law Toxic Tort System, 9 BUFF. ENV'T'L L.J. 35 (2001).

178. KEETON, *supra* note 65, § 41, at 263 and § 79, at 560.

179. Ora Fred Harris, *Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation*, 40 SW. L.J. 909, 912 (1986).

180. See *Dalehite v. United States*, 346 U.S. 15 (1953); *Laird v. Nelms*, 406 U.S. 797, 32 L. Ed. 2d 499, 92 S. Ct. 1899 (1972).

181. See e.g. The CIA World Factbook, available on the World Wide Web at <http://www.cia.gov/cia/publications/factbook/geos/kz.html>.

182. Both positive and negative treatment of alien claims exists in the federal courts. Compare, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (positive treatment) with *Rodriguez v. Costa Rica*, 297 F.3d 1 (1st Cir. 2002) (negative treatment).

183. See, e.g., *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 992-93 (9th Cir. 1987) (holding that claims against the U.S. government related to nuclear testing site activities are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a)).

II in the Southwestern United States and Pacific and Atlantic Oceans.¹⁸⁴

The citizens of Kazakhstan, including the remaining atomic soldiers, may more readily find satisfactory legal remedy in the U.S. courts than American citizens and former military personnel who suffered from remarkably similar personal injury in the past.¹⁸⁵ The experience of American servicemen seeking compensation for radiation sickness resulting from fallout exposure during nuclear testing on U.S. soil after the Korean War pales in comparison with the possibilities available to aliens seeking such relief.¹⁸⁶

In the landmark case of *In re Atmospheric Testing*, the Supreme Court denied review of a Ninth Circuit Court of Appeals opinion holding that the government could not be sued for activities related to nuclear testing.¹⁸⁷ Civilian and military participants involved in the U.S. nuclear testing program filed suit, claiming negligence¹⁸⁸ and breach of duty to warn.¹⁸⁹ Summary judgment against the plaintiffs was granted and affirmed; the substance of the claims was never ruled upon. Instead, the court detailed the balancing that must occur when determining the issue of government immunity for personal injury, citing the Supreme Court's holding in *Dalehite v. United States*.¹⁹⁰

The body of case law requires acts of negligence that are the result of policy decisions made by on-site officials to be exempt from targeted litigation.¹⁹¹ The only way for Americans who suffered radiation poisoning due to nuclear testing by the military to bring suit past the summary judgment stage is if they can prove that the on-site officials were acting negligently outside of their policy-making, enforcement, or other discretionary functions. This inquiry must take place before any questions of causation or proof (both very difficult to

184. See Hogan, *supra* note 88.

185. See *id.*

186. *Id.*

187. *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d at 982, 992-93 (9th Cir. 1987).

188. Specifically, plaintiffs alleged failure to take adequate safety precautions at the test site. See *id.* at 993.

189. Plaintiffs argued that the government had the responsibility of informing them of the dangers to which they had been or would be exposed. See *id.* at 996.

190. *Dalehite v. United States*, 346 U.S. 15, 39-40 (1953) (holding that specific acts of negligence came within the purview of the discretionary function exception because they are performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive department).

191. See *Prescott v. United States*, 973 F.2d 696, 701 (1992).

prove in toxic harm cases) are ever addressed by the courts.¹⁹²

Although the Foreign Sovereign Immunity Act presents Kazakhstan citizens with a similar hurdle in garnering personal jurisdiction over the necessary Russian representatives, it does not contain an analogous exception.¹⁹³ In contrast, Kazakhstan citizens who are able to get past the procedural obstacles mentioned above have the advantage of pursuing claims under the law of nations.¹⁹⁴ The burden of proof, while remaining on the plaintiffs in an Alien Tort Claims Act suit, would not be as technically difficult to meet as the burden in traditional domestic negligence cases. In addition, international violations that would be asserted in a Kazakhstan suit may stigmatize the Russian defense in a way that normal negligence causes of action would not.

The United States does not present an obstacle-free path for legal redress, but it is probably the most likely forum to provide the atomic soldiers, their families and neighbors with meaningful closure. Procedural issues, judicial bias and the cost of filing suit halfway across the world comprise only some of the hurdles that Kazakhstan or its citizens from the Semipalatinsk region would face prior to taking the first real step towards compensation.¹⁹⁵ An opportunity to tell their story under oath to a sympathetic court system would be this step.

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192. *See, e.g.*, *Roberts v. United States*, 887 F.2d 899 (9th Cir. 1989).

193. 28 U.S.C. § 1350 (2001).

194. *Id.*

195. For instance, the primary procedural obstacle to Kazakhstan citizens is Russian sovereignty. However, the Foreign Sovereign Immunity Act provides for general exceptions to the jurisdictional immunity of a foreign state. *See* 28 U.S.C. §§ 1602, 1604–07 (2001).