

BEYOND THE LAW: FLOODING IN MEXICO CAUSED BY UNITED STATES-MEXICO BORDER CONSTRUCTION

*Barbara Zaragoza**

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* Barbara Zalewski-Zaragoza is a practicing immigration attorney who is also pursuing her LL.M. in Human Rights at The American University. She would like to thank international law professor James Cooper at California Western School of Law for his excellent teaching and wonderful insights concerning legal issues at the U.S.-Mexico border.

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INTRODUCTION

*[T]he river of angry water that harasses you.
Celestial shadow, dove branch broken by night. . .¹
—Pablo Neruda*

On July 12, 2008, a typical monsoon hit the desert parched border town of Nogales and within two hours, a downpour pounded the town with two inches of rain.² On this day, the rainstorm turned into a raging river that pummeled through the city streets on both sides of the United States-Mexican border.³

Each year, Nogales—located in the state of Arizona on the United States side and Sonora on the Mexican side—experiences monsoon season from mid-June to September.⁴ “Monsoon” means a seasonal shift in winds when the intense summer heat causes surface air to rise and creates weak low pressure, drawing moisture from the Pacific Ocean and the Gulf of Mexico.⁵ Thunderstorms usually ensue.⁶

However, in 2008, the United States Customs and Border Patrol (CBP) began a rapid push for border construction and built

1. Pablo Neruda, *The Drowned Woman of the Sky*, TEXTOPIAN (1952), <https://app.textopian.com/read/131kl1?ppn=1>.

2. Melissa del Bosque, *Trump's Border Wall Could Cause Deadly Flooding in Texas. Federal Officials Are Planning to Build It Anyway*, TEX. MONTHLY (Dec. 2018), <https://www.texasmonthly.com/news-politics/trumps-border-wall-cause-deadly-flooding-texas-federal-officials-planning-build-anyway/>.

3. *Id.*

4. *Id.*; Diana Leonard, *Monsoon Brings Welcome Rain to Southwest, but Drought Stubbornly Persists*, WASH. POST (July 29, 2021, at 1:28 PM), <https://www.washingtonpost.com/weather/2021/07/29/drought-monsoon-desert-southwest/>.

5. *Id.*

6. *Id.* (explaining that monsoonal moisture and rising air typically trigger intense thunderstorms).

a five-foot concrete barrier inside a storm-water tunnel on the Mexican side.⁷ The barrier acted like a dam, causing massive flooding.⁸ On the Mexican side, shops in the busy commercial district filled with water.⁹ Mexican soldiers and firefighters rushed to pull people from the floodwaters with ropes.¹⁰ The road leading into Mexico buckled and cars were swept away.¹¹ People ran to escape a newly formed ten-foot-wide sinkhole; two people drowned.¹²

This 2008 flood destroyed 578 homes and 45 cars.¹³ The next day, across the border in Arizona, the streets were filled with mud and debris.¹⁴ The devastation in Mexico was far worse with entire streets remaining submerged.¹⁵ Mexico declared Nogales a disaster zone with an estimated \$8 million in damages.¹⁶

The 2008 flood was one in a series caused by border fence construction. Flooding destruction occurred in 2006 at El Paso and Ciudad Juarez, 2007 at Lukeville, Arizona, and again in 2014 at Nogales, Sonora.¹⁷ This Article analyzes whether Mexico or the

7. Brady McCombs, *Reconstructed Border Tunnel Isn't Flood Fix*, ARIZ. DAILY STAR (June 2, 2009), https://tucson.com/news/local/border/article_ad170d1c-0705-5d3b-857f-769c86508622.html; see also Stefanie Herweck & Scott Nicol, *Death, Damage and Failure: Past, Present and Future Impacts of Walls on the U.S.–Mexico Border*, AM. CIV. LIBERTIES UNION 31–32 (Sept. 12, 2018), <https://www.aclu.org/publications/death-damage-and-failure>.

8. Scott Nicol, *New Border Walls Designed to Flood Texas Towns*, TEX. OBSERVER (July 11, 2012, at 9:31 PM), <https://www.texasobserver.org/new-border-walls-designed-to-flood-texas-towns/> (explaining that debris clogged the wall and caused the floodwaters to reach the tops of doorframes and depths of up to six feet).

9. del Bosque, *supra* note 2.

10. *Id.*

11. *Id.*

12. Nicol, *supra* note 8.

13. Brady McCombs, *Mexico Ties Flooding in Nogales to U.S. Border Patrol Built Wall*, ARIZ. DAILY STAR (July 23, 2008), https://tucson.com/news/local/border/article_a11265b0-17c3-5bed-b50a-72e5d17e1369.html#:~:text=Mexican%20officials%20say%20a%20concrete,July%2012%20in%20Nogales%2C%20Sonora.

14. del Bosque, *supra* note 2.

15. *Id.*

16. *Id.*

17. Naveena Sadasivam, *The US-Mexico Border Wall's Dangerous, Costly Side-Effect: Enormous Floods*, QUARTZ (July 20, 2022), <https://qz.com/1353798/the-us-mexico-border-walls-dangerous-costly-side-effect-enormous-floods>. The issue of flooding due to

Mexican residents at the border have any legal recourse against United States border construction that, due to flooding, has caused property destruction and loss of life. Part II provides a brief history of border construction and describes the flooding events that have occurred. Part III describes two lawsuits, one in tort and one on constitutional grounds that have sought damages from the United States due to border-related construction. Part IV acknowledges that although Mexico could bring arguments of the Do No Harm and Due Diligence principles against the United States in the International Court of Justice (ICJ), the United States would likely not comply with any ICJ ruling. This non-compliance can already be seen through the United States' lack of compliance with binational treaties between itself and Mexico.¹⁸ However, evidence suggests that the United States has encroached upon Mexico's national sovereignty by erecting border barriers on Mexican land.¹⁹ Consequently, Mexico could bring a lawsuit in a U.S. federal court and argue the United States has violated its national sovereignty, a *jus cogens* norm, which overrides any U.S. law or statute that allows for border construction.

border construction is also invariably tied with environmental degradation of animal and wildlife along the line. *See generally* James Golden, *Floods and Fragmentation: The Viperous Effect of a Border Wall*, 11 J. ANIMAL AND ENV'T L. 36 (2020).

18. Stephen P. Mumme & Oscar Ibanez, *U.S.-Mexico Environmental Treaty Impediments to Tactical Security Infrastructure along the International Boundary*, 49 NAT. RES. J. 801, 824 (2009) (discussing how the Vienna Convention requires the United States to comply with treaties and addressing the United States' current failure to comply with infrastructure requirements in a treaty with Mexico as an example).

19. Stephen P. Mumme & Regina M. Buono, *Troubled Waters: Recent Challenges to the 1970 US-Mexico Boundary Treaty*, BAKER INST. (Feb. 8, 2024), <https://www.bakerinstitute.org/research/troubled-waters-recent-challenges-1970-us-mexico-boundary-treaty#:~:text=This%20agreement%20%E2%80%94%20generally%20referred%20to,ending%20value%20to%20both%20countries> (discussing how the United States encroached on Mexican land when it set up addition wiring on the river along the Texas-Mexico border).

II. UNITED STATES-MEXICO BORDER CONSTRUCTION AND FLOODING INCIDENTS

In 1848, the Treaty of Guadalupe Hidalgo ended a two-year war between the United States and Mexico.²⁰ Under the Treaty, Mexico gave up more than half its territory, including present-day Arizona, California, New Mexico, Texas, Colorado, Nevada, and Utah.²¹ In exchange, the United States paid Mexico \$15 million.²² Article V of the Treaty established a joint boundary commission to demarcate the exact line between the two countries.²³

Today, the United States-Mexico border spans 1,954 miles.²⁴ The Rio Grande provides a natural boundary for the first 1,255 miles from the Gulf of Mexico to El Paso, Texas, which borders Ciudad Juarez, Chihuahua.²⁵ Thereafter, the border becomes a land boundary through deserts and rugged mountains, ending at the Pacific Ocean in San Diego, California and Tijuana, Baja California.²⁶

A. A Brief History of Border Fence Construction

At first, the joint boundary commission erected only iron and mason obelisks along the border—fifty-two boundary monuments by 1851 and another 206 after 1895.²⁷ However, throughout the

20. RACHEL ST. JOHN, *LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.-MEXICO BORDER* 21–22 (2011).

21. *Id.* at 22; NAT'L ARCHIVES, *TREATY OF GUADALUPE HIDALGO* (1848), <https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo>.

22. ST. JOHN, *supra* note 20, at 22.

23. Treaty To Resolve Pending Boundary Differences and Maintain The Rio Grande And Colorado River As The International Boundary, Mex.-U.S., art. V(A), Nov. 23, 1970, 9 Stat. 922 [hereinafter *Treaty To Resolve*].

24. *About Us*, INT'L BOUNDARY AND WATER COMM'N, <https://www.ibwc.gov/about-us/> (last visited May 1, 2026).

25. *Id.*

26. *Id.*; *see also* *US-Mexico Border: Geography, History, and the Rio Grande*, GEOGRAPHY WORLDS (Mar. 17, 2026), <https://geographyworlds.com/blog/us-mexico-border/>.

27. L. Seward Terry, *On The Mexican Line: Arduous Task of Boundary Surveyors*, S. F. CHRON., Nov. 25, 1894, at 8; *see generally* David Taylor, *MONUMENTS: 276 VIEWS OF THE UNITED STATES-MEXICO BORDER* 285, 287 (2015) (photographing all boundary monuments from El Paso, Texas to San Diego, California).

19th century, settlements grew along the border and problems arose over the exact boundary line.²⁸ Both countries wanted a more clearly demarcated line.²⁹

The first recorded border fence was erected in 1911 when the Bureau of Animal Industry built a border fence to deter animal crossings.³⁰ The barbed-wire fence ran along the California border.³¹ Although government construction of fencing occurred sporadically thereafter, a lack of historical research regarding the actual construction of border fences makes it impossible to provide a comprehensive listing of all fences and when they were built.³² Early records show that ranchers fenced their properties to stop humans from trespassing onto their lands and to prevent livestock from running across the border.³³ The United States government also financed construction of fences in urban areas such as El Paso, Nogales, and San Ysidro in order to enforce official hours when ports of entry remained closed.³⁴ In 1918, Felix B. Penaloza, the Municipal President of Nogales, Mexico, ordered the construction of a fence running along the boundary line between his city and Nogales, Arizona.³⁵ The fence consisted of six wires strung to a height of six feet.³⁶ By the 1920s, most

28. See ST. JOHN, *supra* note 20, at 99 (explaining how problems arose as people began to settle along the U.S. border like livestock moving past the border or settlers having to pay property taxes in both countries).

29. Treaty to Resolve, *supra* note 23.

30. Mary E. Mendoza, *Fracturing Landscapes: A History of Fences on the U.S.-Mexico Divide*, OXFORD UNIV. PRESS BLOG (Sept. 4, 2018), <https://blog.oup.com/2018/09/environmental-history-impact-us-mexico-border/>.

31. Rachel St. John, *The Raging Controversy at the Border Began With This Incident 100 Years Ago*, SMITHSONIAN MAG. (July 2018), <https://www.smithsonianmag.com/history/raging-controversy-border-began-100-years-ago-180969343/>.

32. Oscar J. Martinez, *Border Conflict, Border Fences, and the "Tortilla Curtain" Incident of 1978-1979*, 50 J. THE SW. 263, 267 (2008).

33. *Id.* at 266.

34. *Id.*

35. St. John, *The Raging Controversy*, *supra* note 31.

36. *Id.*

border towns had fences³⁷ and border construction continued for the next sixty years.³⁸

Border fence construction steeply escalated in the early 1990s when an economic recession caused the United States to see “illegal” immigration as a threat to national sovereignty.³⁹ In 1994, El Paso created Operation Hold the Line while southern California launched Operation Gatekeeper.⁴⁰ Both were escalations of security along the border meant to reduce unauthorized migrant crossings.⁴¹ As Joseph Nevins explains,

“[T]he greatest significance of Gatekeeper . . . is perhaps that it represents a significant shift in American practice and thinking toward the U.S.-Mexico boundary and

37. *Id.*

38. Martinez, *supra* note 32, at 267–68, 270. Newspapers reported border construction in 1924, 1925, 1936, 1937, 1948, 1955, and again in 1977 and 1978. *Id.* Martinez created the following timeline based primarily on media reports:

1924: 160-mile long, 8-foot-high fence proposed for the California-Mexico boundary line;

1925: (January) Construction of “hog tight, horse high, and boot-legger-proof” barbed-wire fence, possibly electrically charged, announced for El Paso area;

1925: (February) 30-mile long, 18-foot-high barbed-wire fence proposed for El Paso area; officials adds that existing barbed-wire fence in San Ysidro is “impenetrable;” 1936: High-wire fence proposed for El Paso area;

1937: Funding for construction of eight observation towers in El Paso area approved by U.S. Congress; one tower projected to be 175 feet high, another 125 feet high, and the rest each 75 feet high;

1948: Barbed-wire fence in El Paso reported in story, along with active observation towers;

1955: (May) 696-mil-long fence proposed in U.S. Congress between El Paso and the Pacific Ocean to keep out animals infected with hoof-and-mouth disease and to enforce plant quarantines;

1955: (July) New 14-foot-high fence proposed to replace old fence in San Ysidro. *Id.* at 267–68. By 1977 and 1978 U.S. Congress approved funding to build fencing in El Paso, Texas; San Ysidro, California; and San Luis, Arizona. *Id.* at 270. Dubbed the “Tortilla Curtain” by the U.S. media, a contractor controversially stated the new fences would “sever the toes of anyone trying to scale [them].” *Id.* at 270.

39. JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY 11 (2002).

40. Kristina Davis, *Operation Gatekeeper at 25: Look Back at the Turning Point That Transformed the Border*, SAN DIEGO UNION TRIB. (Sept. 29, 2019), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-09-28/gatekeeper-anniversary-25-san-diego-border>.

41. *Id.*

unauthorized immigration.⁴² This shift is one that has entailed an evolution of the U.S.-Mexico divide from a border (or a zone of transition) to a boundary (or a line of strict demarcation).⁴³

Along with a larger number of border patrol agents, the government also sought to create more fencing. To that end, in 1996, President Bill Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),⁴⁴ a 750-page bill, in which Section 102 specifically related to border construction:

(a) In General.—The Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

...

(c) Waiver.—The provisions of the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section.⁴⁵

Then in 2005, President Bush signed the REAL ID Act, which gave the Secretary of the Department of Homeland Security (DHS) sweeping authority to waive all legal requirements that might impede construction of security barriers.⁴⁶ The waiver gave

42. NEVINS, *supra* note 39, at 12.

43. *Id.* at 12–13.

44. CHAD C. HADDAL, YULE IM & MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 1 (2009).

45. Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996, Pub. L. No. 104-208, §§ 102(a), (c), 110 Stat. 3009 (1996).

46. HADDAL, IM & GARCIA, *supra* note 44, at 6.

DHS the right to disregard all legal requirements that might impede construction of security barriers.⁴⁷ The REAL ID, in part, stated:

(c) Waiver.—

(1) In General.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to *waive all legal requirements* such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) Federal Court Review.—

(A) In General.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland security pursuant to paragraph (1). *A cause of action or claim may only be brought alleging a violation of the Constitution of the United States.* The court shall not have jurisdiction to hear any claim not specified in this subparagraph.⁴⁸

Finally, in 2006, Congress enacted the Secure Fence Act, which allowed DHS to construct a two-layered fence that was

47. *Id.*

48. REAL ID Act of 2005, Pub. L. No. 109—13, §§ 102(c)(1), (c)(2)(A), 119 Stat. 231 (2005) (emphasis added); see Lisa M. Meierotto, *The Blame Game on the Border: Perceptions of Environmental Degradation on the United States-Mexico Border*, 71 HUM. ORG. 11, 15 (2012) (explaining that the waiver has been used by DHS to disregard the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, the Wilderness Act, the National Historic Preservation Act, the National Wildlife Refuge System Administration Act, the Military Lands Withdrawal Act, and the Sikes Act, among others).

estimated to stretch a total of 850 miles.⁴⁹ Thereafter, DHS rapidly escalated border construction along the boundary line.⁵⁰

B. Flooding Incidents at the U.S.-Mexico Border Due to Border Construction

One consequence of this increased border construction was flooding that destroyed property and even led to deaths.⁵¹ Naveena Sadasivam reported:

In 2006, the arid sister cities of El Paso, Texas, and Ciudad Juarez, Mexico, experienced the wettest monsoon period on record, receiving about three-fourths of their average annual precipitation in one week. The heavy, sustained rains resulted in flooding in both towns. The flooding in Juarez was particularly severe, with losses totaling \$600 million. El Paso suffered \$200 million in damages. Geographers believe the disparate impact was at least in part a result of debris clogging the Mexico side of the grates that Border Patrol had installed in tunnels.⁵²

Then, in 2007, DHS built a five-mile segment of fence despite warnings from officials at the Organ Pipe Cactus National Monument in Arizona that the construction would impede the movement of water in the flash-flood prone area.⁵³ DHS did not heed these warnings and after completing construction in 2008, debris stacked up behind the fence. The debris acted like a dam,

49. HADDAL, IM & GARCIA, *supra* note 44, at 9; Secure Fence Act of 2006, Pub. L. No. 109—367, 120 Stat. 2638 (2006).

50. See *Border Wall Construction and Maintenance*, AM. FRIENDS SERV. COMM. (2021), <https://investigate.afsc.org/border-construction> (describing the \$4 billion appropriated to fund border wall construction under the Secure Fence Act).

51. Sadasivam, *supra* note 17. Another consequence of border construction includes environmental degradation. Many border locals view Border Patrol itself as a major perpetrator of environmental destruction. Meierotto, *supra* note 48, at 15. For example, a vehicle barrier fence on the south side of the Cabeza Prieta National Wildlife Refuge did not follow environmental protection procedures. *Id.* at 16. Also, roads have been built in sensitive environmental areas and tire tracks can be seen in many areas. *Id.*

52. Sadasivam, *supra* note 17.

53. *Id.*

pushing water into nearby private businesses as well as into the port of entry at Lukeville, Arizona.⁵⁴

That same year, monsoon rains flooded the border town of Nogales, Sonora in Mexico, trapping merchants in their stores, destroying 578 homes, 45 cars, and causing \$8 million worth of damages.⁵⁵ Two people drowned.⁵⁶ Once again, the culprit was border infrastructure.⁵⁷ The monsoon floodwaters built up behind the wall, collapsing the tunnel on the Mexican side.⁵⁸ However, the Border Patrol refused to take responsibility.⁵⁹

Finally, in 2014, monsoon rains hit the sister cities of Nogales.⁶⁰ Floodwaters rushed down the Mariposa Port of Entry and clogged a sixty-foot section of the border fence with debris.⁶¹ The bollard-style fence—with posts buried at least seven feet underground—had been designed to let water pass through. However, the intensity of the flooding and the size of the debris, including large tree trunks, toppled the fence.⁶² This flood also caused several million dollars in damages.⁶³

Organizations warned the government about the flooding and potential destruction.⁶⁴ In particular, in 2019, a coalition of thirty-two organizations, including the ACLU and many environmental entities, wrote a letter to the U.S. Border Patrol, warning that “[b]uilding walls in the floodplain will cause severe

54. *Id.*

55. McCombs, *Mexico Ties Flooding*, *supra* note 13.

56. *Id.*; Sadasivam, *supra* note 17.

57. Sadasivam, *supra* note 17.

58. *Id.*

59. *Id.*

60. *Id.*

61. Jonathan Clark & Manuel C. Coppola, *Rainstorm Runoff Topples Border Fence, Floods Western Avenue*, NOGALESINT'L (July 27, 2014), https://www.nogalesinternational.com/news/rainstorm-runoff-topples-border-fence-floods-western-avenue/article_6b02dd90-15dd-11e4-991e-001a4bcf887a.html.

62. Sadasivam, *supra* note 17.

63. del Bosque, *supra* note 2.

64. Letter from Animal Legal Def. Fund et al. to Paul Enriquez, Env't Branch Chief, Border Patrol Facilities & Tactical Infrastructure (Aug. 26, 2019), at 6—7, 14. (on file with the Sierra Club).

flooding danger and put communities, property, and wildlife habitat on both sides of the border in harm's way."⁶⁵

III. UNSUCCESSFUL LAWSUITS IN TORT AND ON CONSTITUTIONAL GROUNDS

Border Patrol and the U.S. government did not heed the warnings.⁶⁶ The destruction caused by flooding led to numerous lawsuits, including actions brought by U.S. citizens against the government's border construction seeking compensation on both tort and constitutional grounds.⁶⁷ However, these lawsuits failed. Two cases, in particular, illustrate the history and challenges with holding DHS accountable.⁶⁸

A. Suing in Tort

Both United States citizens and Mexican nationals are unable to sue DHS for the destruction of their property and the loss of life due to the REAL ID waiver provision and its bar on tort claims.⁶⁹ The REAL ID Act states explicitly that a lawsuit may only be brought if the plaintiff alleges a violation of the U.S. Constitution.⁷⁰ Courts do not have jurisdiction over any other claims as it relates to border construction.⁷¹

65. *Id.* at 6.

66. Brady McCombs, *Rain washes away 40 feet of U.S.-Mexico border fence*, ARIZ. DAILY STAR (Aug. 10, 2011), https://tucson.com/news/local/border/rain-washes-away-feet-of-us-mexico-border-fence/article_9eaead31-14eb-5474-a5c5-564a980049b2.html.

67. *Armendiaz v. Stillman*, 54 Tex. 623, 632—33 (1881); *Gringo Pass, Inc. v. Kiewit Sw. Co.*, No. CV-09-251-TUC-DCB, 2012 U.S. Dist. LEXIS 21686, at *32—33 (D. Ariz. Jan. 10, 2012).

68. *See Armendiaz*, 54 Tex. at 632—33 (1881) (holding that an injured party may bring suit in the county where the actor who injured them resides, no matter where the injury occurred, except specific cases enumerated by statute); *see also Gringo Pass*, 2012 U.S. Dist. LEXIS 21686, at *32—33 (holding that the United States was entitled to summary judgment and had sovereign immunity thus exempting the Plaintiff's Federal Tort Claim Act action).

69. 8 U.S.C. § 1103 note (Improvement of Barriers at Border) (waiving United States District Courts from having jurisdiction over any claims arising from actions taken by the Secretary of Homeland Security, except for claims arising out of an alleged violation of the United States Constitution).

70. *Id.*

71. *Id.*

This has not always been the case. As early as 1881, a lawsuit about cross border flooding came before the Texas Supreme Court that ultimately ruled in favor of compensation.⁷² In *Armendiaz v. Stillman*, James Stillman placed an obstruction in the waterbed of the Rio Grande river on the Texas side.⁷³ As a consequence, the river's current flooded Eugenia Armendiaz's land, which was located on the Mexican side of the river.⁷⁴ The flood destroyed her garden, ornamental trees, stables, and other houses on the land.⁷⁵ The lower court dismissed the case due to lack of jurisdiction, stating that the damage occurred in Mexico.⁷⁶ However, the Texas Supreme Court reversed, holding "where an injury has been caused by an act done in one county to land, situated in another, the venue may be laid in either."⁷⁷

Prior to the REAL ID Act, a Mexican national could conceivably sue DHS in an American court for two reasons: (1) the Alien Tort Act allows foreign nationals to have free access to American courts, and (2) many court cases prior to 2005 recognize that damages may be awarded for injuries sustained to real property in another jurisdiction.⁷⁸

However, after the REAL ID Act, torts would necessarily fail. Notably, in 2012, Martha Gay sued DHS for \$6 million in property damage and diminished property value.⁷⁹ Ms. Gay owned and operated Gringo Pass, Inc., a grocery store and gas station located

72. *Armendiaz*, 54 Tex. at 632—33.

73. *Id.* at 627.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 628 (quoting *Thayer v. Brooks*, 17 Ohio 489, 493 (1848)).

78. See Alien Tort Statute, 28 U.S.C. § 1350; Stephen C. McCaffrey, *Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation Between Canada and the United States*, 3 CAL. W. INT'L L. J. 191, 210-12 (1973), <https://scholarlycommons.law.cwsl.edu/cwilj/vol3/iss2/18> (discussing several cases predating 2005 which held that one can elect to sue where the injury was sustained or where the act was committed, including for tort relating to water damage). McCaffrey cites *Bulwer's Case* (electing whether to sue where the injury was sustained or where the act was committed), *Slack v. Walcott* (holding that because water is incorporeal it has no situs and an action for injury thereto may be brought either in the jurisdiction where the diversion was made, or where the injury was suffered), and *Mannville Co. v. Worcester* (holding that a tort action would lie in either state). *Id.* at 211—212.

79. *Gringo Pass*, 2012 U.S. Dist. LEXIS 21686, at *13.

on the west side of the Lukeville Port of Entry along the U.S.-Mexico border.⁸⁰ The business, which started in 1966, was operated by Ms. Gay for thirty-eight years.⁸¹ Ms. Gay claimed that the property had never flooded until July 2008.⁸²

The United States Army Corps of Engineers (USACE) provided construction management and contracted with Kiewit Western Company to build the fence.⁸³ The portion of the border fence that passed through Lukeville, Arizona spanned about 5.2 miles.⁸⁴ The fence was fifteen feet tall in most areas and construction was completed prior to July 2008.⁸⁵ During the planning stages of the border fence, the Organ Pipe Cactus National Monument (OPCNM) expressed concern that flooding could destroy infrastructure; however, the United States insisted that the fence would not impede the natural flow of water.⁸⁶ After the July 2008 storm, OPCNM investigated and concluded that faulty border construction was to blame for the flood that damaged private property, government offices, and commercial businesses in Lukeville.⁸⁷

Subsequently, Gringo Pass sought damages, claiming negligent design and maintenance of the border fence, stating that it interfered with the natural flow of surface waters “causing an invasion of Gringo Pass’ interest in the use and enjoyment of its land.”⁸⁸ In response, the United States filed a motion for summary judgment, citing the discretionary function exemption based on the Federal Tort Claim Act (FTCA).⁸⁹

80. *Id.* at *2.

81. *Id.*

82. *Id.*

83. *Id.* at *3—4.

84. *Id.* at *4.

85. *Id.* at *5.

86. *Id.* at *6.

87. *See id.* at *6—8 (stating that the National Park Service found directional changes in floodwaters, the first in 60 years, in the investigation of OPCNM after the 2008 flood. This change caused the overflow of water which damaged Lukesville properties).

88. *Id.* at *10.

89. *Gringo Pass, Inc. v. Kiewit Sw. Co.*, No. CV-09-251-TUC-DCB, 2012 U.S. Dist. LEXIS 21686, at *13—14 (D. Ariz. Jan. 10, 2012). The court defined the FTCA explaining, “[t]he FTCA waives the federal government’s sovereign immunity for tort claims arising out of the negligent conduct of government employees and agencies in circumstances where the United States, if a private person, would be liable to the claimant under the law

The court used a two-step test to determine whether the exception applied.⁹⁰ First, the court held that the waiver provision did not mandate a specific course of action, but rather the government retained an element of choice with respect to border construction.⁹¹ Second, the court had to determine whether the “judgment is of the kind that the discretionary function exception⁹² designed to shield, namely, only governmental actions and decisions based on considerations of public policy.”⁹³ The United States argued that the building of the fence and the design decision was solely the function of national policy, which balanced the flow of water with the DHS mission to secure the international borders of the United States.⁹⁴ The court agreed.⁹⁵

The court concluded, “[i]n hindsight it may be easy to say the fence should not have been built or should have been built differently, but that is exactly the judicial second-guessing of government decision-making that the discretionary function exception is designed to prevent.”⁹⁶ However, the court erred, having itself acknowledged in its opinion that the OPCNM

of the place where the act or omission occurred.” *Id.* at *17 (citing *Terbush v. United States*, 516 F.3d 1125, 1128—29 (9th Cir. 2008)). “However, the discretionary function exception provides the government an immunity from suit that private persons do not have: for [a]ny claim . . . based upon the exercise or performance of the failure to exercise or perform a discretionary function” *Id.* at *17—18 (quoting 28 U.S.C. § 2680(a)). “The discretionary function exception is a limit placed by Congress on its waiver of traditional sovereign immunity from suit; it ‘marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” *Id.* at *18 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

90. *Id.* at *18.

91. *Id.* at *21—22. It is important to note that the REAL ID Act provided no mandatory or specific policies requiring any specific fence design. REAL ID Act of 2005, Pub. L. No. 109—13, 119 Stat. 231 (2005).

92. *Gringo Pass, Inc. v. Kiewit Sw. Co.*, No. CV-09-251-TUC-DCB, 2012 U.S. Dist. LEXIS 21686, at *21-22 (D. Ariz. Jan. 10, 2012).

93. *Id.* at *19 (quoting *Terbush*, 516 F.3d at 1129).

94. *Id.* at *23—24.

95. *Id.*; see also *id.* at *24, *32-33 (stating that the United States “established the discretionary immunity exemption,” therefore the court lacked subject matter jurisdiction, and “no material questions of fact . . . [precluded] resolution” of the motion).

96. *Id.* at *26.

warned DHS about flooding due to border fencing *prior* to the construction.⁹⁷

Nevertheless, the case is instructive on how a court would rule if a Mexican national brought a claim in a U.S. court against DHS for property damage due to border construction. The ruling further demonstrated the manner in which the waiver provision has immunized DHS from any torts, and therefore any liability for property damage or even deaths caused by border barriers.⁹⁸

B. Border Construction as Constitutional Violation

Federal courts also have upheld the waiver provision when confronted with lawsuits arguing that the provision is unconstitutional.⁹⁹ In the case of *In re Border Infrastructure Env't Litig.*, numerous organizations, including the Center for Biological Diversity, the Defenders of Wildlife, the Sierra Club, the Animal Legal Defense Fund, and the People of the State of

97. *Id.* at *6.

98. *See id.* at *17–18 (stating that the discretionary function exemption provides the government immunity from suits, regardless of “whether or not the discretion involved be abused” (citing 28 U.S.C. §268(a))); *see also id.* at *20 (stating that the discretionary function exemption is applicable even in cases where it may result in “a shield for carelessness” (citing *National Union Fire v. United States*, 115 F.3d 1415, 1422 (9th Cir. 1997))); *see also id.* at *26 (stating that the discretionary function exemption is explicitly meant to prevent the court from determining “whether the federal government made the correct decision” (citing *Miller*, 163 F.3d 591, 596 (9th Cir. 1998))); *see Terbush*, 516 F.3d at 1128, 1131 (holding that based on the FTCA exception, the National Park Service (“NPS”) could not be held liable for the death of a rock-climber for failure to establish safety provisions when no such requirement was made by NPS policies and when the decisions were rooted in policy).

99. *See* *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007); *County of El Paso v. Chertoff*, No. EP-07-CA-206-PRM, 2008 U.S. Dist. LEXIS 144743 (W.D. Tex. Dec. 1, 2008); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *El Paso County v. Trump*, 982 F.3d 332 (5th Cir. 2020); *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019); *California v. Trump*, 963 F.3d 926 (9th Cir. 2020); *In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018); Skye M. Walker, *Chapters: Wars, Walls, and Wrecked Ecosystems: The Case for Prioritizing Environmental Conservation in a National Security-Central Legal System*, 51 ENV'T L. 913, 924 (2021). Walker explains the lawsuits did show a glimmer of hope when the Ninth Circuit recognized the Sierra club had standing and a legally cognizable harm to the environment and quasi-sovereign bodies. *Id.* at 925. These hopes, however, were dashed in *In re Border Infrastructure Env't Litig.* as further described below.

California, brought suit against the DHS.¹⁰⁰ These organizations contended that the DHS waiver—which in 2017 allowed the Secretary to waive more than thirty-three legal requirements while replacing fifteen miles of existing border fence in the San Diego Sector and three miles of existing border fence in the El Centro Section—was unconstitutional.¹⁰¹

Among the many constitutional claims, the five most significant included violations of the non-delegation doctrine; the Take Care Clause; Article I, Section 7; the First Amendment; and the Tenth Amendment.¹⁰² Ultimately, the court granted every one of the United States' motions for summary judgment and cited Chief Justice Roberts, who stated "[i]t is not our job to protect the people from the consequences of their political choices."¹⁰³

The court may have provided a small opening when it declined to address the plaintiffs' claim that their First Amendment right

100. *In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d. at 1107.

101. *Id.* at 1101 (holding that waivers were constitutional and did not exceed the authority delegated by Congress).

102. *Id.* at 1131—46 (holding that Congress may delegate its authority as long as it provides an intelligible principle and that the waiver didn't interfere with the state's police power because it was narrowly applied only to the border). The five most important points included: (1) Section 102 is a violation of the non-delegation doctrine because it grants the Executive Branch a blanket waiver in violation of the separation of powers. *Id.* at 1131. The court held Congress may delegate its authority as long as it provides an intelligible principle. Here, Congress's principle was intelligible because the Executive Branch has independent and significant authority in border control enforcement. *Id.* at 1132, 1135-36. (2) the Waiver Determination violates the Take Care Clause. Here, the United States successfully argued the clause only applies to the actions of the President, not the Secretary of DHS or other cabinet members. *Id.* at 1137. (3) the DHS Secretary's waiver of more than thirty environmental laws violates Article I, Section 7 of the U.S. Constitution because it amounts to an amendment or repeal of statutes. *Id.* at 1140. Here, the court held the waivers were narrow in scope because they were only for the purpose of building border barriers. *Id.* at 1141. (4) the waiver deprived individuals of their due process rights and impaired their First Amendment right to petition the government. *Id.* at 1141—42. The government counter-argued that the plaintiffs had not demonstrated that they have a cognizable life, liberty or property interest. *Id.* at 1142. The court then declined to address the issue because the issue had not been properly briefed by the parties. *Id.* at 1143. (5) the waiver interfered with the state's police powers, thereby violating the Tenth Amendment, because it allowed the federal government to override state laws. *Id.* at 1145—46. The court again disagreed, explaining that the waiver was narrow and applied only to the border. *Id.* at 1146.

103. *Id.* at 1102.

to petition the government had been violated.¹⁰⁴ The court declined to rule on the issue for lack of proper briefing.¹⁰⁵ Therefore, future victims of flooding due to border construction could still bring a constitutional claim arguing that their First Amendment right to petition the government has been violated.¹⁰⁶ However, glaringly absent from the plaintiff arguments and the opinion of the court was any mention of international law.¹⁰⁷ In this case, the court did not grapple with the important fact that the waiver and the Congressional statute are not valid in Mexico because the United States' jurisdiction ends at its territorial boundaries—ends, indeed, at the border.¹⁰⁸

IV. THE WAIVER AND INTERNATIONAL LAW

The REAL ID Act meant Congress codified a space of government lawlessness at the U.S.-Mexico border, giving DHS the right to disregard international law as well as bilateral treaties and encroach upon another State's national sovereignty.¹⁰⁹

104. *Id.* at 1143.

105. *Id.*

106. *Id.* at 1142—43.

107. See Raymond H. Brescia, *The Shifting Frontiers of Standing: How Litigation Over Border Wall Funding Is Exposing Standing's Current Doctrinal Fault Lines*, 68 UCLA L. REV. DISC. 80, 82 (2020) (analyzing whether plaintiffs had Article III standing to challenge border wall funding decisions without addressing international law or the possibility of Mexico suing the United States as an equally aggrieved party). This author focuses on whether the plaintiffs had standing to challenge the actions; however, the article does not address international law or the possibility of Mexico suing the United States as an equally aggrieved party.

108. *In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d at 1107, 1142—43.

109. The DHS waiver authority also foreclosed the possibility of collaboration between local and regional actors on both sides of the border regarding flooding. See REAL ID Act of 2005, Pub. L. No. 109-13, §§ 102(c)(1), (2)(A), 119 Stat. 231 (2005) (emphasis added); Vivienne Bennett & Lawrence A. Herzog, *U.S.-Mexico Borderland Water Conflicts and Institutional Change: A Commentary*, 40 NAT. RES. J. 973, 980 (2000) (noting cross-border water management challenges such as with allocation disputes, increased salinization of Colorado River water affecting Mexican farmers, and sewage spills from Tijuana into San Diego).

A. The International Court of Justice

Perhaps the reason Mexico has not sued the United States is because of their lack of success in the past.¹¹⁰ Although the international law principles of Do No Harm and Due Diligence would apply here, it is unlikely that the United States would consent to a lawsuit in the ICJ or comply with any judgment against itself in any other forum.¹¹¹

110. For example, in 2003, Mexico brought proceedings against the United States alleging violations of the Vienna Convention on Consular Relations. See William J. Aceves, *Consular Notification and the Death Penalty: The ICJ's Judgment in Avena*, AM. SOC'Y INT'L L. INSIGHTS (Apr. 2, 2004), <https://www.asil.org/insights/volume/8/issue/6/consular-notification-and-death-penalty-icjs-judgment-avena>. (describing Mexico's 2003 ICJ proceedings against the United States under the Vienna Convention on Consular Relations involving fifty-four Mexican nationals sentenced to death). Mexican nationals had been convicted and sentenced to death in fifty-four separate cases. *Id.* By 2004, the ICJ issued a unanimous decision, ruling that the United States needed to take all measures necessary to ensure three Mexican nationals in particular would not be executed. *Id.* In response, President George W. Bush called for state courts to review the convictions. *Mexico Again Sues United States in ICJ; ICJ Directs United States to Block Medellin Execution; U.S. Supreme Court Again Denies Relief; Texas Executes Medellin*, 102 AM. J. INT'L L. 860 (2008) (detailing that the Supreme Court held that the directive from the ICJ proceedings did not have domestic legal force and Texas was not obligated to honor it). The case made its way to the U.S. Supreme Court, which in *Medellin v. Texas* ruled the directive did not have domestic legal force and Texas was not obligated to honor it. *Id.* Similarly, in 2001 Mexico filed for an arbitration panel under the North American Free Trade Act Chapter 20, which allowed country-to-country disputes to be settled through an arbitration panel. Elizabeth Townsend, *NAFTA, Mexican Trucks, and the Border: Making Sense of Years of International Arbitration, Domestic Debates, and the Recent U.S. Supreme Court Decision*, 31 TRANSP. L.J. 131, 132—91 (2004) (explaining that despite the arbitration panel unanimously concluding that the United States had violated NAFTA obligations to Mexico, American organizations sued going up to the Supreme Court resulting in the United States continuing not to comply with the NAFTA agreement for many years). Mexico complained that the United States did now allow cross-border trucks to be processed for application and denied Mexicans the ability to invest in cross-border trucking in the United States. *Id.* at 132. The Arbitration Panel unanimously concluded the United States had violated its NAFTA obligations. *Id.* at 139. However, several American organizations, including the International Brotherhood of Teamsters, sued. *Id.* at 153. The case went all the way up to the Supreme Court, but the court cases meant that the United States continued not to comply with the NAFTA agreement for many years. *Id.* at 191.

111. If the flooding contained toxic pollution, further arguments could be made. Within the context of international law, as between countries, a federal government's power usually has been subject to compromise. Vicki L. Golich & Terry Forrest Young, *Resolution of the United States-Canadian Conflict Over Acid Rain Controls*, 2 J. ENV'T AND DEV. 63, 66-67 (1993) (detailing that the United States has not abided by the

1. The Do No Harm Principle

Nevertheless, Mexico would have a strong suit in the ICJ on grounds that the United States is violating the Do No Harm and Due Diligence principles. The Do No Harm principle as it relates to international boundaries began in 1966 when the International Law Association (ILA) created the Helsinki Rules on the Uses of Waters of International Rivers (Helsinki Rules).¹¹² These rules codified customary legal norms, but these norms were not formally binding.¹¹³ Then, in 1970, the United Nations General Assembly requested the ILA to conduct a study concerning surface waters and unconfined groundwaters, and by 1994 the ILA provided draft articles to the General Assembly.¹¹⁴ It took until 1997 for the United Nations to adopt the Convention on the Law of Non-navigational Uses of International Watercourses (UNWC).¹¹⁵ However, this treaty did not enter into force for seventeen years.¹¹⁶ Thus, in 2004 the ILA reconvened and created the Berlin Rules.¹¹⁷ Of particular importance was the definition of “Do No Harm,” which said: “[S]tates . . . shall refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State having due regard for the

principles of good neighborliness where nation-states are held accountable for damage inflicted, intended or not, as a result of harm emanating from their territory, the duty to inform where governments are required to notify each other of significant discoveries regarding the causes and consequences of any pollution, and the requirement of the polluter compensates for damage). For example, in the context of harm done to neighboring countries such as pollution, toxic water runoff, and acid rain, customary legal principles—although unwritten—have included good neighborliness, where nation-states are held accountable for damage inflicted, intended or not, as a result of harm emanating from their territory. *Id.* Further, the duty to inform has required governments to notify each other of significant discoveries regarding the causes and consequences of any pollution. *Id.* Finally, the polluter pays principle has required polluters to compensate “pollutes” for damage. *Id.* As shown above, thus far, the United States has not abided by any of these principles in regard to the damaged property for flooding.

112. David Goad, *Water Law Be Dammed?: How Dam construction by Non-Hegemonic Basin States Places Strain on the Customary Law of Transboundary Watercourses*, 35 AM. U. INT’L L. REV. 907, 917 (2020).

113. *Id.*

114. *Id.* at 917—18.

115. *Id.* at 918.

116. *Id.*

117. *Id.*

right of each basin State to make equitable and reasonable use of the water.”¹¹⁸ If Mexico sued in the ICJ for flooding on Mexican territory due to U.S. border construction, Mexico could argue that the United States had a duty to refrain from and prevent acts within its territory that caused significant harm.¹¹⁹

This Do No Harm principle exists not only in customary international law, but the United States itself upheld this principle during the Trail Smelter Arbitration Tribunal, a special convention that dealt solely with a dispute arising between a smelter in British Columbia, Canada that had caused damage to landowners in the state of Washington.¹²⁰ Here, the Tribunal explained:

[U]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.¹²¹

This case was not the only time the United States agreed that actions by one state that harmed another state should cease.¹²²

118. *Id.* at 923. In international water law, the meaning of “no-harm” remains vague; the language referring to the obligation also varies from one instrument to another. *See* Mara Tignino & Christian Bréthaut, *The role of international case law in implementing the obligation not to cause significant harm*, 20 INT’L ENV’T AGREEMENTS: POLS., L. & ECONS. 631, 632 (2020).

119. *See id.* (noting the existing duty of States in international law to “refrain from and prevent acts . . . within their territory that cause significant harm” to other basin States).

120. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1907, 1965 (1941) (noting that the Tribunal in this arbitration came to its conclusion using the principles of international law and the existing law of the United States, particularly the decisions of the Supreme Court of the United States).

121. *Id.* at 1965.

122. *See* GARRISON DIVERSION ISSUES – BACKGROUND MEMORANDUM, N.D. LEGIS. COUNCIL 2 (1997) (noting that in a irrigation project that would affect Canadian waters, the United States government responded to Canadian concerns by recognizing its obligation under the Boundary Waters Treaty of 1909, and adopting a policy that “no construction affecting Canada would be undertaken” unless treaty obligations were clearly met).

The United States also upheld the Do No Harm principle in *United States v. Arjona* when the Supreme Court stated, “[t]he law of nations requires every national government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof.”¹²³

2. The Due Diligence Principle

Furthermore, international law includes not only the Do No Harm principle, but also the duty of due diligence, which may be defined as “[a] duty to cease and remedy damage that emanates from a State’s territory.”¹²⁴ The Trail Smelter Tribunal also mentioned this State responsibility, explaining, “[a] State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.”¹²⁵

Therefore, it can be assumed that the United States itself has agreed to both principles as general rules of international law. Consequently, the ICJ may rule in favor of Mexico if the State brought a suit against the United States for damages as a result of border construction.¹²⁶ Two cases, in particular, point to a positive ruling by the ICJ if Mexico were to sue the United States. First, in 2006 Argentina sued Uruguay contending that the construction of two pulp mills along the River Uruguay could cause significant damage to the water quality of the river, resulting in transboundary harm.¹²⁷ In this case, the Court held,

123. *United States v. Arjona*, 120 U.S. 479, 484 (1887).

124. Eric Talbot Jensen & Sean Watts, *Cyber Due Diligence*, 73 OKLA. L. REV. 645 (2021).

125. Trail Smelter Arbitration, 3 R.I.A.A. at 1963 (quoting CLYDE EAGLETON, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 80 (1928)).

126. See Goad, *supra* note 112, at 916-17 & n.72 (explaining that the ICJ referenced the doctrine of absolute territorial sovereignty in the *Gabcikovo-Nagymaros* case during its discussion of *Lake Lanoux*. There the arbitral tribunal asserted that states have the “sovereign right to utilize their natural resources. The ICJ, however, reeled in an absolutist view in *Gabcikovo-Nagymaros*, applying limitations to absolute sovereignty, and instead held that the right of a state to unilaterally build a dam on a shared watercourse within its territory was subject to limitations.” The limitations were found to include the duty to avoid “significant transboundary harm” and the principle of “equitable and reasonable utilization of a shared watercourse”).

127. Jensen & Watts, *supra* note 124, at 676.

“[i]t is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’”¹²⁸ Second, Costa Rica began proceedings against Nicaragua, alleging that Nicaragua had occupied Costa Rican territory and impermissibly carried out dredging operations in a channel of the San Juan River.¹²⁹ Nicaragua then instituted proceedings against Costa Rica alleging that road construction beside the San Juan River between the two countries had caused major environmental damage to its territory.¹³⁰ The Court once again cited the due diligence principle that states had a duty to prevent significant transboundary harm and should notify and consult with the affected state in good faith.¹³¹

However, the United States would likely not consent to the ICJ’s jurisdiction, and even if it gave consent and the ICJ ruled in favor of Mexico, the United States would not likely comply.¹³²

128. *Id.* at 677 (quoting *Pulp Mills on River Uruguay*, 2010 I.C.J. 14, ¶ 101 (Apr. 20)); *see generally* Goad, *supra* note 112, at 916–17 & n.72 (explaining that although the Court has indeed given deference to a state’s absolute sovereignty, the Court has also held that right of a state to unilaterally build a dam on a shared watercourse within its territory is subject to limitations, positing that these limitations include the duty not to cause significant transboundary damage).

129. Jensen & Watts, *supra* note 124, at 678.

130. *Id.*

131. *Id.* at 678–79 (citing *Certain Activities Carried Out by Nicaragua in Border Area* (Costa Rica v. Nicar.) and *Construction of Road in Costa Rica Along San Juan River* (Nicar. V. Costa Rica), Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16)).

132. *See generally* Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, in *THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* (Cesare Romano, ed., 2008) (explaining that the United States has a long standing practice of being unwilling to submit itself to the authority of the court and has historically reacted negatively to decisions that are unfavorable. For example, the United States withdrew from the general compulsory jurisdiction of the ICJ in 1986, after an unfavorable decision in a case relating to U.S. military attacks in Nicaraguan territory. The United States also withdrew from the court’s jurisdiction over disputes arising under the Vienna Convention on Consular Relations). *See generally* Lan Nguyen & Truong Minh Vu, *After the Arbitration: Does Non-Compliance Matter?*, ASIA MAR. TRANSPARENCY INITIATIVE (July 22, 2016), <https://amti.csis.org/arbitration-non-compliance-matter/> (noting that after a judgment against the United States in the Nicaragua case, the United States ignored Nicaragua’s request for negotiations on compensation. Nicaragua sought enforcement of the judgment through the U.N. Security Council, which has the power to decide upon the measures that need to be taken to enforce the judgment. But the United States exercised its power as a permanent member of the council and vetoed several draft resolutions).

Mexico can surmise this lack of compliance for various reasons, including the United States' lack of compliance with bilateral treaties.¹³³

B. Disregard for Binational Treaties

Today, a few scholars posit that no state right exists to the unilateral establishment and management of border issues.¹³⁴ This view may slowly become customary international law when acknowledging that border territory is owned jointly by two countries, and therefore a binational treaty, not national laws, should govern certain areas where actions by one state affect the other.¹³⁵ Many binational treaties have been ratified by the United States and Mexico, but the United States has violated many of these treaties through border construction, with the most notable being the 1944 Water Treaty and the 1970 Treaty.¹³⁶

133. See generally STEPHEN P. MUMME, BORDER WATER: THE POLITICS OF U.S.-MEXICO TRANSBOUNDARY WATER MANAGEMENT, 1945–2015, 35, 291 (2023) (describing instances where the United States has not complied with its treaties with Mexico; noting that although the first water treaty between the United States and Mexico, the Rio Grande Convention, was signed in 1906, the United States did not honor the treaty until the New Mexico dam was completed in 1916; and further noting that the United States has continued barrier construction on the north bank of the Rio Grande without Mexico's consent as required by the 1970 Boundary Treaty).

134. Beth A. Simmons, *Border Rules*, 21 INT'L STUD. REV. 256, 276 (2019).

135. Golich and Young explain three formal international legal principles can apply to the management of so-called "global commons." Golich & Young, *supra* note 111, at 66. *Res nullius* notes the resource is unowned, but available for ownership by any state capable of claiming and governing it. *Res publica* vests global commons ownership with the community of nation-states as a whole, which is entitled to establish rules regarding commons use. *Res communis* acknowledges the resource is currently unowned, and claims further that it cannot be owned. It is, instead, the "common heritage of mankind" to be owned jointly and shared by all states irrespective of their capabilities. *Id.* The question arises whether the border is a shared space governed by international law rather than sovereign interests. See Robert McCorquodale & Raul Pangalangan, *Pushing Back the Limitations of Territorial Boundaries*, 12 EUR. J. INT'L L. 867, 868 (2001) (noting that international law is shifting towards "regimes of sharing" that reconceptualize borders as spaces governed by collective international law rather than exclusive state interests).

136. Another salient argument Mexico could make in the ICJ would be that the United States has broken its treaty obligations. See Treaty to Resolve, *supra* note 23 (establishing a binational prohibition against constructing works that would lead to the "deflection or obstruction" of the flow of the river). As Brian Taylor Sumner explains, "[c]laims based on treaty law are particularly persuasive at the ICJ because Article 38 of

Article 2 of the 1944 Water Treaty states, “[n]either Section shall assume jurisdiction or control over the works located within the limits of the country of the other without the express consent of the Government of the latter.”¹³⁷ Article 17 expressly states that “[t]he use of the channels of the international rivers for the discharge of flood or other excess waters shall be free and not subject to limitation by either country . . .”¹³⁸

Similarly, the 1970 Treaty, Article IV, paragraph B(2) states:

If the Commission should determine that any of the works constructed by one of the two Contracting States in the channel of the river or within its territory causes such adverse effects on the territory of the other Contracting State, the Government of the Contracting State that constructed the works shall remove them or modify them and, by agreement of the Commission, shall repair or compensate for the damages sustained by the other Contracting State.¹³⁹

Both of these treaties show that the United States is not in compliance with its binational obligations.¹⁴⁰ According to the

the ICJ Statute obligates the court to consider treaties. Moreover, through treaties parties agree to relinquish their historical or other claims to the property subject to the treaty. Thus, it is no surprise that treaties (unless defective) are binding on the parties that have ratified them.” Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L. J. 1779, 1782 (2004).

137. Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., art. 2, Feb. 3, 1944, T.S. No. 994 [hereinafter 1944 Water Treaty].

138. *Id.* art. 17.

139. Treaty to Resolve, *supra* note 23.

140. Yuxin Nie, *Mexico Raises Concerns Over Texas Floating Barriers on Rio Grande Border*, JURISTNEWS (July 16, 2023), <https://www.jurist.org/news/2023/07/mexico-raises-concerns-over-texas-floating-barriers-on-rio-grande-border/>. U.S. and Mexican authorities have tried to cooperate on numerous water issues at the border, but as Paul Ganster and David E. Lorey have noted, “U.S. and Mexican authorities have not been able to develop agreements to jointly manage the river basins, or watersheds, that lie across the international boundary.” PAUL GANSTER & DAVID E. LOREY, *THE U.S.-MEXICAN BORDER INTO THE TWENTY-FIRST CENTURY* 158 (2008). Two bilateral organizations created by NAFTA, the Border Environment Cooperation Commission (“BECC”) and North American Development Bank (“NADBank”), were designed to be binational border institutions with equal participation by the United States and Mexico. *Id.* at 169. However, lack of funding and national security interests by the United States rendered

1969 Vienna Convention on the Law of Treaties (“Vienna Convention”), a country cannot unilaterally violate a bilateral treaty.¹⁴¹ Notably, Article 62, section 2 states:

A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.¹⁴²

Mexico signed the Convention in 1969 and ratified it in 1974.¹⁴³ The United States, on the other hand, signed in 1970, but never ratified the Vienna Convention.¹⁴⁴ Nevertheless, the United States does regard the Convention as an expression of customary international law.¹⁴⁵ Despite this, DHS has unilaterally decided that U.S. treaty obligations with Mexico do not override its sweeping waiver provision at the border.¹⁴⁶

In response to these breaches in bilateral treaties caused by U.S. border construction, Mexico has lodged numerous complaints against the United States.¹⁴⁷ As Stephen Mumme and Oscar Ibanez note: Mexico’s Secretariat of Foreign Relations has

these institutions mostly ineffective. *Id.* at 172. *See also* Linda J. Allen, *BECC and NAD Bank at 25 Years: Achievements, Challenges, and Evolution*, 39 STAN. ENV’T L. J. 199, 205 (2020) (highlighting that BECC and NADBank were not as successful as desired).

141. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1115 U.N.T.S. 331 [hereinafter Vienna Convention] (referring to art. 62).

142. *Id.*

143. Mumme & Ibanez, *supra* note 18.

144. *Id.*

145. *Id.*

146. *See id.* Mumme & Ibanez also argue that due to border construction, the United States is in non-compliance with the 1983 La Paz Agreement signed by Presidents Ronald Reagan and Miguel de la Madrid. *Id.* at 817. Article 7 stated, “[t]he Parties shall assess, as appropriate, in accordance with their respective national laws, regulations and policies, projects that may have significant impacts on the environment of the border area, so that appropriate measures may be considered to avoid or mitigate adverse environmental effects.” Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, U.S.-Mex., Aug. 14, 1983, 80 Stat. 271.

147. Mumme & Ibanez, *supra* note 18, at 802–03.

sent five diplomatic notes to either the U.S. Embassy in Mexico or directly to the U.S. Department of State questioning the development of security infrastructure along the border without receiving a formal response from the State Department.”¹⁴⁸ Mexico’s complaints, however, have been left unheard.¹⁴⁹

The organization responsible for managing water problems along the border is the International Boundary and Water Commission (IBWC), which is composed of a United States and Mexican section.¹⁵⁰ The IBWC consists of technical engineers and legal advisors who report to the Department of State and Mexican Foreign Ministry.¹⁵¹ The agency is not only in charge of supervising projects that affect both sides of the border, but also provides technical information on the border’s hydrologic problems.¹⁵²

However, Customs and Border Protection (CBP) has overtly asked the United States section of the IBWC (USIBWC) and the State Department in Washington D.C. to disregard its treaties with Mexico for the sake of border construction.¹⁵³ CBP stated that because the Mexican section of the IBWC continued to oppose walls, “we need [US]IBWC and Department of State’s support for an [sic] unilateral decision to proceed with the fence construction.”¹⁵⁴

According to documents obtained by the Sierra Club, the IBWC continued to reject plans for border construction, citing “unacceptable risks to lives and property on both sides of the . . .

148. *Id.* at 822.

149. Mumme & Ibanez, *supra* note 18.

150. Mark A. Sinclair, *The Environmental Cooperation Agreement between Mexico and the United States: A Response to the Pollution Problems of the Borderlands*, 19 CORNELL INT’L L. J. 87, 111—12 (1986). Mumme & Ibanez succinctly describe: “The International Boundary and Water Commission (“IBWC”) of the United States and Mexico was originally established in 1889 as the International Boundary Commission. IBWC is comprised of two national sections each operating under the authority of its respective foreign ministry. The IBWC exercises exclusive jurisdiction for administration and interpretation of the boundary and water treaties and conventions between the United States and Mexico.” Mumme & Ibanez, *supra* note 18, at 809 n.34.

151. Sinclair, *supra* note 150, at 112.

152. *Id.*

153. Nicol, *supra* note 8.

154. *Id.*

[border].”¹⁵⁵ To circumvent the research of the IBWC, CBP hired Baker Engineering to create a floodplain model that claimed border walls would have a “minimal effect on the Rio Grande floodplain.”¹⁵⁶ CBP tried to use this new model to convince the USIBWC to permit the walls, but the commission rejected them.¹⁵⁷ Then, in a startling reversal, in 2011, the USIBWC agreed to allow CBP to take unilateral action.¹⁵⁸

Mexico’s complaints continued. On December 13, 2011, Luis Antonio Rascon Mendoza, Principal Engineer of the IBWC Mexican Section, wrote a letter to John Merina, principal engineer of the USIBWC regarding planned border construction in Roma, Rio Grande City, and Los Ebanos, Texas.¹⁵⁹ He wrote:

We reiterate our opposition to the construction of the proposed fence in the Rio Grande floodplain . . . the decision . . . must first be agreed upon through the Commission. There is an urgent need for the Commission to define the way to address . . . the potential for a disaster to occur in the event of a flood as a result of occupying the floodplain, which would be the responsibility of the Commission.¹⁶⁰

Mexico’s complaints have not abated. As late as 2017 under the first Trump administration, Rascon said Mexico would oppose any “[c]oncrete wall that blocks trans-border water movement . . . if they plan that type of project, we will oppose it.”¹⁶¹ He once again explained that the United States would be in violation of the 1970 Treaty.¹⁶² Despite strong opposition to border

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. See Letter from Luis Antonio Rascon Mendoza to John Merino, No. CEU 01538/11 (Dec. 13, 2011).

160. *Id.*

161. John Burnett, *Mexico Worries That a New Border Wall Will Worsen Flooding*, NPR (Apr. 25, 2017), <https://www.npr.org/2017/04/25/525383494/trump-s-proposed-u-s-mexico-border-wall-may-violate-1970-treaty>.

162. *Id.*

construction, Mexico has not yet brought any lawsuit against the United States for their non-collaboration with the treaty.¹⁶³

C. *Encroachment Upon Mexico's National Sovereignty*

The State of Mexico may have one viable option for addressing the flooding at the border, which is likely to continue and, in the future, again may cause loss of property and life in border communities. A report by Protect NEPA, or the National Environmental Policy Act, and the Sierra Club explained that in 2008, CBP built a 5-foot concrete barrier inside a storm-water tunnel in between Nogales, Sonora and Nogales, Arizona.¹⁶⁴ Notably, the barrier was built on the Mexican side of the border without informing Mexico.¹⁶⁵

Article 2 of the 1944 Water Treaty expressly states, “[n]either Section shall assume jurisdiction or control over works located within the limits of the country of the other without the express consent of the Government of the latter.”¹⁶⁶

Furthermore, a Freedom of International Act request to the IBWC has pointed to the possibility that DHS encroachments onto Mexican sovereign territory have occurred in many more areas throughout the boundary line.¹⁶⁷ In 2015 and 2017, USIBWC employees attempted to clean and maintain certain boundary monuments still extant along the border near Lukeville and Yuma, Arizona.¹⁶⁸ However, the IBWC employees were

163. *Id.*

164. Maya L. Kapoor, *The Desert, Divided: The Borderlands Thrive on Connections. What Would It Mean to Sever Them?*, HIGH COUNTRY NEWS (Mar. 19, 2018), <https://www.hcn.org/issues/50-5/us-mexican-border-arizonas-borderlands-thrive-on-connections/>.

165. *Id.*

166. 1944 Water Treaty, *supra* note 137, art. 2.

167. *Annual Report 2* (2008), INT'L BOUNDARY & WATER COMM'N, 2008, https://www.ibwc.gov/wp-content/uploads/2023/04/2008_report_English.pdf (last visited May 1, 2026); *Border Fence Built in Mexico by Mistake*, CBS NEWS (July 3, 2007), <https://www.cbsnews.com/news/border-fence-built-in-mexico-by-mistake/>.

168. INT'L BOUNDARY & WATER COMM'N, *About Us*, <https://www.ibwc.gov/about-us/> (last visited Feb. 5, 2026); International Land Monument Maintenance: Yuma Field Office, Monuments 192 to 204A (Nov. 8, 2017); International Land Monument Maintenance: Yuma Field Office, Monuments 168 to 191 (Nov. 27, 2017); International Land Monument Maintenance: Yuma Field Office, Monuments 168 to 183 (Apr. 22–24,

unable to access several monuments due to the DHS border fence.¹⁶⁹ This meant that border construction impeded the IBWC from properly maintaining the boundary line.¹⁷⁰ One can infer, therefore, that the proper boundary survey of the line has not occurred in various areas, but has been impeded due to border construction. Article 2 of the 1944 Water Treaty acknowledged that the boundary, particularly within the areas of the Rio Grande and Colorado Rivers, shifts and changes based on the weather and exposure to the elements, such as wind, rain, and shifting water flows.¹⁷¹ Therefore, regular surveys of the international boundary line are paramount so that each country does not encroach on the other's national sovereignty.¹⁷²

The IBWC and Article 2 of the Comisión Internacional de Límites y Aguas (CILA) further state that the IBWC and CILA are international bodies that furnish reports, studies, and plans to each of their respective governments.¹⁷³ Article 2 explains, "[t]he Commission and its personnel may freely carry out their observations, studies and field work in the territory of either country."¹⁷⁴ However, based on the boundary maintenance reports by the IBWC, it can be inferred that border construction impedes both countries from carrying out these observations, studies, and fieldwork.

2015); International Land Monument Maintenance: Yuma Field Office, Monuments 185 to 191 (May 14, 2015).

169. INT'L BOUNDARY & WATER COMM'N, *supra* note 167; International Land Monument Maintenance reports, *supra* note 168.

170. International Land Monument Maintenance reports, *supra* note 168.

171. 1944 Water Treaty, *supra* note 137, (stating "[T]he International Boundary Commission . . . to avoid difficulties occasioned by reason of the changes which take place in the beds of the Rio Grande (Rio Bravo) and the Colorado River shall hereafter be known as the International Boundary and Water Commission, United States and Mexico, which shall continue to function for the entire period during which the present Treaty shall continue in force"); Treaty to Resolve, *supra* note 23 (stating "[w]hen a tract of land passes from the sovereignty of one Contracting State to the other . . . its area shall be ascertained and recorded by the Commission as a credit in favor of the Contracting State from which it was separated" Article D states, "[t]he Commissioners shall exchange all information coming to their attention about possible or actual separation of lands . . . [t]he Commission shall promptly make the necessary surveys and investigations in all cases of separation . . .").

172. Treaty to Resolve, *supra* note 23, art. II(C).

173. 1944 Water Treaty, *supra* note 137, art. 2.

174. *Id.*

U.S. courts have repeatedly ruled that the waiver provision encompasses *all laws*.¹⁷⁵ However, what lawsuits so far have failed to argue—whether by the plaintiffs or the courts’ opinions—is that the jurisdiction of the United States ends where Mexico’s territorial boundaries begin.¹⁷⁶ The waiver provision has no effect in Mexico because it is a Congressional Act that pertains exclusively to United States territory.¹⁷⁷ For this reason, if CILA can prove that DHS has encroached upon Mexican territory either by building a 5-foot concrete barrier on Mexican land or constructing fences on Mexican territory, which CILA is unable to properly survey, then Mexico has a strong cause of action against DHS in a U.S. federal court.¹⁷⁸

D. International Law in United States Courts: the Jus Cogens Argument

Although the REAL ID Act applies on United States territory, the Act has no effect on Mexican territory.¹⁷⁹ If DHS has encroached upon Mexican territory, Mexico can bring suit in United States federal courts and argue international law must be applied in the case of flooding on the Mexican side due to border construction.¹⁸⁰

Here, Mexico has a powerful argument that the United States has violated a *jus cogens* norm. *Jus cogens* was recognized as a legal concept within international law in 1969 when the Vienna

175. *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007); *County of El Paso v. Chertoff*, No. EP-68-CA-196-FM, 2008 U.S. Dist. LEXIS 144743 (W.D. Tex. Sept. 11, 2008); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008).

176. *Save Our Heritage Org.*, 533 F. Supp. 2d at 58; *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010).

177. *See generally Chertoff*, 527 F. Supp. 2d at 119; *Morrison*, 561 U.S. at 255.

178. *Mumme & Buono*, *supra* note 19 (describing Mexico’s formal objections through its section of the International Boundary and Water Commission to U.S. border barrier construction near the Rio Grande as unlawfully interfering with the international boundary, thereby giving rise to legally cognizable disputes between the two states).

179. *Real ID Frequently Asked Questions*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/realid/realid-faqs> (last visited May 1, 2026).

180. *Mumme & Buono*, *supra* note 19 (discussing how flooding caused by U.S. border infrastructure implicates obligations under the 1970 U.S.–Mexico Boundary Treaty and explaining that such disputes, if litigated in U.S. federal courts, would be evaluated under applicable international law governing boundary waters).

Convention of the Law of Treaties provided a broad definition.¹⁸¹ Article 53 states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which *no derogation* is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁸²

Although debate has surrounded what specific acts constitute violations of *jus cogens* norms, the international community largely accepts that the use of force, the execution of juveniles, and the torture of individuals all violate international law.¹⁸³ Another powerful *jus cogens* norm relates to a nation's territorial integrity.¹⁸⁴

1. National Sovereignty as Jus Cogens Norm

Mexico has a powerful argument that encroachments on their territorial integrity are a *jus cogens* norm recognized by the United States. The integrity of national sovereignty has been a customary legal norm dating as far back as 1927 when the Permanent Court of International Justice held in the famous *S.S. Lotus*, “[i]nternational law governs relations between

181. Markus Petsche, *Jus Cogens as a Vision of the International Legal Order*, 29 PENN ST. INT'L L. REV. 233, 235 (2010).

182. Vienna Convention, *supra* note 141, art. 53.

183. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* 2019 I.C.J. Separate Opinion Robinson 294 (Feb. 25, 2019); Martá Brown & Caroline Smiley, *The Interrogation and Detention Reform Act: A Critical Analysis*, UNC SCH. LAW, (May 2009) <https://law.unc.edu/wp-content/uploads/2019/10/interrogationanddetentionreformactcriticalanalysis.pdf>; David Weissbrodt et al., *Supplement to Chapter 13: Domestic Remedies for Human Rights Violations within the U.S.*, U. OF MINN. (Nov. 2003), <https://hrlibrary.umn.edu/intlhr/chapter13.html>.

184. Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT'L L. 1 (2005), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1011&context=scujil>.

independent States . . . now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”¹⁸⁵

Mexico also could point to the Harmon Doctrine, which arose precisely in reaction to a boundary dispute between the United States and Mexico. In the late 19th century, farmers and ranchers in Colorado and New Mexico were diverting water from the Rio Grande.¹⁸⁶ Thereafter, Mexican communities near Ciudad Juarez experienced a reduction in their water supply.¹⁸⁷ When the Mexican Minister sent a letter to the U.S. Secretary of State in 1895, the Secretary of State turned to the Attorney General Judson Harmon to address the problem.¹⁸⁸ Attorney General Harmon delivered the opinion that “[t]he fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory.”¹⁸⁹ He then quoted Chief Justice Marshall from *Schooner Exchange v. McFadden*: “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”¹⁹⁰

Thus, if Mexico sued in a U.S. federal court for infringement of its national sovereignty due to border construction, U.S. national laws would not apply in this cause of action. Rather, the courts would have to apply international law.¹⁹¹

2. The Sovereign Immunity Argument Would Not Stand in a United States Court

The United States would likely try to avoid being sued in court by arguing it had sovereign immunity. However, a landmark 2019 decision, *Al Shimari v. CACI Premier Tech., Inc.*, points to a court

185. S.S. *Lotus* (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) ¶ 44.

186. McCaffrey, *supra* note 78, at 205.

187. *Id.*

188. *Id.* at 205–06.

189. *Id.* at 206.

190. *Id.* at 206 (quoting *Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812)).

191. Mumme & Buono, *supra* note 19.

possibly rejecting the sovereign immunity argument.¹⁹² In *Al Shimari*, three Iraqi plaintiffs brought suit after having been detainees at the notorious Abu Ghraib prison where both U.S. military personnel and CACI employees tortured them.¹⁹³ The plaintiffs described experiencing several weeks of horrendous treatment, including sexually related humiliation, long periods of being kept naked or without food or water, and being threatened with dogs.¹⁹⁴ However, the United States argued that the Eastern District of Virginia lacked subject matter jurisdiction because the U.S. government had sovereign immunity.¹⁹⁵ The plaintiffs contended that *jus cogens* norms had been violated and the court agreed. Thereafter, the court noted five important principles.

First, the court noted that it was already a settled proposition that federal common law could incorporate international law.¹⁹⁶ Second, the court reasoned sovereign immunity itself was a principle of international law, and when an international law conflicted with *jus cogens*—a non-derogable norm—sovereign immunity had to give way.¹⁹⁷ Third, the court explained that the United States had consented to suit with respect to *jus cogens* violations by holding itself out as a member of the international community.¹⁹⁸ Fourth, while the court agreed a sovereign could not be sued in courts of a foreign state, the United States did not retain sovereign immunity *in an American court* for *jus cogens* violations committed *by Americans*.¹⁹⁹ Fifth, and most powerfully, the court explained:

192. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 970 (E.D. Va. 2019).

193. *Id.* at 940.

194. *Id.*

195. *Id.* at 942.

196. *See id.* at 957 (citing *Kadic v. Karadzic*, 70 F.3d. 232, 246 (2d Cir. 1995)).

197. *Id.* at 963 (citing *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 718 (9th Cir. 1992)).

198. *Id.* at 964.

199. *Id.* at 959 (“[B]y joining the community of nations and accepting the law of nations, the federal government has impliedly waived any right to claim sovereign immunity with respect to *jus cogens* violations when sued for such violations in an American court.”) (emphasis added).

[t]he federal government may immunize itself from liability for *jus cogens* violations only if the acts of authorizing or engaging in such violations fall within the sphere of authority that has been legitimately delegated by the People. Under the principles of international law . . . the People as sovereign are bound by the non-derogability of *jus cogens* norms, which means that the People may not legitimately delegate to the government the power to engage in *jus cogens* violations.²⁰⁰

Here, the court acknowledged that even if the people of a sovereign nation voted and agreed to violations of international law, a government could still be held accountable for a *jus cogens* violation.²⁰¹

This precedent case demonstrates that if Mexico were to bring suit in a United States federal court based on the *jus cogens* norm of violating its national sovereignty due to border fence encroachments on its land, the court may rule in Mexico's favor.²⁰² Such a case would also demonstrate that, contrary to *In re Border Infrastructure Env't Litig.*'s pronouncement that "[i]t is not our job to protect the people from the consequences of their political choices," when Congress or the People violate a *jus cogens* norm, international law overrides the legislation.²⁰³

In addition, DHS might want to cite the Foreign Sovereign Immunity Act (FSIA) of 1976 and have such a lawsuit dismissed.²⁰⁴ However, FSIA has an exception when property is taken in violation of international law. 1605(a)(3) states:

A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the

200. *Id.* at 967–68.

201. *Id.*

202. *Id.* at 959.

203. *In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012)).

204. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604.

United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.²⁰⁵

Here, Mexico could argue that DHS, a U.S. agency, has been taking the property of Mexico, or encroaching upon it, in violation of international law.²⁰⁶

Most importantly, Mexico could argue that only international law applies because the REAL ID Act and the waiver provision do not apply to Mexican territory—only Mexican laws apply within its sovereign jurisdiction. Therefore, Mexico could ask the court to enjoin DHS from further border construction until the boundary line has been properly re-surveyed by the IBWC and CILA and a joint report documents the potential encroachments along the 1,954 miles of border.

V. CONCLUSION

The waiver provision, enacted by U.S. Congress and upheld by federal courts, has created a space where the government can act lawlessly: breaking domestic laws, bilateral treaties, and international laws, while causing property destruction and death.²⁰⁷

Mexico has already lodged complaints with the appropriate entities, including the IBWC and the State Department—all to no avail.²⁰⁸ In the United States, individuals and organizations have brought lawsuits both in tort for property damage and on constitutional grounds regarding border construction more generally, but these too have failed.²⁰⁹ Although Mexico has

205. 28 U.S.C. § 1605(a)(3).

206. See *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 959 (E.D. Va. 2019).

207. See *In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018).

208. Mumme & Ibanez, *supra* note 18.

209. See *Gringo Pass*, 2012 U.S. Dist. LEXIS 21686, at *3, *4—5, *25—26, (2012); *In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d 1092, 1111, 1147 (S.D. Cal. 2018).

legitimate claims to bring a cause of action against the United States in the ICJ, the United States would likely not consent to such an action, or, if the ICJ ruled against the United States, the State would not comply with the judgment.²¹⁰

However, one avenue does exist: Mexico could sue the United States in federal court.²¹¹ In particular, Mexico could use the *jus cogens* norm, arguing its national sovereignty has been violated by border construction that has encroached upon its territory.²¹² The court could then rule that DHS must stop border construction until the joint USIBWC and CILA agencies properly determine the encroachments to Mexican territorial integrity.²¹³ DHS would then have to comply with international law, which overrides the waiver provision, and at the very least bring down any barriers that encroaches upon Mexican territory.²¹⁴ Mexico's most effective argument would be that the waiver provision of the REAL ID has no legal affect on Mexico's sovereign territory and DHS has no jurisdiction there.

Based on the *jus cogens* principle, which demands that the sovereign's jurisdiction is absolute within its territory, a federal court could no longer legally argue that the waiver provision upholds U.S. national security and foreign policy. By having to adhere to at least one legal norm, a lawsuit by Mexico would impede or even halt the current DHS's sweeping ability to be lawless at the border. When ruling, the federal courts should also consider the words of Supreme Court Justice Brandeis' dissenting opinion in *Olmstead v. United* when he famously stated, "[i]f the Government becomes a lawbreaker, it breeds contempt for law;

210. See *Mexico Again Sues United States in ICJ: ICJ Directs United States to Block Medellin Execution: U.S. Supreme Court Again Denies Relief: Texas Executes Medellin*, 102 AM. J. INT'L L. 806 (2008); Elizabeth Townsend, *NAFTA, Mexican Trucks, and the Border: Making Sense of Years of International Arbitration, Domestic Debates, and the Recent U.S. Supreme Court Decision*, 31 TRANSP. LAW J. 131, 139, 185, 187 (2004).

211. Mumme & Buono, *supra* note 19.

212. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, ¶ 44–45 (Sept. 7).

213. See Mumme & Buono, *supra* note 19 (explaining that Mexico can file suit in United States federal courts and argue that international law be applied to discontinue DHS's border construction).

214. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 968 (E.D. Va. 2019).

it invites every man to become a law unto himself—it invites anarchy.”²¹⁵

215. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).