SHOULD OR MUST?: NATURE OF THE OBLIGATION OF STATES TO USE TRADE INSTRUMENTS FOR THE ADVANCEMENT OF ENVIRONMENTAL, LABOUR, AND OTHER HUMAN RIGHTS

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This article examines whether customs, treaties, and historical facts have caused the ethical human rights obligations of economically powerful states to assume a legal quality. The author argues that the legal quality of these obligations may arise from the global harm principle of international law and human rights obligations found in treaties. As a consequence, states may be held accountable for the human rights violations of transnational corporations. Further, the author examines the possibility of pursuing claims under the U.S. Alien Tort Statute for torts committed in violation of international treaties as another avenue for enforcing human rights obligations.

Cet article examine si les coutumes, les traités et les faits historiques ont causé des obligations de droits de la personne éthiques des États économiquement puissants pour assumer une qualité juridique. L'auteur fait valoir que la qualité juridique de ces obligations peut provenir du principe de tort mondial du droit international et des obligations de droits de la personne incluses dans les traités. Par conséquent, les États peuvent être tenus responsables de violations des droits de la personne dans le cas de corporations transnationales. De plus, l'auteur examine la possibilité de poursuivre une cause d'action en vertu de la Alien Tort Statute américaine commise en violation de traités internationaux comme étant un autre moyen de faire respecter les obligations des droits de la personne.

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I. INTRODUCTION

A. NATURE OF TRADE LAW'S INTERSECTION WITH HUMAN RIGHTS LAW

At the inception of the *General Agreement on Tariffs and Trade*[1] in 1947, it was possible to forgive negotiators their failure to appreciate trade's inevitable effects on human rights. Such ignorance in the crafting of trade treaties that have transformed the world over the past 30 years into an unstoppable engine of economic growth with near fathomless power to change the standard of living of every global citizen can no longer be countenanced. Each new treaty not only is born into the corpus of existing public international law, including human rights treaties and custom, but each new trade negotiation also occurs within the factual milieu that half a century of ever-broader trade rules has revealed.

B. TRADE'S WINNERS AND LOSERS

Trade law's inexorable growth has, as economists predicted, created winners and losers. Austrian economist Joseph Schumpeter called this eminently predictable process "creative destruction,"[2] the perpetual cycle by which capitalism destroys old, less efficient products and services and replaces them with new, more efficient ones. Technological change, Schumpeter noted, "incessantly revolutionizes the economic structure *from within*."[3] Trade's winners mostly have been transnational corporations which are able to reduce costs by seeking out countries with a comparative advantage in their products, usually without concern either for the human lives or the natural resources abused in that search. Trade's biggest losers have been the human rights of workers; the environment, and, consequently the health of women; of indigenous populations; of the poor, and of development and developing countries generally.

C. ISSUES POSED BY THIS ARTICLE

States must assume the responsibility of delivering through their trade agreements the human rights promised by a dozen United Nations treaties. States have been careful in couching their human rights commitments in order to avoid, with respect to many critical needs of individuals, any binding and measurable actions to ensure the human rights either of their own citizens or those in other countries. The broadest human rights document is not called, after all, the Universal *Guarantee* of Human Rights, but the Universal *Declaration* of Human Rights.[4] The question raised in this article is whether, nonetheless, a combination of treaties, customs, and historical facts have transformed human rights obligations for economically powerful states into duties that are not solely moral in nature, but that have also taken on penumbral legal or rule-based characteristics. The article then examines whether

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1 *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948), including Annex 1A, *Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (entered into force 1 January 1995) [collectively referred to as the *GATT*].

2 Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Bros., 1942) at 81.

3 *Ibid.* at 83 [footnotes omitted, emphasis in original].

4 GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

existing enforcement mechanisms can effectively provide a remedy for violations of such legal duties.

II. SOURCES OF LEGAL OBLIGATION

A. GLOBAL HARM PRINCIPLE

There are two sources of this penumbral legal obligation. The first is the customary international law principle of global harm. According to John Stuart Mill,"the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[5] Thomas W. Pogge, in a series of essays completed in the 1990s, concludes that each of us has a negative duty to refrain from causing harm to others.[6] When we harm others through our actions, "we become liable to rectify the damage we have caused."[7] This duty applies equally to States.

The global harm principle finds reflection in customary international environmental law emanating from the *Trail Smelter* (*United States of America v. Canada)*[8] decision, which affirmed Canada's responsibility for the damage from copper smelter fumes that travelled across the the border into the state of Washington. Basing its conclusion on general principles of international law, the Tribunal found in 1941 that "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."[9] Recognition of a cross-border harm principle carved out an important exception to the long-standing customary international law principle — a touchstone of traditional international law — that states have unfettered national sovereignty over natural resources and absolute freedom of the seas beyond the three-mile territorial limit.[10] Three decades later, that concept had become so widely accepted that Principle 21 of the *Declaration of the United Nations Conference on the Human Environment*[11] provided global scope to the *Trail Smelter* principle by confirming that states have sovereign rights to exploit their natural resources, but may not do so in a manner that causes harm to other states: "States have … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[12]

State practice establishes that this customary international environmental law principle also finds universal acceptance with respect to other human rights harm. The UN implicitly recognized the global harm principle in 1989 with respect to activities carried out in the

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5 John Stuart Mill, *On Liberty*, ed. by Elizabeth Rapaport (Indianapolis: Hackett, 1978) at 9.

6 Thom Brooks, "Is Global Poverty a Crime?" (2006), online: Social Science Research Network (SSRN) <http://papers.ssrn.com/sol3/papers.cfm?abstracts_id=943762> at 17, referring to Thomas W. Pogge, *World Povery and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge, U.K.: Polity; Malden, Mass.: Blackwell, 2002) at 130.

7 *Ibid.*

8 3 R.I.A.A. 1905 (Int'l Arb. Tribunal 1938), 1938 (Int'l Arb. Tribunal 1941) [*Trail Smelter*].

9 *Ibid.* at 1965.

10 See Edith Brown Weiss, "Global environmental change and international law: The introductory framework" in Edith Brown Weiss, ed., *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992) 3 at 7-12.

11 16 June 1972, UN Doc. A/CONF.48/14/Rev.1, 11 I.L.M. 1416.

12 *Ibid.* at 1420.

territory of a State in its declaration that "States of origin shall take appropriate measures to prevent or, where necessary, to minimize the risk of transboundary harm" and, if such harm nonetheless occurs, "the State of origin shall make reparation for appreciable harm."[13] To this end, Frank J. Garcia argues that the moral obligations that require a liberal state to do justice in domestic social arrangements, namely the obligations to its citizens have to one another in their domestic social relationships, attach with equal force with respect to the transnational economic relations of that state.[14] Garcia reasons from the general conception of justice articulated by John Rawls to assert that "[i]nternational social and economic inequalities are just only if they result in compensating benefits for all states, and in particular for the least advantaged states."[15] Thus situated as an element of distributive justice, Rawlsian theory offers additional support for the global harm principle that this article posits as the penumbral legal debt the economically powerful states owe to those elements of civil society harmed by the global activity of these states.

In the aftermath of World War II, the major powers imposed the present global institutional order known as the Bretton Woods System, consisting of the International Monetary Fund to regulate exchange rates, the World Bank to finance development, and the *GATT* (now the World Trade Organization (WTO)) to regulate trade.[16] To manage the peace and prevent future war, these powers also created the UN. While these institutions at their creation foretold a stable economic and financial system in which every nation had an equal opportunity to develop to its full potential, the existence of development, poverty, disease, regional conflict, genocide, and other human rights disasters is now undeniable. In the face of these now foreseeable, inevitable, and avoidable effects on human rights, the affluent states have maintained this same institutional order, despite the presence of viable alternatives that do not cause these human rights harms.

The WTO "has enabled the exacerbation of deaths from global poverty through monetary agreements that favour affluent states at the cost of poor states."[17] Additionally, "protectionist exemptions insisted upon by affluent states which have 'had a huge impact on employment, incomes, economic growth, and tax revenues in the developing world where many live on the brink of starvation.'"[18] By perpetuating a global order whose foreseeable effects are widespread human rights violations and whose effects are avoidable because viable alternatives exist that do not cause such violations, affluent states have caused harm to others, and have in fact committed human rights violations. For these reasons, the major trade powers have a negative duty to ameliorate the human rights their global institutional order has undermined.

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13 *Report of the International Law Commission on the Work of its Forty-First Session*, UN GAOR, 44th Sess., Supp. No. 10, UN Doc. A/44/10 (1989), arts. 8-9.

14 Frank J. Garcia, *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade* (Ardsley, N.Y.: Transnational, 2003) at 70.

15 *Ibid.* at 134.

16 On the Bretton Woods System, see John H. Jackson, William J. Davey & Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text*, 4th ed. (St. Paul, Minn.: West Group, 2002) at 199.

17 Brooks, *supra* note 6 at 11, referring to Pogge, *supra* note 6 at 19.

18 Brooks, *ibid.* at 11, quoting Pogge, *ibid.* at 18.

In response to the notion that human rights conventions limit the responsibility of a state to protect the rights of its own citizens, reliance is placed on case law that finds jurisdiction for violation of the human rights of civil society outside a state's territory depending on whether the state was in fact exercising jurisdiction over those persons when the violation was committed. Even without recourse to a broader definition of "territory," the European Commission of Human Rights looked to a relational concept of jurisdiction. An obvious example is the exercise of control by a state's armed forces, as in the case of Turkey and Turkish-occupied Northern Cyprus.[19] The global economic order exercises no less control over the daily lives of citizens in every state, from the value of their work, the buying power of their wages, the availability and conditions for receiving a loan, and the financial consequences of their compliance with international trading rules. A state that has "effective overall control" over another state's citizens is bound by human rights obligations that otherwise are confined to acts on the state's own territory.[20]

In fact, as Garcia has observed, states also have expanded their zone of responsibility by asserting, in both regional and global trade agreements, jurisdiction over the civil societies of other states, from the treatment such societies must provide to transnational investments to the types of production that the world's buyers will reward with foreign exchange earnings upon export. Increased jurisdiction over economic affairs of the citizens of other states brings greater requirements to make restitution for human rights violations.[21]

B. *PACTA SUNT SERVANDA*

The second source of the quasi-legal obligation of states to use trade instruments for the advancement of human rights flows from their good faith obligation to implement the commitments they have assumed by acceding to particular human rights treaties.[22] At a minimum, they have a UN *Charter* obligation to promote human rights, including through international institutions "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."[23] The *Universal Declaration of Human Rights*,[24] in addition, contributes to the increasingly customary status of many human rights.

Two factors support broad application of the good faith principle with regard to human rights. First, human rights treaties inherently require global effect. Of course, the refusal of major players in the arena to become signatories will undermine the objectives of any treaty. However, because of the natural, theological, humanist, positive law, near-spiritual origin of human rights law, the argument that the *Convention on the Elimination of All Forms of*

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19 *Chrysostomos and Papachrysostomou v. Turkey* (1991), 86A Eur. Comm'n H.R. D.R. 4 at 26.

20 *Cyprus v. Turkey*, no. 25781/94, [2001] IV E.C.H.R. 1, 35 E.H.R.R. 731 at para. 77. See Nicola Vennemann, "Application of International Human Rights Conventions to Transboundary State Acts" in Rebecca M. Bratspies & Russell A. Miller, eds., *Transboundary Harm in International Law: Lessons from the* Trail Smelter *Arbitration* (Cambridge: Cambridge University Press, 2006) 295 at 297.

21 See Frank J. Garcia, "The 'Fair' Trade Law of Nations, or A 'Fair' Global Law of Economic Relations?" (2007) 45 Alta. L. Rev. 303.

22 See *Vienna Convention of the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 26 (entered into force 27 January 1980) [*Vienna Convention*].

23 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Preamble.

24 *Supra* note 4.

Discrimination Against Women,[25] for example, could protect women in France, but not women in Nicaragua is, quite plainly, illogical. The same incoherency applies to treaties that prohibit genocide, racial discrimination, torture, and so forth. So to contend would be inconsistent with the object of the *CEDAW* even if Nicaragua had not yet become a state party and, in fact, regardless of what states have ratified the *CEDAW*. Exempting certain states from obligation under such treaties undermines the essence and the very logic of human rights treaties, not simply their effectiveness.

The second factor favoring broad application of *pacta sunt servanda* is the changing nature of the concept of territory. It is recognized that a signatory is bound to ensure application of its international obligations only within its own territory, and that the usual meaning of "territory" is the geographical reach of the state's political boundaries. However, a different meaning must emerge in the face of the inevitably extraterritorial effect of trade agreements.

Just as the *Vienna Convention* would find invalid a reservation to a treaty that is incompatible with the object and purpose of the treaty,[26] we must find suspect the contention of signatories to human rights treaties that the scope of the treaty is by definition limited to the geographical territory that is under full control of the signatories. Analysts have documented extensively the adverse effects of trade agreements on both the political and economic human rights of civil society of the members of such treaties.[27]

Without detracting from the positive effects of trade agreements in gradually reducing poverty, increasing environmental awareness, and overcoming infrastructural and institutional obstacles to the advancement of human rights, the adverse effects are common knowledge to nations that have taken on both human rights and trade obligations. In fact, these adverse effects on the liberalization of trade transform the meaning of the effects doctrine with respect to the extent of each signatory's human rights obligation. For example, when the United States negotiates a chapter in a trade agreement with Costa Rica that brings broad protections to U.S. investment in the telecommunications market of Costa Rica, U.S. human rights obligations extend to the telecommunications workers in Costa Rica adversely affected by the investment chapter because of the trade instrument's necessary and inevitable effects.

This global projection of state action taken within its geographical boundaries has led to the emergence of objective territorial principles. If a state may use these principles to extend its traditional jurisdictional reach, the principles also must support expansion of the state's

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25 18 December 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force 3 September 1981) [*CEDAW*].

26 *Vienna Convention*, *supra* note 22, art. 19(c).

27 See e.g. Saskia Sassen, "Economic Globalization and the Redrawing of Citizenship" in Berta Esperanza Hernández-Truyol, ed., *Moral Imperialism: A Critical Anthology* (New York: New York University Press, 2002) 135 at 138; Hannah L. Meils, "A Lesson from NAFTA: Can the FTAA Function As a Tool Improvement in the Lives of Working Women? (2003) 78 Ind. L.J. 877 at 882; Marjorie Cohn, "The World Trade Organization: Elevating Property Interests Above Human Rights" (2001) 29 Ga. J. Int'l & Comp. L. 427 at 428.

traditional international obligations.[28] In addition, the very nature of globalization has forced the concept of territory to be transformed. As a result, geographical boundaries have become less relevant not only for measuring delivery of social justice, but also for determining the extent of a state's international obligations. Globalization has forced our usual notions of both time and space to be reconsidered and has made the reconception of law's relationship to territorial boundaries the central challenge of international law.[29]

We may also distinguish the general international law definition of jurisdiction, which relies on territory, from that of jurisdiction for human rights violations based on the different objects and purposes of relevant treaties. General state jurisdiction seeks to protect the sovereign equality and independence of states. Territorial limits best accomplish this purpose. Human rights treaties seek, on the other hand, to protect the individual from acts or omissions of the state. Territorial limits to jurisdiction are not relevant to these objects and art. 31 of the *Vienna Convention* thus instructs us to eschew the limitations of a territorial premise for state jurisdiction.[30]

WTO case law is similar in its effect. Early trade dispute settlement panels reasoned that *GATT* members could not act under the public health and welfare exceptions to the *GATT*'s nondiscrimination prescriptions if doing so projected the member's policies beyond its borders.[31] The WTO Appellate Body rejected this line of thinking on the unassailable ground that the *GATT* and other WTO agreements necessarily have effects beyond any one member's borders. Limiting access to the *GATT*'s important human rights exceptions solely to those social purposes achievable within a Member's territory would eviscerate the safe harbours guaranteed by the trading system's public health and welfare exceptions.[32] In the *U.S. — Shrimp Products* case, the WTO Appellate Body conceded that conservation of endangered sea turtles that roam thousands of miles into the ocean was impossible through the intra-territorial action of a single WTO member.[33] Indeed, the Appellate Body required the U.S. to engage in good faith negotiations to seek accomplishment of its environmental protection purpose without violating the nondiscrimination principles of the WTO.[34] However, in the end it approved U.S. border restrictions on shrimp caught without turtle protective devices, thus projecting the U.S. objective to every nation that either caught or processed shrimp and wished access to the large U.S. market.

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28 Lori F. Damrosch *et al.*, *International Law: Cases and Materials*, 4th ed., American Casebook Series (St. Paul, Minn.: West Group, 2001) at 1095, referring to *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).

29 See Garcia, *supra* note 21.

30 Vennemann, *supra* note 20 at 302; *Vienna Convention*, *supra* note 22, art. 31.

31 *United States—Restrictions on Imports of Tuna* (1991), GATT Doc. DS21/R, 39th Supp. B.I.S.D. (1991-1992) 155 at para. 5.27, online: WTO <http://docsonline.wto.org/gen_search/asp>. The second panel rejected this approach, although it reached the same result by finding that U.S. projection of its environmental policy beyond its borders undermined *GATT*'s multilateralism: *United States —Restrictions on Imports of Tuna* (1994), GATT Doc. DS29/R, online: WTO <http://docsonline.wto.org/gen_search/asp> at paras. 5.32, 5.38.

32 *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <http://docsonline.wto.org/gen_search/asp> at para. 156 [*U.S.—Shrimp Products*].

33 *Ibid.* at para. 168.

34 *Ibid.* at paras. 170-72.

III. ENFORCEMENT OF DUTY

A. STATE RESPONSIBILITY FOR VIOLATIONS OF HUMAN RIGHTS TREATIES BY TRANSNATIONAL CORPORATIONS

1. TRANSNATIONAL CORPORATIONS SHOULD BE TREATED AS STATES, NOT AS INDIVIDUALS

Transnational corporations (TNCs) cause substantial human rights violations by polluting air and water, and by using natural resources beyond the ability of these resources to sustain themselves. They also secure patents over the traditional knowledge of indigenous populations without compensation, co-opt governments of smaller economies into selling rights to the future livelihood of their civil societies, and violate the core labor rights of their workers. Amy Sinden has argued that the ability of TNCs to exercise such extensive control over the well-being of civil society requires that we treat TNCs not as private individuals, but rather as governmental entities.[35] The multinational food company Nestlé S.A. would not, by this logic, somehow literally be bound by human rights treaties signed by Switzerland. The theory does argue, however, that those harmed by human rights violations committed by TNCs may hold the country of registration responsible for those violations, wherever they occur. Failure of the state to employ the civil and criminal jurisdiction that international law authorizes the state to exercise over its corporations amounts to state-sanctioned violation of human rights by the TNC.[36]

By reference again to the *Vienna Convention*'s prohibition of reservations that are inconsistent with the object and purpose of a treaty, signatories could not have intended to escape responsibility for the human rights violations of their citizens because the state simply chose not to regulate the TNC with respect to a particular activity.[37]

2. JURISDICTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS OVER HUMAN RIGHTS VIOLATIONS OF TNCS

This penumbral or constructive state responsibility for the human rights violations of TNCs arguably confers jurisdiction on the Inter-American Court of Human Rights (IACHR) for human rights violations committed by TNCs. In fact, a state which is a signatory to the *American Convention on Human Rights*[38] has violated the *Convention* by failing to police and prevent the violation by an entity within its control. Enforcement is not thereby automatically ensured, because many important countries of registration of TNCs, such as

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35 Amy Sinden, "The Power of Rights: Imposing Human Rights Duties on Transnational Corporations for Environmental Harms" in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds., *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press) [forthcoming in 2007], online: SSRN <http://ssrn.com/sol3/papers.cfm?abstract_id=925679>.

36 International law generally recognizes jurisdiction of a state over foreign branches or subsidiaries of legal persons organized under its laws, whose principal place of business is located in their territories, or which nationals of the state own. See *Restatement (Third) of the Foreign Relations Law of the United States* § 414 (1987) at Reporters' Note 4.

37 *Vienna Convention*, *supra* note 22, art. 19(c).

38 22 November 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force 18 July 1978).

the U.S. and Canada, have not ratified the *American Convention on Human Rights*, much less its San Salvador Protocol on economic, social, and cultural rights.[39] The fact remains that the state has committed a violation of its human rights obligation, imposed through the global harm and *pacta sunt servanda* principles, as a result of the actions of its transnational corporate agent.

B. NATIONAL TORT CLAIM FOR CUSTOMARY HUMAN RIGHTS VIOLATIONS

1. IN GENERAL

The recently revived U.S. *Alien Tort Statute*[40] is available to litigants in U.S. federal courts to enforce certain duties of states and corporations to protect human rights. The *ATS* calls upon the concepts of customary international law and *pacta sunt servanda* to establish positive law prohibiting human rights violations, such as those that occur as a direct result of the global trading system created and perpetuated by states and corporations. By its resurrection as an instrument of human rights enforcement, the *ATS* joins a line of precedent extending from the 18th century, more recently reconstituted after World War II in the form of the Nuremberg trials and other reparation arrangements sought soon thereafter from the Soviet Union, Castro's Cuba, and South Africa for human rights violations. More recent reparations claims involve slave labour, forced prostitution and sterilization, torture, illegal occupation, looting of art works, and expropriation of land.

Latin America has a particularly strong history of judicially-enforced reparation in the form of its *amparo* suit, which permits federal courts to provide remedies to citizens for violations by the state of their constitutional rights.[41] Many of these constitutional protections sound in human rights, which explains the basis for the guarantee of the *amparo* suit by the *American Convention on Human Rights*.[42] Because the *ATS* has only recently joined the ranks of judicial enforcement instruments, this article will concentrate on its fascinating, if limited, jurisprudence.

Landmark decisions in *Filartiga v. Pena-Irala*[43] and *Sosa v. Alvarez-Machain*[44] brought a flood of *ATS* human rights cases to U.S. federal courts.[45] This inundation resulted from the

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39 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 14 November 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156 (entered into force 16 November 1999) [San Salvador Protocol].

40 28 U.S.C. § 1350 (2000) [*ATS*]: "The district courts shall have original jurisdiction of 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."

41 Bruce Zagaris, "The Amparo Process in Mexico" (1998) 6 U.S.-Mex. L.J. 61.

42 *Supra* note 39, art. 25.1; *Habeas Corpus in Emergency Situations (Arts. 27(2), 25 (1) and 7(6) American Convention on Human Rights)* (1987), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A), No. 8 at para. 32, *Inter-American Yearbook on Human Rights: 1987* (Dordrecht, Neth.: Martinus Nijhoff) at 750.

43 630 F.2d 876 (2d Cir. 1980) [*Filartiga*].

44 542 U.S. 692 (2004) [*Sosa*].

45 Carolyn A. D'Amore, "*Sosa v. Alvarez-Machain* and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?" (2006) 39 Akron L. Rev. 593 at 600: courts granted *ATS* jurisdiction in only two of 20 cases filed between 1789 and 1980.

original drafters' indeterminate intent,[46] coupled with the ambiguous holding in *Sosa*.[47] The crux of the uncertainty about the *ATS* hinges on both personal and subject matter jurisdiction, that is, the elemental questions of who is subject to *ATS* jurisdiction and which causes of action remain.

2. THE SUBJECT-MATTER QUESTION — WHAT VIOLATIONS ARE ACTIONABLE UNDER THE *ATS*?

An *ATS* claim must meet three conditions: (1) the plaintiff is alien to the United States; (2) the violation is tortious; and (3) the tort violates the law of nations or a treaty of the United States.[48] Jurists debate whether the *ATS* itself creates a cause of action or if a separate statute is necessary to find cause.[49] Furthermore, it is unclear whether the tort need violate the law of nations that existed when the *ATS* came into effect in 1789, or if the tort can arise from since-developed custom.[50]

Many scholars of the *ATS* hoped for some clarity when the Supreme Court granted *certiorari* for *Sosa*, but it unfortunately left them with a question for every answer.[51] The Court conceded the *ATS* itself does not create a cause of action, yet it inferred that the legislature intended for the statute to have practical effect.[52] Therefore, it granted jurisdiction for *ATS* claims fitting within the paradigm of present-day customary international law from that of the law of nations that existed in the late-eighteenth century.[53] In other words, an *ATS* suit is permissible if the alleged violation assumes today the same degree of importance as the concerns that existed when Congress passed the *ATS* (such as piracy and crimes against ambassadors).

As a result of *Sosa* and the lack of specificity as to which claims are actionable, doubt remains as to what claims will find favour with the federal courts. It seems that the advice

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46 *IIT v. Vencap, Ltd.*, 519 F.2d 1001 at 1015 (2d Cir. 1975), noting that the First Congress created the *ATS* with virtually no legislative history, "[the *ATS*] is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act … no one seems to know from whence it came" [references omitted].

47 *Sosa*, *supra* note 44 at 713: "The parties and *amici* here advance radically different historical interpretations of this terse provision." See D'Amore, *supra* note 45 at 594, suggesting that "[t]he Supreme Court's decision in *Sosa v. Alvarez-Machain* neither threw the door open nor shut it firmly. Instead, this decision perpetuates the uncertainty surrounding the ATS by leaving the door slightly ajar, suggesting that the issue will be revisited frequently as human rights issues push to the forefront of the national conscience" [footnotes omitted]. See James Boeving, "Half Full … or Completely Empty?: Environmental Alien Tort Claims Post *Sosa v. Alvarez-Machain*" (2005) 18 Geo. Int'l Envtl. L. Rev. 109 at 111-12, noting that "[w]hether or not the Court actually clarified the scope of the ATS, and the decision's potential future implications, will no doubt be the subject of debate for some time to come."

48 *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 at 548 (Dist. Ct. D.C. 1981).

49 Boeving, *supra* note 47 at 135. The author points out that the Court did not discuss what would happen in cases involving violations of U.S. treaties.

50 *Sosa*, *supra* note 44 at 71: the Court refers to William Blackstone's limited law of nations derived from English common law at the time, which included "violation of safe conducts, infringement of the rights of ambassadors, and piracy."

51 Boeving, *supra* note 47 at 111-12.

52 *Sosa*, *supra* note 44 at 724-25.

53 *Ibid.*

that held true in *Paul v. Avril*[54] remains valid — a well-pleaded tort that violates the law of nations is sufficient to provide a cause of action.The good news for the human rights community is that many human rights violations that arise from the global trading system meet this standard. Despite Scalia J.'s taunt that the *Sosa* decision represents the "latest victory for [the Supreme Court's] Never Say Never Jurisprudence,"[55] in actuality, the courts have dismissed many *ATS* claims since *Sosa*.[56] A recent decision by the Ninth Circuit Court of Appeals in a case involving egregious trade-related activities, *Sarei v. Rio Tinto, PLC*,[57] may clarify which human rights violations are actionable.The Ninth Circuit lays out the facts in an eye-opening manner:

> Rio Tinto is an international mining group headquartered in London. During the 1960s, Rio Tinto sought to build a mine in the village of Panguna on Bougainville, an island province of PNG. Rio Tinto offered the PNG government 19.1 percent of the mine's profits to obtain its assistance in this venture.
>
> Operations commenced in 1972. Each day, approximately 300,000 tons of ore and waste rock were blasted, excavated and removed from the mine, producing 180,000 tons of copper concentrate and 400,000 ounces of gold annually. The resulting waste products from the mine polluted Bougainville's waterways and atmosphere and undermined the physical and mental health of the island's residents. In addition, the islanders who worked for Rio Tinto, all of whom were black, were paid lower wages than the white workers recruited off island and lived in "slave-like" conditions.
>
> In November 1988, Bougainvilleans engaged in acts of sabotage that forced the mine to close. Rio Tinto sought the assistance of the PNG government to quell the uprising and reopen the mine. The PNG army mounted an attack on February 14, 1990, killing many civilians. In response, Bougainvilleans called for secession from PNG, and 10 years of civil war ensued.
>
> During the 10-year struggle, PNG allegedly committed atrocious human rights abuses and war crimes at the behest of Rio Tinto, including a blockade, aerial bombardment of civilian targets, burning of villages, rape and pillage. Plaintiffs assert that the war has ravaged the island and devastated its inhabitants. Thousands

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54 812 F. Supp. 207 at 212 (Dist. Ct. Fla. 1993): the plain language of the statute, with phrases such as "committed in violation" of the law of nations, implies a cause of action.

55 *Sosa*, *supra* note 44 at 750, Scalia J., concurring in part [emphasis in original, references omitted]:

> This Court seems incapable of admitting that some matters — *any* matters — are none of its business.… In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then — repeating the same formula the ambitious lower courts *themselves* have used — invites them to try again.

56 *Bowoto v. Chevron*, 2007 U.S. Dist. 59374 (QL) (N.D. Cal. 2007) (brutal attacks by Nigerian Government forces against protestors at Chevron oil platform did not amount to crime against humanity); *Matar v. Dichter*, 500 F.Supp.2d 284 (S.D.N.Y. 2007) (suit against director of Israeli security forces for targeted killings of over 500 suspected terrorists and bystanders dismissed based on sovereign immunity); *Corrie v. Caterpillar Inc.*, 403 F.Supp.2d 1019 (W.D. Wash. 2005), aff'd. 2007 U.S. App. 22133 (QL) (9th Cir. 2007) (suit for killing family members with bulldozer purchased by U.S. and operated by Israeli Defense Forces to demolish homes in Palestinian Territories dimissed under political question doctrine).

57 *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) [*Rio Tinto*].

> of Bougainville's residents have died; those who survived suffer health problems, are internally displaced and live in care centers or refugee camps or have fled the island.[58]

Rio Tinto contains both egregious abuses of *jus cogens* norms and violations that encompass grayer areas of customary international law, all based on trade and investment activities. The District Court found that the complaint stated actionable *ATS* claims of racial discrimination, violations of the laws of war, and violation of the *United Nations Convention on the Law of the Sea*.[59] However, based primarily on a Statement of Interest filed by the U.S. Department of State, the District Court dismissed all claims on grounds of nonjusticiable political questions and, alternatively, on the basis of international comity and the act of state doctrine.[60]

Noting that its review of the appeal of the lower court's dismissal required only a finding that one of the claims was a non-frivolous violation of the law of nations, the appellate court separated the alleged violations into three categories: (1) war crimes and crimes against humanity; (2) racial discrimination; and (3) environmental destruction.[61] Because the first set of allegations involved well-established violations of international norms, the appellate court adjudged them actionable under the *ATS* and did not analyze them in detail.[62] The *Rio Tinto* opinion thus primarily focused on the customary nature of the racial and environment claims.

The District Court had dismissed claims of racial discrimination under the act of state doctrine. The appellate court reversed this decision based on its view that racial discrimination, like war crimes and crimes against humanity, comprised "the least controversial core" of today's *ATS* jurisdiction.[63] The Court found systematic racial discrimination to be a *jus cogens* violation that cannot have international law protection as a sovereign act. [64]

The appellate court did not view the environmental devastation claim, based on the *UNCLOS*, as rising to the level of a *jus cogens* violation, but rather ruled that the act of state doctrine did not for that reason necessarily shield the state from prosecution. Because approximately 150 nations have ratified the *UNCLOS*, the appellate court held that the treaty thereby codified customary international law and permitted an *ATS* claim.[65]

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58 *Ibid.* at 1198. The Court, *ibid.* at 1202, also noted that *Re Marcos Estate*, 25 F.3d 1467 at 1475 (9th Cir. 1994) accepted the requirement that the *ATS* "creates a cause of action for violations of specific, universal and obligatory international human rights standards which confer fundamental rights upon all people vis-a-vis their own governments."

59 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force 16 November 1994) [*UNCLOS*].

60 *Sarei v. Rio Tinto, PLC*, 221 F. Supp.2d 1116 at 1139-63, 1199-1209 (C.D. Cal. 2002).

61 *Rio Tinto, supra* note 57 at 1198.

62 *Ibid.* at 1202.

63 *Ibid.*

64 *Ibid.* at 1209, quoting *Siderman de Blake v. Argentina*, 965 F.2d 699 at 717-18 (9th Cir. 1992) in which the Court held that "the Foreign Relations Law Restatement 'identif[ies] jus cogens norms prohibiting … systematic racial discrimination'" and that "'international law does not recognize an act that violates jus cogens as a sovereign act.'"

65 *Rio Tinto, ibid.* at 1210.

Another important issue from *Rio Tinto* was the affirmation of the lower court's finding that the *ATS* does not require an exhaustion of local remedies.[66] This interpretation opens the door widely to litigation, largely because of the difficult nature of trying to remedy a state violation within that same state, or the hurdles that exist in pursuing a case in a national court.[67]

3. THE PERSONAL JURISDICTION QUESTION — WHETHER STATES, INDIVIDUALS, OR CORPORATIONS ARE LIABLE

Sosa nearly disregarded the question of which states, private actors, or corporate entities fit within the scope of liability under the *ATS*.[68] The overall message of the courts consistently states that in the realm of *jus cogens* virtually anyone can be held accountable, but for "lesser" violations the question of who can be brought under the *ATS* is still unresolved.

For corporations, however, the gate of liability seems to be swinging open a little wider. *Sosa* is now a litigation tool that enforces limited but binding standards on transnational corporations.[69] These corporations also face vicarious liability claims for aiding and abetting human rights violations when a state perpetrator is unreachable because of sovereign immunity.[70] Federal courts have allowed claims with only the requirement that the corporations knowingly provided "practical assistance or encouragement that has a substantial effect on the perpetration of a crime."[71] Examples of such claims include environmental torts, expropriated property claims, and other human rights violations committed by host governments.[72] Even if many of these claims ultimately fail in court, the deterrent effect of exposure to litigation that results in lawyer fees and bad press may start a trend of settlements and preventive corporate responsibility.[73]

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66 *Ibid.* at 1214. The *Rio Tinto* Court addresses the Supreme Court's warning of allowing too many claims under the *ATS*, but refuses to infer a mandatory exhaustion requirement until Congress or the Supreme Court does so.

67 *Rio Tinto*, *ibid.* at 1214, quoting from *Enahoro v. Abubakar*, 408 F.3d 877 at 892 (7th Cir. 2005), Cudahy J., dissenting in part: "There can be little doubt but that the legal remedies … were indeed ineffective, unobtainable, unduly prolonged, inadequate or obviously futile under any applicable exhaustion provisions."

68 Boeving, *supra* note 47 at 133, pointing out the neglected issue of personal jurisdiction: "[T]he Court did not address whether liability under the ATS extends to private actors, such as corporations."

69 D'Amore, *supra* note 45 at 626-29.

70 *Rio Tinto*, *supra* note 57 at 1202-203, noting the *ATS* uses federal common law, which contains established concepts of vicarious liability.

71 *Doe I v. Unocal Corp*, 395 F.3d 932 at 947 (9th Cir. 2002).

72 Konrad L. Cailteux & B. Keith Gibson, "'Alien Tort Statute' Shakedown: Court Must Arrest New Attempt to Expand Mischievous U.S. Law" (2005) 20 Legal Backgrounder No. 3 at 1, online: Washington Legal Foundation <http://www.wlf.org/upload/ 011405LBCailteux.pdf>.

73 See Rachel Chambers, "The *Unocal* Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses," online: Global Policy Forum <http://www.globalpolicy.org/ intljustice/atca/2005/09unocal.pdf>.

4. SUMMARY OF *ALIEN TORT STATUTE*

Although the scope of *ATS* jurisdiction remains unshaped, it clearly reaches extreme violations of human rights, such as war crimes, systematic racial discrimination, torture, and other *jus cogens* human rights violations. Moreover, the courts now seem willing seriously to analyze whether other human rights abuses, such as health and environment questions, should be actionable as equally fundamental. The *Rio Tinto* Court turned to an international law restatement and a multilateral environmental agreement as a basis for determining today's law of nations. It is likely that courts in the U.S. states will look to other international agreements in placing the *ATS* among other national judicial remedies, including the important *amparo* action, for human rights violations that may be unenforceable at the international level.

IV. CONCLUSION

The clear historical record of 60 years of operation of the modern system of financial and economic instruments created by the major trading nations after World War II proves the severely adverse effects of the system on much of the world's population. Far too many people suffer from poverty, lack of clean air to breathe or clean water to drink, continued lack of access to essential medicines to treat modern plagues such as HIV-AIDS, overt racial and sexual discrimination at work, dying indigenous cultures that had survived thousands of years before the Bretton Woods System, and continued marginalization from political and economic attention.

Combined with the principles of global harm and *pacta sunt servanda*, this undeniable, inevitable, predictable, and preventable record of globalization's "creative destruction" creates an enforceable legal obligation on the part of economically healthy states to make reparations for the human rights violations caused by their actions and by those of the TNCs subject to their jurisdiction. In extreme cases, regional human rights courts and national courts have enforced this obligation, using both tort and constitutional rights deprivation theories to find jurisdiction.

Important issues must yet be resolved. To what extent will a state's border restrictions in support of human rights find justification in WTO public health and welfare exceptions and, importantly, its public morals clauses? WTO panels recently have explored these issues in an important case involving internet gambling.[74] Difficulties in enforcement of human rights obligations persevere in part because of limited ratification of the *American Convention on Human Rights* and, *a fortiori*, its San Salvador Protocol that clarifies the indivisibility of economic, social, and cultural human rights from those that seek primarily civil and political freedoms. In resolving these remaining hurdles, officials should be mindful that the obligation of states to use trade instruments for the advancement of human rights is decidedly rule-based in nature — a legal, not solely a moral, duty.

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[74] *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005), WTO Doc. WT/DS285/AB/R (Appellate Body Report), online: WTO <http://docsonline.wto.org/gen_search/asp?>. For a discussion of this issue, see Stephen J. Powell, "The Place of Human Rights Law in World Trade Organization Rules" (2004) 16 Fla. J. Int'l L. 219.