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ARTICLE

A NEW STORY OF DAVID AND GOLIATH:

THE ALIEN TORT CLAIMS ACT GIVES VICTIMS OF ENVIRONMENTAL INJUSTICE IN THE DEVELOPING WORLD A VIABLE CLAIM AGAINST MULTINATIONAL CORPORATIONS

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INTRODUCTION

Developing countries form lucrative partnerships with multinational corporations (hereinafter “MNCs”) to boost their economies in exchange for unexploited natural resources, cheap

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labor costs and poor governmental regulation.¹ MNCs in search of lower costs and increased profits often forge economic alliances with some of “the most barbarous regimes on earth.”² As a result, many of the most serious environmental threats to human rights have come from oil development, mining, commercial forestry operations, and similar large-scale development projects carried out by MNCs.³ Herz’s comments provide a fruitful analysis of this problem. He notes:

When a country lacks political rights, such as rights to meaningful participation, information, expression, access to judicial remedies and at least some measure of local control, we often see distorted types of development ... Repressive regimes are not accountable to their people, particularly minority groups. Accordingly, they are free to impose projects that destroy environments local people depend on for their subsistence, without providing substantial local benefits. Governments understand that such projects will be unpopular, and therefore commit abuses to squelch or even preempt opposition... Thus an absence of respect for political rights can directly result in a type of development that is not only destructive to the environment and environmental rights, but that is often accompanied by abuses against those who protest or those who are perceived by the government as likely protestors. The projects in turn give the governments the hard currency they need to stay in power, thus funding further repression. Only meaningful political participation can break this vicious cycle, under which repression, environmental degradation and destructive “development” persist *ad infinitum*.⁴

In this excerpt, Herz echoes many of the same concerns that the Environmental Justice movement has expressed since

¹ HILARY F. FRENCH, *Assessing Private Capital Flows to Developing Countries*, in STATE OF THE WORLD 149-65 (W.W. Norton & Company) (1998), quoted in HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1406 (Foundation Press, 2002).

² John Vidal, *A Dirty Business Bogged Down in a Moral and Political Mire*, The Guardian, Aug. 15, 1998, at 5, quoted in Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 Cath. U.L. Rev. 881, 882 (1999).

³ Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. Int'l L. & For. Aff. 81, 82 (1999).

⁴ Richard L. Herz, *Making Development Accountable to Human Rights and Environmental Protection*, American Society of Int'l Law, Proceedings of the 94th Annual Meeting 216, 217 (2000), quoted in HUNTER, *supra* note 1, at 1357.

the mid-1980s.⁵ The Environmental Justice movement has argued that “low-income communities and communities of color bear a disproportionate burden of the nation's pollution problem” because the “environmental laws, regulations, and policies have not been applied fairly across all segments of the population.”⁶ People in developing nations face similar or worse environmental threats because of their greater poverty and vulnerability.⁷ Citizens in developing nations do not have the same rights to protection against environmental threats as citizens in the Western world.⁸ Either by toxic and hazardous wastes generated in the industrialized world and shipped to developing nations, or by pesticides banned, but manufactured in the U.S., Japan or Western Europe and exported to Third World countries,⁹ the most extreme environmental injustices are those that developed nations inflict on developing countries.¹⁰ MNCs and governments have abused those least able to be informed about, or to stop environmentally destructive projects imposed on their communities without prior consultation or notification.¹¹ MNCs, but also governments, via state-owned companies, have profited from weak environmental laws without providing benefits in return to those communities bearing the environmental costs.¹² MNCs have sometimes ignored or even encouraged human rights violations committed in relation to the activities they carried out.¹³ Accordingly, noticing environmental injustice “abroad” is simply the logical continuity of battling it “at home.”¹⁴

⁵ Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 Stan. Env'tl. L.J. 338, 339 (1996).

⁶ PERCIVAL, ET AL., ENVIRONMENTAL REGULATION, LAW, SCIENCE, AND POLICY 20 (3D ED. 2000) QUOTING R. BULLARD, UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR XV (1994).

⁷ KRISTIN SHRADER-FRECHETTE, ENVIRONMENTAL JUSTICE: CREATING EQUALITY, RECLAIMING DEMOCRACY 191 (Kristin Shrader-Frechette ed., Oxford University Press 2002).

⁸ *Id.* at 20.

⁹ Cyril Uchenna Gwam, *Adverse Effects of the Illicit Movement and Dumping of Hazardous, Toxic, and Dangerous Wastes and Products on the Enjoyment of Human Rights*, 14 Fla. J. Int'l L. 427, 459 (2002).

¹⁰ SHRADER-FRECHETTE, *supra* note 7, at 20.

¹¹ *Id.* at 7.

¹² *See Herz supra* note 4.

¹³ *See, e.g., Doe v. Unocal Corp.*, 2002 Cal. Daily Op. Service 9585 (9th Cir. 2002). *See also, e.g., Sarei v. Rio Tinto PLC*, 221 F.Supp.2d 1116, 1121 (C.D. Cal. 2002).

¹⁴ *See SHRADER-FRECHETTE, supra* note 7, at 4-20.

The Alien Tort Claims Act (hereinafter "ATCA") may well help avoid these environmental injustices.¹⁵ By providing a basis for liability, "business as usual" may not always prevail. Brandishing the ATCA as a legal weapon to break the power of impunity, lawyers with imagination and courageous judges will find a way to ensure that equal protection from risks across national boundaries can be guaranteed.

Part I of this Comment provides a general background highlighting the tentacular role that multinational corporations play in our "globalized" world. Part I also stresses the link between extractive industries, environmental destruction and human rights violations, and uses three cases recently brought in U.S. federal courts against multinational corporations to illustrate such linkages. Part II provides general background information regarding the ATCA, its application and circumstances of its passage. Most important, Part II discusses the general opacity surrounding the birth of the ATCA and concludes that such nebulous origins contributed to the confusion practitioners meet today in its application. Part III analyzes the various hurdles met by plaintiffs in order to bring a successful claim. Various policy pressures militate against finding for the plaintiffs so that much time is spent fighting on doctrinal, constitutional and procedural grounds to the detriments of the merits of the claim. Part IV proves that a minimum standard of environmental protection in international law exists and constitutes a binding customary principle. This part focuses on the principle of prohibition of significant transboundary environmental harm. Governments and citizens in developed countries can find a substantial interest in the recognition of this principle because making profit from weak environmental regulations has shown to be dangerously shortsighted.¹⁶ Finally, the conclusion emphasizes the extreme im-

¹⁵ The Alien Tort Claims Act, 28 U.S.C. § 1350.

¹⁶ SHRADER-FRECHETTE, *supra* note 7, at 181-182. The author first notes that in 1998, 52% of all U.S. fruits and vegetables were coming from Mexico. She then argues that in the developing world many activities objects of "environmental dumping" and their byproducts can return through the biosphere to injure the economy and environment of developed nations in large part because of global trade. One example involves a 1998 study showing that over 15% of the beans and 12% of the peppers imported from Mexico into the U.S. violated Food and Drug Administration pesticide residue standards, and half of imported green coffee beans contained measurable levels of pesticides banned in the U.S.

portance of the ATCA, as the only legal tool existing so far to scrutinize MNCs' activities abroad.

I. MULTINATIONAL CORPORATIONS' TENTACULAR POWER AND THEIR PRACTICES IN THE DEVELOPING WORLD

A. UNDERSTANDING MULTINATIONAL CORPORATIONS' BARGAINING POWER IN A GLOBALIZED ECONOMY

In recent years, the relation between governments and businesses has been the focus of various studies and publications.¹⁷ The Economist, a traditionally conservative newspaper, recently conducted a survey on "Capitalism and Democracy."¹⁸ In its survey, The Economist found that "the notion of nation state is dead ... states' powers have been handed over to markets by "fundamentalists" the deregulation and privatization led by R. Reagan and M. Thatcher in the 1980s or usurped by globalization or supranational institutions (World Bank, IMF, WTO etc)." ¹⁹ It further concluded, "[c]orruption, by firms and individuals seeking to exploit governments' vast powers, is a big problem for democracies all over the world."²⁰

Such challenges to democracy, however, do not impact developed and developing nations in the same way.²¹ Democratic principles are far more anchored in the developed world, because they are far more ancient. Developed nations are better armed to resist capture, at least to the extent their people enjoy well-enforced political rights and public liberties.²² In the developing world, increased pressures from former colonial powers to protect their long-established title to exploit the rich

¹⁷ See e.g., GEORGE MONBIOT, THE CAPTIVE STATE: THE CORPORATE TAKEOVER OF BRITAIN (Macmillan 2000), NOREENA HERTZ, THE SILENT TAKEOVER (Arrow Books Ltd., 2002), JOHN GRAY, THE FALSE DAWN (Granta Bks., 2002), ARIANNA HUFFINGTON, PIGS AT THE TROUGH (Crown Publishers, NY, 2003), JONATHAN RAUCH, GOVERNMENT'S END: WHY WASHINGTON STOPPED WORKING (PublicAffairs, 1999), KEVIN PHILLIPS, WEALTH AND DEMOCRACY (Broadway Books, 2002).

¹⁸ *A Survey of Capitalism and Democracy*, The Economist, June 28 to July 7, 2003, at 14.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Applied to the environmental context, see Alan Neff, *Not In Their Backyards Either: A proposal For a Foreign Environmental Practices Act*, 17 Ecology L.Q. 477, 486-487 (1990).

natural resources of their historic backyards have hampered the process of decolonization and the nation building that followed.²³ The drastic increase of foreign direct investments (hereinafter "FDIs"),²⁴ weak political institutions, and the continued interference from former colonial powers led the most venal newborn nations to relinquish their sovereignty to the power of money.²⁵ Thus, numerous governments have allowed or even encouraged companies and wealthy people to manipulate them, stretching public faith in democracy to its breaking point.²⁶

MNCs have great influence in the world today. As Professor Thomas Donaldson concluded, "[w]ith the exception of a handful of nation-states, multinationals are alone in possessing the size, technology, and economic reach necessary to influence human affairs on a global basis."²⁷ The following figures illustrate this dichotomy and highlight the MNCs' powerful influence. Out of 191 countries in the world today, Wal-Mart, the number twelve corporation,²⁸ generates revenues based on its annual sales for an amount superior than the gross domestic product (GDP)²⁹ of 161 countries, including Israel, Poland and Greece.³⁰ Similarly calculated, General Motors is bigger than

²³ See SHRADER-FRECHETTE, *supra* note 7, at 118.

²⁴ Foreign direct investments are defined as "a measure of the productive capacity of multinational corporations", in Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 *Env'tl. L.* 1, 1 (1995).

²⁵ See e.g., Jamie Cassels, *Outlaws: Multinational Corporations And Catastrophic Law*, 31 *Cumb. L. Rev.* 311, 313 (2000/2001).

²⁶ *A Survey of Capitalism and Democracy*, *supra* note 18, at 14.

²⁷ THOMAS DONALDSON, *THE ETHIC OF INTERNATIONAL BUSINESS* 31 (1992) (SIM Academy of Management Best Book Award) quoted in Fowler, *supra* note 24, at 1. Professor T. Donaldson writes, teaches, and consults in the areas of business ethics, values, and leadership. He is a founding member and past president of the Society for Business Ethics, and is a member of the editorial boards of various journals.

²⁸ Anthony Mak, *Comparison of Revenues among States and Transnational Corporations*, using the 1999 FORTUNE GLOBAL MAGAZINE 500 (for corporations) and the U.S. CENTRAL INTELLIGENCE UNIT WORLD FACTBOOK (for states), available at <http://www.globalpolicy.org/soecon/tncs/tncstat2.htm> [Para. 6] (last visited, March 21, 2004).

²⁹ Gross Domestic Product is defined as the market value of all goods and services produced in a calendar year. Nations devote considerable attention to calculating GDP because it serves as an indicator of the extent of economic well-being and as a basis for economic planning, *ENCYCLOPEDIA AMERICANA* 506 (1994).

³⁰ Sarah Anderson and John Cavanagh, *Top 200: The Rise of Global Corporate Power*, available at <http://www.globalpolicy.org/soecon/tncs/top200.htm>, Top Ten Findings para. 1., (Revenues generated by corporations' sales versus GDP) (last visited, March 21, 2004).

Denmark.³¹ Ford is bigger than the GDP of South Africa and Toyota is bigger than the GDP of Norway.³² In addition to influencing developing and developed nations' economic policies, MNCs benefit from many legal privileges under corporation law³³ and from a legal vacuum under international law.³⁴ Hence, The Economist concludes that "[MNCs] unavoidably carry much more political weight than do individual citizens."³⁵

In addition to being legally "untouchable" and more economically powerful than the foreign States in which they operate, MNCs' practices and general ethics have sometimes been referred to "slow motion Bhopals."³⁶ Indeed, critics frequently accuse these powerful entities of practicing double standards.³⁷ That is, MNCs adopt lower environmental and social standards for their operations in developing countries than do their counterparts in the developed world.³⁸ Studies have shown that this general trend is likely to worsen. FDI levels mostly targeted at pollution-intensive industries are rapidly increasing in the developing world.³⁹

³¹ *Id.*

³² *Id.*

³³ *A Survey of Capitalism and Democracy*, *supra* note 18, at 14.

³⁴ Cassels, *supra* note 25, at 314.

³⁵ *A Survey of Capitalism and Democracy*, *supra* note 18, at 14.

³⁶ The Bhopal Disaster of 1984 killed thousands of people in the Indian city of Bhopal in Madhya Pradesh, following the accidental release of forty tons of methyl isocyanate (MIC) from a chemical plant located in the heart of the city and owned by the U.S. corporation Union Carbide. Investigations have revealed that many safety procedures were bypassed and the standard of operations in the Indian plant did not match those at other Union Carbide plants. Available at http://en.wikipedia.org/wiki/Bhopal_Tragedy (last visited, March 21, 2004). See also generally: *The Bhopal Syndrome: Pesticides, Environment, and Health* by David Weir, (1987). The expression "slow motion Bhopals" was first used by Thomas M. Kerr, *What's Good for General Motors Is Not Always Good for Developing Nations: Standardizing Environmental Assessment of Foreign-Investment Projects in Developing Countries*, 29 Int'l Law. 153, 17 (1996).

³⁷ Fowler, *supra* note 24, at 11.

³⁸ *Id.* at 12.

³⁹ Patrick Low & Alexander Yeats, *Do "Dirty Industries Migrate?" in International Trade and the Environment* 89, 98 (World Bank Discussion Papers, No 159, 1992) quoted in Alan R. Jenkins, *NAFTA: Is the Environmental Cost of Free Trade Too High?*, 19 N.C.J Int'l L. & Com. Reg. 143, 150 n46.

B. DENIAL OF JUSTICE: THE CLOSE LINK BETWEEN ENVIRONMENTAL DESTRUCTION AND HUMAN RIGHTS VIOLATIONS

The birth of MNCs has profoundly changed “the rules of the game.” In this unrestrained race to globalization, MNCs have become dominant players, to the detriment of individual citizens. MNCs’ bargaining power allows them to impose projects that destroy the environment without benefiting the local populations in return. In this no-win exchange, people and minority groups are often exposed to more alarming threats. Indeed, large environmentally destructive projects often accompany human rights violations. Three tragedies discussed below exemplify the need for the international community to find ways to hold MNCs accountable for their practices abroad and protect those who put their life in peril for demanding such a change.

The first example involves nine environmental activists from the Ogoni region in Nigeria⁴⁰ who were sentenced to death and executed by the government for leading peaceful protests against Shell Petroleum’s egregious practices of polluting land, water, and air.⁴¹ The Niger Delta Region, Ogoniland, is one of the major oil-producing areas in Nigeria.⁴² Oil exploitation activities have caused tremendous environmental pollution and degradation in Ogoniland without any significant corresponding benefits to the Ogonis.

In a report for the Non Governmental Organization, Pro-natura, a visitor described finding:

Badly maintained and leaking pipelines, polluted water, fountains of emulsified oil pouring into villagers' field, pools of sul-

⁴⁰ Ogoniland, a district in Rivers State in the Niger Delta region of southeastern Nigeria, is a densely populated (404 square mile strip of land inhabited by approximately 500,000 Ogoni), Human Rights Watch/Africa, *Nigeria: The Ogoni Crisis, A Case-Study of Military Repression in Southeastern Nigeria* (July 1995), online: Human Rights Watch http://hrw.org/reports/1995/Nigeria.htm#P293_54052 (last visited, March 21, 2004).

⁴¹ Joshua Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Right To a Healthy Environment*, 15 B.U. Int’l L.J. 261, 266 (1997). See also generally, MICHELLE LEIGHTON ET AL., BEYOND GOOD DEEDS, (July 2002), available at http://www.corporate-accountability.org/docs/good_deeds_full.pdf (last visited, March 27, 2004).

⁴² *Id.* at 264 (noting that a petrochemical complex; a fertilizer plant; 2 oil refineries, 8 oilfields with over 100 oil wells and 4 flow stations flaring gas 24 hours a day, are all situated in Ogoniland, at 266).

fur, blow-outs, air pollution, canals driven through farmland causing flooding and disruption of fresh water supplies, foot-paths blocked by pipelines, drainage problems, polluted wells, inordinate delays in repairing faults and continual noise.⁴³

Ken Saro-Wiwa, a writer, poet, and environmentalist founded the Movement for the Survival of Ogoni People (MOSOP) to fight this environmental menace and to secure some basic rights for the Ogonis. On May 21, 1994, 300,000 people gathered in a protest that soon turned into uncontrolled riots. The protests prompted Shell to request assistance from the Nigerian military, which responded by systematic "cleaning" and punitive raids against the Ogoni people. In a masquerade trial, Ken Saro-Wiwa was sentenced to death.⁴⁴ On November 10, 1995 Ken Saro-Wiwa was executed.

The second example involves a co-venture between the France-based Total-Fina-Elf and the Burmese military junta's Myanmar Ministry for Oil and Gas Enterprises (hereinafter "MOGE") for the construction of a natural gas pipeline. The California-based Unocal Corporation decided to invest in the project, despite its knowledge of the junta's notorious and well-deserved reputation as one of the worst human rights violators in the world. The project's objective was to exploit the Yadana natural gas field located off Burma's coast in the Andaman Sea, by extracting gas from the underwater field and transporting it via a pipeline from Burma into Thailand. Pursuant to its contract with Total and Unocal, MOGE drastically increased the presence of the Burmese military junta to secure the pipeline construction. Not surprisingly, human rights abuses directly related to the project increased daily. The military junta relocated entire villages for the benefit of the construction of the pipeline, used forced labor, killed, raped, and tortured thousands of innocent people.⁴⁵

⁴³ John Vidal, *Born of Oil, Buried in Oil*, *The Guardian*, Jan. 4, 1995, quoted in Eaton *supra* note 41, at 266 n19.

⁴⁴ For a thorough analysis of Ken Saro-Wiwa's trial and flaws of the Nigerian criminal law system, see G.N.K. Vukor-Quarshie, *Criminal Justice Administration: Ken Saro-Wiwa in Review*, 8 *Crim. L.F.* 87, 109 (1997), and quoting *The Guardian*, Nov 1, 1995 at 1, at 109 n61.

⁴⁵ 1999 World Report, Human Rights Watch, Burma-Thailand. Available at www.hrw.org/hrw/worldreport99/special/corporations.html (last visited, March 21, 2004).

Freeport McMoran's practices in Irian Jaya, Indonesia are equally outrageous. Local indigenous groups accused the U.S.-based mining firm of violating international human rights and of committing "cultural genocide."⁴⁶ Local indigenous groups opposed the mine since its opening in 1967. The Amungme Tribe and other indigenous tribal people alleged that Freeport's mining operations and drainage practices resulted in the destruction of their natural habitat and religious symbols, forcing them to relocate, and thus threatening their cultural extinction.⁴⁷ The mine itself hollowed several mountains, re-routed rivers, stripped forests, and increased toxic and non-toxic materials and metals in the river system. Additionally, some Australian, North-American and Indonesian human rights reports noted that the security services retained by Freeport, as well as the Indonesian military personnel, engaged in acts of intimidation, extracted forced confessions, and shot three civilians; five Dani villagers disappeared, and thirteen people were arrested and tortured.⁴⁸ A report from the Catholic Church refers to the murder of over a dozen civilians and multiple instances of torture.⁴⁹

All these tragic cases present a recurring pattern. A MNC invests in a country with a poor human rights record, undertakes large oil or gas developments, mining or commercial forestry operations that provide substantial cash flow to the regime in power.⁵⁰ The MNC contracts private guards (often a "subsidiary" of governmental police forces) or contracts directly with military officials to provide security on the worksite. In

⁴⁶ *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

⁴⁷ *Id.* at 163.

⁴⁸ Pat Walsh, "Trouble at Freeport: Eyewitness Accounts of West Papuan Resistance to the Freeport-McMoran mine in Irian Jaya, Indonesia and Indonesian Military Repression: June 1994 - February 1995," Report from the Australian Council for Overseas Aid (April 5, 1995). Available at <http://www.moles.org/ProjectUnderground/motherlode/freeport/acfoa.html>

⁴⁹ "Violations of Human Rights in the Timika Area of Irian Jaya", Report of the Catholic Church of Jayapura, (1994-1995). Available at <http://www.moles.org/ProjectUnderground/motherlode/freeport/catholic.html#Violations> (last visited, March 21, 2004).

⁵⁰ According to EarthRights International, the construction of the pipeline in Burma, once in full operation, was expected to provide Burma's dictatorship "with up to US \$400 million per year, making it the junta's single largest source of liquid funds", EarthRights International and Southeast Asian Information Network, "Total Denial, A Report on the Yadana Pipeline Project in Burma". Available at www.ibiblio.org/freeburma/docs/totaldenial/td.html p.1 (last visited, March 21, 2004).

most cases, instead of securing the operation against potential robbers or other legitimate threats, the private guards or military junta understand their mission as eliminating any opposition against the given project. In some extreme circumstances, such as Burma, these groups force people to work for the MNC under the threat of execution. In most instances, the MNC is not the violator *per se*. Most human rights reports, however, establish that substantial ties exist between those who commit the atrocities and the MNC operating in the region.⁵¹ Thus, the question remains whether a MNC may legally or morally make a profit when it knows that human rights abuses are committed in connection with its activities, it benefits from such abuses, and, most importantly does nothing to discourage their commission.

Additionally, these environmental and human rights abuses are often committed with impunity. The lack of access to an effective and impartial judicial remedy merely exacerbates the environmental and human rights abuses.⁵² In many countries where defendant multinational corporations operate, the judiciary usually does not hear claims of ordinary citizens against large corporations. This is particularly true where those corporations have a close relationship with the host government.⁵³ Sometimes, even bringing a claim could expose the plaintiffs to dangerous retribution.⁵⁴ In many instances, the judiciary depends on the executive branch or on the military.⁵⁵ As a result, these domestic courts do not provide victims with

⁵¹ Zia-Zarifi, *supra* note 3, at 82. On the relationship between natural resources, extractive industries and conflicts, see generally <http://www.globalpolicy.org/security/docs/minindx.htm#Documents> (last visited, March 21, 2004).

⁵² See, e.g., *Awas Tingni Community v. Nicaragua* (Inter-American Commission of Human Rights, case no. 11,577), *Complaint of the Inter-American Commission on Human Rights, Submitted to the Inter-American Court of Human Rights in the Case of the Awas Tingni Mayagna (Sumo) Indigenous Community Against the Republic of Nicaragua*, 19 *Ariz. J. Int'l & Comp. Law* 17, 43 (2002), and for the Awas Tingni's proceedings under domestic law, at 40-45.

⁵³ Neff, *supra* note 22 at 487.

⁵⁴ For an example of Burma's inherent flawed judicial system, see Terry Collingsworth, *Boundaries in the Field of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 *Harv. Hum. Rts. J.* 183, 185 (2002).

⁵⁵ See, e.g., U.S. Department of State, Human Rights Reports for 1999, Burma [para.1] available at http://www.state.gov/www/global/human_rights/1999_hrp_report/burma.html (last visited, March 21, 2004). Also see, U.S. Department of State, Human Rights Reports for 1999, Nigeria [para.1], available at http://www.state.gov/www/global/human_rights/1999_hrp_report/nigeria.html (last visited, March 21, 2004).

an adequate forum to bring claims in a fair and equitable manner.

ATCA may be the vehicle that brings MNCs to the eye of justice. The interest in the Alien Tort Statute resides in its unique language, allowing U.S. courts to enforce international law for violations of the norms it prescribes.⁵⁶ While advocating to redress victims of human rights and environmental violations in the form of damages, this Comment will also show that the Alien Tort Claims Act can ultimately give citizens the ability to gain democratic control over their institutions.

II. OVERVIEW OF AN ATCA CASE

The first U.S. Congress enacted the Alien Tort Statute on September 24, 1789, as part of the Federal Judiciary Act.⁵⁷ Simply worded, the ATCA provides that "U.S. 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 U.S."⁵⁸ The First Congress's intent has been widely debated,⁵⁹ and the lack of formal legislative history and Congressional records⁶⁰ has exacerbated the general confusion that courts, scholars, and practitioners, face today in applying this "legal Lohengrin."⁶¹ It seems that the statute was enacted

⁵⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2nd Cir. 1980).

⁵⁷ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (current version, with minor changes, codified at 28 U.S.C. § 1350 (1994)). See generally, Peter Schuyler Black, *Recent Development: Kadic v. Karadzic: Misinterpreting the Alien Tort Claims Act*, 31 Ga. L. Rev. 281at 281 (1996), quoting Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923) (who studied the chronological events of the First Judiciary Act in depth).

⁵⁸ The Alien Tort Claims Act, *supra* note 15, 28 U.S.C. §1350.

⁵⁹ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-813 (D.C. Cir. 1984) *cert. denied*, 470 U.S. 1003 (1985) (Bork, J., concurring); Joseph Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445, 476 (1995). But See, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 Hastings Int'l & Comp. L. Rev. 221, 241-244 (1996); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int'l L. 687, 712 (2002).

⁶⁰ Officially, and as recognized by courts and scholars, the ATCA has no formal legislative history, see, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n10 (2d Cir. 2000).

⁶¹ Because of the nebulous origin and purpose of the ATCA, it has been dubbed a "legal Lohengrin," named after a mysterious character in a Wagner opera, see *IIT v. Vancap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

to provide extraterritorial jurisdiction over the crimes of piracy, slave trading, violations of safe conduct, and the kidnapping of ambassadors.⁶²

Before 1980, the ATCA 's jurisprudence only consisted of two cases.⁶³ The Second Circuit's ruling in *Filartiga v. Pena-Irala* gave the ATCA a new unexpected dimension. Often termed the "*Brown v. Board of Education*" of domestic human rights litigation,⁶⁴ the precedent laid by *Filartiga* embodies a U.S. court's determination to enforce the international human right to be free from torture, no matter where committed, by or against whom.⁶⁵ The physical presence of the defendant in U.S. territory was sufficient to give U.S. courts jurisdiction.⁶⁶ As the Court of Appeals for the Second Circuit pointed out, "in our modern world, a nation's treatment of its own citizens is a matter of international law."⁶⁷ After *Filartiga*, those who have committed or contributed to egregious human rights violations anywhere in the world can no longer find safe havens in the U.S. The ATCA's new vocation echoes universal jurisdiction statutes in other countries.⁶⁸ The ATCA's unique language extends the scope of actionable claims far beyond the crimes usually covered by universal jurisdiction statutes, to practices that have not yet, but may ripen into customary legal norms in the future.⁶⁹

⁶² Black, *supra* note 57, at 290.

⁶³ *Filartiga*, 630 F.2d at 888 n. 21.

⁶⁴ Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347 at 2366 (1991).

⁶⁵ *Filartiga*, 630 F.2d at 878.

⁶⁶ *Id.* at 878-79.

⁶⁷ *Id.* at 881-882.

⁶⁸ See e.g., John B. Fowles, NOTE & COMMENT: *Compounding the Counter-majoritarian Difficulty Through "Plaintiff's Diplomacy": Can the International Criminal Court Provide a Solution?*, 2003 B.Y.U.L. Rev. 1129, 1145. The ATCA has been compared to the Belgian statute on universal jurisdiction, see (in the context of the Bush Administration's attacks on the jurisprudence of the ATCA and its Belgian counterpart), COMMENT: Tikkun A. S. Gottschalk *The Realpolitik of Empire*, 13 J. Transnat'l L. & Pol'y 281, 293 (2003).

⁶⁹ Fowles, *supra* note 68, at 1147. Under the principle of universal jurisdiction a state is required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim. Such crimes generally include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture, see generally, *The Princeton Principles on Universal Jurisdiction* 28-36, and corresponding comments, principle 1 and 2 (Stephen Macedo ed., 2001), available at http://www.princeton.edu/~lapa/unive_jur.pdf (last visited, March 21, 2004).

In *Filartiga*, the Second Circuit Court of Appeals principally relied on Supreme Court precedent. The Second Circuit found that: (1) the law of nations is part of the federal common law, such that cases arising under it arise under the laws of the United States as required by Article III of the Constitution;⁷⁰ (2) the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law;”⁷¹ (3) a norm must “command ‘the general assent of civilized nations’” to be part of the law of nations;⁷² (4) the law of nations must be interpreted “not as it was in 1789, but as it has evolved and exists among the nations of the world today.”⁷³

According to its own terms, to establish a claim under the ATCA, a plaintiff must show that (1) he is an alien, (2) suing in tort, and (3) that tort was committed in violation of the law of nations or a treaty of the U.S.⁷⁴ For purposes of the ATCA, aliens may be permanent residents anywhere in the world, including the United States.⁷⁵ U.S. citizens, however, are excluded even when they reside outside the U.S.⁷⁶ Plaintiffs must assert a tort understood as a civil wrong for which courts provide a remedy in a form of action for damages.⁷⁷ In every action, a plaintiff must provide sufficient evidence that (1) the law of nations or a treaty of the United States gives rise to a right, (2) the defendant has violated that right, and (3) the plaintiff has suffered damages as a result.⁷⁸

Although simple on its face, the plain language of the statute has proved to be an inefficient way to overcome the countless questions and general confusion surrounding the applica-

⁷⁰ *Filartiga*, 630 F.2d at 886-87, quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁷¹ *Id.* at 880 quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L. Ed. 57 (1820); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (E.D.Pa.1963).

⁷² *Id.* at 881, quoting *The Paquete Habana*, 175 U.S. at 694.

⁷³ *Id.*

⁷⁴ The Alien Tort Claims Act, *see supra* note 15, 28 U.S.C. § 1350.

⁷⁵ *Miner v. Begum*, 8 F.Supp.2d 643, 644 (SD Tex. 1998).

⁷⁶ *Id.*

⁷⁷ PROSSER AND KEETON, *THE LAW OF TORTS* 2 (1984) quoted in HUNTER *supra* note 1, at 1339.

⁷⁸ *Jogi v. Piland, et al.*, 131 F. Supp.2d 1024, 1027 (D.Ill.2001).

tion of the ATCA.⁷⁹ Plaintiffs will first face obstacles inherent to the Statute's plain language, and then will be attacked by a myriad of technical and procedural hurdles.

III. CLEANING OUT THE AUGEAN STABLES: A CHALLENGE FOR ATCA PLAINTIFFS⁸⁰

A. UNCERTAINTIES ARISING FROM THE STATUTE'S PLAIN LANGUAGE

1. *The Alien Tort Statute, Private Cause of Action, and Federal Jurisdiction*

The plain language of the ATCA indicates that jurisdiction to federal courts will be granted if, *inter alia*, the defendant has violated the law of nations or a treaty of the U.S.⁸¹ Hence, it is the violation of international law (i.e., the "law of nations" or a "treaty of the United States") that triggers the application of the ATCA, which in turn provides federal district courts with jurisdiction.⁸² Difficulties arise, however, when courts attempt to decide whether the ATCA actually creates a cause of action or merely provides jurisdiction for a cause of action that already exists.⁸³ Courts have to cope with two well-established rules.⁸⁴ The first rule provides that: "the Judicial Code (Title 28 of the United States Code), in vesting jurisdiction in the dis-

⁷⁹ See *supra* note 59.

⁸⁰ In Greek mythology, the hero Hercules was sentenced to perform a series of seemingly insurmountable tasks – the most odious of which was to cleanse the pungent, manure-filled Augean stables. The Augean stables housed 3,000 oxen and had not been mucked out in thirty years. The surrounding fields were barren because they lacked fertilizer and the fear of food-shortage threatened most inhabitants of the kingdom. In addition, the vast quantity of accumulated manure had contaminated soils and groundwater, seriously impacting human health in the region. The Augean stables metaphoric figure is often used to illustrate the "Herculean task" of achieving environmental protection. See generally The Encyclopedia Mythica, online at <http://www.pantheon.org/> (last visited, March 21, 2004).

⁸¹ The Alien Tort Claims Act, see *supra* note 15, 28 U.S.C. 1350.

⁸² *Filartiga*, 630 F. 2d at 878.

⁸³ Jay M.L. Humphrey, *A Legal Lohengrin: Federal Jurisdiction Under The Alien Tort Claims Act of 1789*, 14 U.S.F. L. REV. 105, 112 n.52 (1979), quoted in David P. Kunstle, *Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations Under The Alien Tort Claims Act?*, 6 Duke J. Comp. & Int'l L. 319, 321 n17 (1996).

⁸⁴ Michael Dwayne Pettyjohn, "Bring Me Your Tired, Your Poor, Your Egregious Torts Yearning To See Green": *The Alien Tort Statute*, 10 Tulsa J. Comp. & Int'l L. 513, 521 (2003).

strict courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.”⁸⁵ The second rule holds that “a jurisdictional statute cannot alone confer jurisdiction on the federal courts, and that the rights of the parties must stand or fall on federal substantive law to pass constitutional muster.”⁸⁶ Applied to the ATCA, in order to secure jurisdiction under section 1350, both rules require that a plaintiff allege a private right to sue, granted by international law.⁸⁷ This assertion, however, is questionable. On its face, the statutory language of the ATCA is unambiguous.⁸⁸ It requires that there be a “tort only” and that the commission of such a tort violate international law.⁸⁹ Unlike the term “arising under” in section 1331, which indicates that a plaintiff’s right to sue must be expressly provided for in another law, treaty, or constitutional provision,⁹⁰ the ATCA does not require that the alleged tort “arise under” an international treaty or customary international law, but only that it be committed “in violation of” such law.⁹¹ Because international law, out of respect for domestic sovereignty, remains silent regarding domestic enforcement,⁹² international law cannot provide a cause of action.⁹³ Requiring an express cause of action from an international norm that is not substantive law would effectively nullify the “law of na-

⁸⁵ *Montana-Dakota Util. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951).

⁸⁶ *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 501 (9th Cir. 1992), citing *Mesa v. California*, 489 U.S. 121, 136-137 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 at 495-97(1983).

⁸⁷ *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 549 (D.D.C. 1981) (Bork, J., concurring).

⁸⁸ Andrew Ridenour, Recent Development: *Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act*, 9 Tul. J. Int'l & Comp. L. 581, 584 (2001).

⁸⁹ The Alien Tort Claims Act, *supra* note 15, 28 U.S.C. § 1350.

⁹⁰ 28 U.S.C. § 1331 (Federal Question Jurisdiction) “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”.

⁹¹ See generally, Virginia A. Melvin, *Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act*, 70 Minn. L. Rev. 211, 222 (1985).

⁹² *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-778 (D.C. Cir. 1984) (Edwards, J., concurring) quoting HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972).

⁹³ *Hilao v. Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994).

tions” portion of ATCA.⁹⁴ Such construction would render the ATCA valueless in regards to violations of international law, and would be inconsistent with the canon of construction that acts of Congress should not be construed as “inoperative or superfluous, void or insignificant.”⁹⁵ For these reasons, the courts’ solution has been to construe the ATCA as providing both jurisdictional authority and a private cause of action.⁹⁶ Courts have concluded that a “violation” is required for jurisdiction, and the “tort” supplies the basis for a claim for relief.⁹⁷

2. *The Law of Nations and the “Specific, Universal and Obligatory” Standard*

Because courts have agreed that, “the law of nations does not create or define the civil actions to be made available by each member of the community of nations” and that “the states leave that determination to their respective municipal laws,”⁹⁸ plaintiffs have been able to overcome the cause-of-action obstacle. To stand in court, however, and gain jurisdiction, plaintiffs are left to show that a tort violating the law of nations, and impliedly giving them the right to sue, has occurred.⁹⁹ Because there cannot be any subject-matter jurisdiction under the ATCA, unless the complaint adequately pleads a violation of the law of nations, the jurisdictional issue is always intertwined with the merits of plaintiffs’ claims.¹⁰⁰ Ascertaining the content of the law of nations is of paramount importance to surviving threshold attacks and eventually winning the case on the merits. The following sub-section will present four possible interpretations of the Law of Nations, and will show that the standard courts have adopted narrows the scope of the statute and disregards its plain language.

⁹⁴ *Tel-Oren*, 726 F.2d at 778.

⁹⁵ *Id.*

⁹⁶ See overview by JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 104.24 (3d ed.1999).

⁹⁷ See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996).

⁹⁸ *Tel-Oren*, 726 F.2d at 778.

⁹⁹ See e.g., H. Knox Thames, ARTICLE: *Forced Labor and Private Individual Liability in U.S. Courts*, 9 MSU-DCL J. Int’l L. 153, 161 (2000).

¹⁰⁰ *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1130 (C.D. Cal 2002). See also, *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

i. The Law of Nations in International Law and in US Domestic Law

From the Judiciary Act of 1789 until the 1980 landmark case of *Filartiga v. Pena-Irala*, the ATCA remained mostly dead letter.¹⁰¹ This long period of inertia certainly contributed to the difficulties courts meet today in interpreting the law of nations.¹⁰² In 1900, the Supreme Court asserted that the law of nations meant international law, encompassing both treaty-based and customary international law.¹⁰³ The Statute of the International Court of Justice¹⁰⁴ and the Restatement (Third) of Foreign Relations Law [hereinafter “Restatement (Third)”]¹⁰⁵ both define customary international law as the general and consistent practice of states where such practice is done under the belief that it is required by law.¹⁰⁶ This sense of legal obligation is referred to as *opinio juris*.¹⁰⁷

Throughout ATCA jurisprudence, courts have systematically ignored the traditional definition of customary international law as internationally defined today, and have disre-

¹⁰¹ *Filartiga*, 630 F.2d at 888 n.21.

¹⁰² Pettyjohn, *supra* note 84, at 514.

¹⁰³ The Paquete Habana, *supra* note 70, at 700.

¹⁰⁴ The International Court of Justice is the principal judicial organ of the United Nations. It operates under a Statute, which is an integral part of the Charter of the United Nations. The Court has a dual role: to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. The Court decides in accordance with international treaties and conventions in force, international custom, the general principles of law and, as subsidiary means, judicial decisions and the teachings of the most highly qualified publicists. Online: The International Court of Justice, General Information, The Court at a Glance, available at <http://www.icj-cij.org/icjwww/icj002.htm> (last visited, March 21, 2004).

¹⁰⁵ The Restatement consists of international law as it applies to the United States, and domestic law that has substantial impact on the foreign relations of the United States or has other important international consequences. For the most part, the domestic component of the law restated in the Restatement is federal law, deriving mainly from the Constitution, acts of Congress, and judicial decisions. The international law restated stems largely from customary international law and international agreements to which the United States is a party. The Restatement (Third) reflects the opinion of The American Law Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § Scope [hereinafter “Restatement (Third)”].

¹⁰⁶ Statute of the International Court of Justice art. 38(1)(b), RESTATEMENT (THIRD) § 102(2).

¹⁰⁷ 1 OPPENHEIM'S INTERNATIONAL LAW 30 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

garded the plain language of the Restatement. By their own interpretations, courts have restricted actionable customary international norms under the ATCA to norms that satisfy the strict “definable, universal and obligatory” criteria.

ii. From States Practice and *Opinio Juris* to “Specific, Universal and Obligatory:” the Incorrect Statutory Construction of the Courts

According to the U.S. Supreme Court, “law of nations” refers to international law, and encompasses both treaty-based and customary international law.¹⁰⁸ This definition is consistent with international law and the Restatement (Third).¹⁰⁹ Courts dealing with ATCA cases, however, have narrowed the original meaning of customary international law. They have developed a three-criterion test that restricts actionable claims under the ATCA.

Defining customary norms as “definable, universal and obligatory” is not the only way to ascertain the content of the law of nations. The following section proposes four possible standards that courts could use to determine whether a violation of a norm constitutive of the law of nations has occurred and is actionable.

The first construction of customary international law consists of creating new laws and recognizing new obligations under the law of nations.¹¹⁰ It is relevant to inquire about what “law of nations” meant at the time the ATCA was passed.¹¹¹ Law of nations seemed to encompass natural law concepts, i.e., the law that persons are under when in a state of nature.¹¹²

The Black’s Law Dictionary defines natural law or law of nature as:

A system of rules and principles for the guidance of human conduct which, independently of enacted laws or of the sys-

¹⁰⁸ The Paquete Habana, *supra* note 70, at 700.

¹⁰⁹ See *supra* note 106.

¹¹⁰ David P. Fidler, *Dinosaur, Dynamo, or Dangerous? Customary International Law in the Contemporary International System*, in ELLEN G. SCHAFFER & RANDALL J. SNYDER, *CONTEMPORARY PRACTICE OF PUBLIC INTERNATIONAL LAW* 75 (Oceana Publications 1997).

¹¹¹ Black, *supra* note 57, at 290.

¹¹² The Prize Cases, 67 U.S. 635, 670 (1862).

tems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning his whole mental, moral and physical constitution.¹¹³

Therefore, in 1789, the meaning of law of nations was premised on the belief that the law of nature as applied to nations could be discovered by reason.¹¹⁴ Hence, the law of nations was the law of justice.¹¹⁵

The plausibility of this interpretation is further echoed in 1822, in a Circuit Court case for the District of Massachusetts.¹¹⁶ In *The United States v. The La Jeune Eugenie*, the District Court of Massachusetts noted that “every doctrine that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation may theoretically be said to exist in the law of nations.”¹¹⁷ The court’s use of the language, “correct reasoning” shows that a few years after the ATCA was passed, the law of nations encompassed the law of common wisdom or natural law.¹¹⁸ This standard, however, is unlikely to prevail today. If wisdom, correct reasoning, and natural law were the underlying principles of the law of nations in 1789, and reflected the legislative intent of the First Congress, many concepts today would be covered by the scope of the law of nations. Environmental protection would certainly be one of them. In the modern sense of customary international law, however, the crystallization of a norm into custom derives not from reason, but from state practice.

The second standard to construe the law of nations consists of a plain reading of the Restatement (Third) and from article 38(1)(b) of the Statute of the International Court of Jus-

¹¹³ BLACK’S LAW DICTIONARY 1026 (6th ed. 1990).

¹¹⁴ See e.g., Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 Calif. L. Rev. 779, 780 (1988).

¹¹⁵ *Id.*

¹¹⁶ *The United States v. The La Jeune Eugenie*, 26 F. Cas. 832 (D.C. Mass. 1822). And in 1814 the Supreme Court said simply that the “law of nations . . . may be stated to be the law of nature, rendered applicable to political societies.” *The Views*, 12 U.S. 253, 297 (1814). The “law of nations,” the Court continued, “is a law founded on natural practice . . .”.

¹¹⁷ *Id.* at 846.

¹¹⁸ William S. Dodge, *The Historical Origins of the Alien Tort Statute: A response to the “Originalists”*, 19 Hastings Int’l & Comp. L. Rev. 221, 226 (1996).

tice, which is part of the United Nations Charter (under article 93) that the U.S. signed and ratified.¹¹⁹ Because international law and U.S. law both agree on the general and consistent practice of states, followed by the *opinio juris*, there is nothing that requires a norm to be “universal” to qualify for customary. Congress endorsed this view when it passed the Torture Victim Protection Act [hereinafter “TVPA”].¹²⁰ In addition, the House Report contains language suggesting that Congress rejected Judge Bork’s narrow interpretation of the law of nations.¹²¹ In *Tel-Oren v. Libyan Arab Republic*, Judge Bork took the position that the law of nations only included those human rights considered universally binding in 1789.¹²² Views articulated during the TVPA hearings indicate that Judge Bork’s reservations regarding the scope of the ATCA in *Tel-Oren* served as an impetus for the TPVA’s enactment.¹²³ House and Senate Reports, however, make clear that both the House and Senate drew a clear distinction between the TVPA and the ATCA, and that both statutes are mutually supportive. Regarding the ATCA, the Senate Report specifically states, “claims based on torture or summary execution do not exhaust the list of actions that may appropriately be covered by section 1350 [ATCA]. Consequently, that statute should remain intact.”¹²⁴ Congress added that “[t]he ATCA should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.”¹²⁵ This is strong language from Congress recognizing that violations actionable under the

¹¹⁹ UN Charter art. 93.

¹²⁰ Rachael E. Schwartz, “*And Tomorrow?*” *The Torture Victim Protection Act*, 11 *Ariz. J. Int’l & Comp. Law* 271, 283 (1994) citing H.R. REP. No. 102-367, pt.1, at 3-4 (1991) reprinted in 1992 U.S.C.C.A.N. 84, 86. For a comparative analysis between the Torture Victim Protection Act (TVPA) and the Alien Tort Claims Act, see generally, Jennifer Correale, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 *Pace Int’l L. Rev.* 197 (1994). Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, codified at 28 U.S.C. § 1350.

¹²¹ Schwartz, *supra* note 120, at 283 citing H.R. REP. No. 102-367, pt.1, at 3-4 (1991).

¹²² *Tel-Oren*, 726 F.2d at 816.

¹²³ Schwartz, *supra* note 120, at 283 citing H.R. REP. No. 102-367, pt.1, at 3-4 (1991).

¹²⁴ Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 *Syracuse L. Rev.* 941, 954 (2001) citing S. REP. No. 102-249, at N2 (1991).

¹²⁵ Schwartz, *supra* note 120, at 283 H.R. REP. No. 102-367 at 4.

ATCA may evolve into new norms of customary international law, and are not limited to what courts have agreed to recognize since *Filartiga*, namely, torture, extra judicial killings, slavery, genocide and war crimes.

The third possible standard courts may use is the one adopted in *Filartiga* and later cases.¹²⁶ The “universal, obligatory and definable” standard arose from a 1981 article in the Harvard International Law Journal analyzing the *Filartiga* opinion.¹²⁷ A norm will fall within the law of nations if the tort pled is “definable, obligatory (rather than hortatory) and universally condemned.”¹²⁸ This standard may cause inconsistencies if the principles recognized by judges interpreting the “law of nations” under the ATCA differ from the principles recognized by international law.¹²⁹ Indeed, there is an apparent distinction between requiring a norm to be “universally condemned” as opposed to “widely accepted”.¹³⁰ While the former seems not to allow for exceptions, the latter tend to refer to the widespread recognition of a norm, applicable to a majority of states. As applied by U.S. courts, this more stringent standard is likely to bar claims based on emerging customary rules. This is particularly true with norms of international environmental law. For example, in *Sarei v. Rio Tinto*, the District Court rejected a claim based on the principle of sustainable development.¹³¹ Contrastingly, in the case concerning the Gabcikovo-Nagymaros Project, Judge Weeramantry, then Vice-President of the International Court of Justice, issued a separate opinion where he expressly recognized the principle of sustainable development as binding customary law.¹³² Courts are thus narrowing the scope of the ATCA, and rebutting claims

¹²⁶ See Hari M. Osofsky, ARTICLE: *Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 Suffolk Transnat'l L. Rev. 335, 355-356 (1997).

¹²⁷ *Id.* at 355 n10, citing Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 Harv. Int'l L. J. 53, 87-90 (1981).

¹²⁸ *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1539-1541 (N.D.Cal. 1987).

¹²⁹ Natalie L. Bridgeman, ARTICLE: *Human Rights Litigation Under the ATCA as a Proxy For Environmental Claims*, 6 Yale H.R. & Dev. L.J. 1, 2 (2003).

¹³⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1)(3).

¹³¹ *Sarei*, 221 F. Supp. 2d at 1160-1661.

¹³² Case Concerning The Gabcikovo-Nagymaros Project (Hungary v. Slovakia), separate opinion of Vice-President Weeramantry, 1997 I.C.J., (25 Sept.) (citations omitted).

that could be actionable under international and U.S. law.¹³³ In addition, critics blame definitional loopholes. They assert that courts' decisions do not explain what is meant by "definable, obligatory and universal" in any clearer ways than international scholars did, when trying to elucidate the content of customary international law.¹³⁴

Finally, the last possible standard to determine the obscure content of the "law of nations" is to strictly construe the law of nations as norms qualified as *jus cogens*. A norm of *jus cogens* is defined as "a peremptory norm of general international law ... 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."¹³⁵ Courts have been tempted to recognize *jus cogens* norms as the applicable standard for determining the law of nations.¹³⁶ One of the practical implications of *jus cogens* norms is that they are so fundamental that they usually bind both state and non-state actors, so that plaintiffs are exempt from showing state action.¹³⁷ Lifting the burden of state action is an undeniable advantage for plaintiffs seeking to sue a private corporation.¹³⁸ *Jus cogens* norms, however, prohibit crimes such as genocide, slavery, piracy, war crimes, and, perhaps, certain acts of terrorism,¹³⁹ so that environmental crimes are unlikely to be covered.¹⁴⁰

In conclusion, the four possible interpretations of the law of nations show that there is not one unique static definition. Indeed, the first interpretation is unlikely, the last one much too narrow, and the interpretation accepted by courts is both unjustified and raises additional problems of definition. Therefore, the real construction of the law of nations should be the one recognized by international law and by the Restatement

¹³³ William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 *Hastings Int'l & Comp. L. Rev.* 351, 355 (2001).

¹³⁴ Osofsky, *supra* note 126, at 356. *See also infra* Part IV D of this Comment.

¹³⁵ 1969 Vienna Convention on the Law of Treaties art. 53.

¹³⁶ *See Doe v. Unocal*, 110 F.Supp.2d 1294, 1304 (C.D. Cal. 2000).

¹³⁷ *Kadic*, 70 F.3d at 240.

¹³⁸ For further discussion, *see* Part III (B) (3).

¹³⁹ *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §404. *Also see, Tel Oren*, 726 F.2d at 795 (Edwards, J., concurring).

¹⁴⁰ *But see*, Beanal's claims of "cultural genocide", *Beanal*, 197 F.3d at 163.

Third. The norm should reflect consistent states' practice and legal obligation should be inferred from it.

B. RESIDUAL OBSTACLES: A NON-EXHAUSTIVE LIST

Although not arising from the statute's plain language, ATCA plaintiffs will nonetheless have to make their way through a series of obstacles. These obstacles notably include the doctrine of *forum non-conveniens*,¹⁴¹ the political-question doctrine, the act-of-state doctrine,¹⁴² and the state-action test.¹⁴³

1. *Forum Non-Conveniens*

Under the doctrine of *forum non-conveniens*, courts have the discretion to decline jurisdiction where a more convenient forum can hear the case. This doctrine constitutes another "weapon" in the defendant's arsenal, by which a court may dismiss a case without reaching the merits.¹⁴⁴ Because MNCs doing business in developing nations usually have close ties with, and a perceived influence on host governments, MNCs have a substantial interest in having the action adjudicated before the tribunals of the foreign country.

Courts apply a two-part analysis.¹⁴⁵ The first inquiry is whether an alternative forum is available.¹⁴⁶ If the answer is affirmative, the court will then determine whether the alternative forum is adequate.¹⁴⁷ In asserting the availability of the alternative forum, the defendant has the burden to prove that the foreign court can assert jurisdiction over the case.¹⁴⁸ The

¹⁴¹ A response to concerns about "internationalising" American jurisdiction to cover cases with only limited ties with the U.S.

¹⁴² A response to concerns about the judicial fear of infringing upon the separation of powers and interfering in foreign policy.

¹⁴³ A response to concerns that international law only applies to states, so that plaintiff must show that the defendant corporation acted under "color" of a state or authority of a state.

¹⁴⁴ See Matthew R. Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self After Wiwa*, 16 Emory Int'l L. Rev. 187, 204 (2002).

¹⁴⁵ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

¹⁴⁶ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n22 (1981) quoting *Gilbert*, 330 U.S. at 507.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 255 (holding "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.")

second inquiry is whether the alternative forum is adequate. The main standard governing adequacy balances public and private interest factors.¹⁴⁹

The courts have broad discretion in deciding *forum non-conveniens* cases.¹⁵⁰ It is a powerful defense because unless the foreign forum is a notoriously repressive regime, it is evident that sources of proof for instance are more easily accessible where the violations took place and where the harm was done.¹⁵¹ In some instances, plaintiffs have tried to convince the court that the doctrine of *forum non-conveniens* will undermine the very purpose of the ATCA, which is to offer a U.S. forum to alien victims of egregious violations of international law.¹⁵² One could argue, however, that the relative ease of courts to dismiss a case on the grounds of *forum non-conveniens*, could also influence them to adopt a less stringent test for qualifying new international torts as “violation of the law of nations.” As a matter of fact, courts could “without risk” open the door to international environmental torts because they always retain the authority to dismiss cases on *forum non-conveniens* grounds if claims filed in international environmental tort become too numerous.

2. *The Political Question and the Act of State Doctrines*

In addition to the difficulties raised by the doctrine of non-conveniens, the political-question and act-of-state doctrines also militate against finding for the plaintiffs. The difficulty comes from judging a MNC, which has received from the host government full powers to cause massive, irreparable environmental harms in its own territory. In adjudicating an ATCA claim based on massive environmental pollution, U.S. courts must inevitably take a position on quintessentially political questions, directly impacting U.S. foreign policy decisions with other countries.

The political question doctrine is another defensive startagem, which, if granted, will terminate the case without

¹⁴⁹ *Gilbert*, 330 U.S. at 508-9.

¹⁵⁰ *Id.* at 508.

¹⁵¹ *Id.* at 508-509.

¹⁵² *Wiwa v. Royal Dutch Petroleum*, 1999 U.S. Dist. LEXIS 22352, 6 (1999) and *Jota v. Texaco* 157 F.3d 153, 159 (1998).

reaching the merits.¹⁵³ Under this doctrine, U.S. courts are precluded from adjudicating a case that may require them to take positions on quintessential political questions related to the foreign policy choices of the Executive Branch.¹⁵⁴ The “act of state” doctrine bars courts from questioning the validity of foreign nations’ sovereign acts that occur within their own jurisdictions.¹⁵⁵

In *Sarei v. Rio Tinto*, residents of Bougainville Island, Papua New Guinea (hereinafter “PNG”), brought a claim against an international mining group for destroying their island’s environment, harming the health of the people, and inciting a ten-year civil war.¹⁵⁶ The PNG government stated its objection to the ongoing proceedings and warned the U.S. Department of State that the impact of the litigation on the PNG-US relations and wider regional interests would be “very grave.”¹⁵⁷ In a letter from the U.S. Department of Justice to the U.S. District judge for the Northern District of California in charge of the case, Mr. W.H Taft “highly invites” Judge Morrow to take into consideration the potential implications of her decision on the US-PNG foreign relations. In July 2002, for the first time in the history of the ATCA, a claim based on a violation of customary international environmental law survived a motion to dismiss under Rule 12(b). Other motions to dismiss on more frequently adjudicated claims were also denied.¹⁵⁸ Judge Morrow, however, barred the environmental claim under the act-of-state doctrine and ultimately all claims, under the political-question doctrine.¹⁵⁹ The *Sarei* case exemplifies the dangers that the political-question doctrine and act-of-state doctrine pose for future ATCA cases. Additionally, the *Sarei*

¹⁵³ See e.g., Paul Hubschman Aloe, *Note on the Presidential Foreign Policy Power (Part I): Justiciability and the Limits of Presidential Foreign Policy Power*, 11 Hofstra L. Rev. 517, 535 (1982).

¹⁵⁴ *Baker v. Carr*, 369 U.S. 186, 210-211 (1962).

¹⁵⁵ *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972).

¹⁵⁶ *Sarei*, 221 F.Supp.2d 1116.

¹⁵⁷ Available at www.state.gov/s/1/16097.htm (last visited Jan. 20, 2003) Letter from W.H Taft, IV legal adviser, to R.D. McCallum, Jr., Assistant Attorney General, Dept of Justice, regarding the impact on U.S foreign policy of continued litigation, A. Holyweek *Sarei v. Rio Tinto plc*, October 31, 2001).

¹⁵⁸ *Sarei*, 221 F.Supp.2d at 1208-1209.

¹⁵⁹ *Id.* at 1193 and 1198.

case shows the necessity of developing legal doctrines to overcome such obstacles.

3. *The State Action Test*

Oil drilling, mining, timber harvesting and other massive development projects in developing countries are often undertaken by MNCs through joint ventures with the host governments. Because the foreign government may be protected from liability by sovereign immunity, it may be necessary to establish the private company's liability. Liability for private actors under international law is the central issue in many ATCA cases.

In the modern conception of international law, individuals are generally neither conferred rights nor subject to obligations; international law is the law that governs relations between states.¹⁶⁰ The key question is whether the alleged human right or environmental tort requires the private party to have engaged in state action. If a plaintiff cannot prove that a substantial relationship exists between the private actor and the state actor, his claim will fail because no remedy exists against non-state actors' violations of laws to which they are not subject.¹⁶¹

The road is not completely barred against seeking redress for private corporations' egregious practices. Some norms of customary international law can generate individual liability when violated by non-state actors.¹⁶² These norms include "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism, even where no other basis of jurisdiction is present."¹⁶³ Judge Edwards in his concurrence in *Tel-Oren v. Libyan Arab Republic*, confirmed the assertion that while most crimes require state action for ATCA liability to attach, there are a "handful of crimes to which the law of nations attributes

¹⁶⁰ *DEVELOPMENTS IN THE LAW - INTERNATIONAL CRIMINAL LAW: V. Corporate Liability for Violations of International Human Rights Law*, 114 Harv. L. Rev. 2025, 2030 (2001).

¹⁶¹ *Id.* at 2031.

¹⁶² *Tel Oren*, 726 F.2d at 795.

¹⁶³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404.

individual responsibility,” such that state action is not required.¹⁶⁴ Based on this argument, the Second Circuit recently expanded this analysis and carved a new interpretation under the ATCA for liability of non-state actors.¹⁶⁵

In *Kadic v. Karadzic*, the Second Circuit extended international liability of non-state actors, absent a showing of state action, to crimes committed *in pursuit* of genocide, war crimes, slavery, piracy and perhaps certain acts of terrorism.¹⁶⁶ The Second Circuit first noted that genocide and war crimes do not require state action for ATCA liability to attach.¹⁶⁷ The Court next stated, “Acts of rape, torture, and summary execution,” like most crimes, “are proscribed by international law only when committed by state officials or under color of law.” The groundbreaking comes from the Second Circuit’s ruling that when committed *in pursuit of genocide or war crimes*, acts of rape, torture, and summary execution can give rise to liability of non-state actors without regard to state action.¹⁶⁸

Unless a MNC has committed or is an accomplice in the commission of genocide and war crimes, the only way for plaintiffs to establish the MNC’s liability is to plead the “color of law.”¹⁶⁹ The courts have not adopted a uniform test to establish whether a private party has acted under “color of law.”¹⁷⁰ The Restatement (Third) section 207 addresses the state-action question, but courts have largely ignored this test because its broad language does not allow for application to specific facts of a case.¹⁷¹ Instead, the courts have focused on the Civil Rights

¹⁶⁴ *Tel Oren*, 726 F.2d at 795.

¹⁶⁵ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

¹⁶⁶ *Id.* at 244.

¹⁶⁷ *Id.* at 242-243.

¹⁶⁸ *Id.* at 244.

¹⁶⁹ *Bridgeman*, *supra* note 129, at 9.

¹⁷⁰ *Id.* at 9-10.

¹⁷¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 207 cmt d. Under this test, courts judge state action based on “all the circumstances, including whether the affected parties reasonably considered the action to be official, whether the action was for public purpose or for private gain, and whether the persons acting wore official uniforms or used official equipment.” In the jurisprudence of the ATCA, only the District Court for the Fifth Circuit once discussed the Restatement (Third) § 207 state action test, which however, proved inconclusive for the plaintiffs, *see Beanal v. Freeport-McMoRan*, 969 F. Supp. 362, 375 (E.D. La. 1997). For a critical analysis, *see Saman Zia-Zarifi, supra* note 3, at 111; *see Richard Herz, Litigating Environmental Abuses under the Alien Tort Claims Act: A practical Assessment*, 40 Va. J. Int’l L. 545, 559 n 97, or Andrew Ridenour, *Recent Development: Doe v. Unocal Corp., Apples and*

Act,¹⁷² which asks “whether the conduct allegedly causing the deprivation of a right can be fairly attributable to the State.”¹⁷³ The U.S. Supreme Court has articulated four different tests for determining when a private actor is liable under “color of state law” within the meaning of the Civil Rights Act.¹⁷⁴ In *Forti v. Suarez-Mason*, the Ninth Circuit first relied on this federal provision as a guideline to deal with the state action issue.¹⁷⁵ The Fifth Circuit in *Beanal* undertook the thorough study of discussing each test. This meticulous analysis allowed for a clarification of what factual allegations courts require in order to pass the state action obstacle.¹⁷⁶ The joint action test requires that the private actor and the government act “in concert.”¹⁷⁷ The symbiotic test implies that the state “insinuates itself into a position of interdependence with the private actor,” so that the challenged conduct can no longer be considered private.¹⁷⁸ The nexus test is met if the state provides such significant encouragement to the private party that the decision was, in fact, the state’s.¹⁷⁹ Finally, the public function test implies that the private entity exercises powers traditionally reserved exclusively to the state.¹⁸⁰ Regarding all four tests, the Fifth Circuit held that a government contract or concession, governmental regulation, subsidies, or state majority partnership in the joint venture did not make the state responsible for the conduct.¹⁸¹

Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act, 9 Tul. J. Int'l & Comp. L. 581, 591 (2001).

¹⁷² 42 U.S.C. § 1983 provides “Every person who, under color of any statute, ordinance, regulation, custom, or usage, ... , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,”

¹⁷³ *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988) quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

¹⁷⁴ These tests include the Nexus Test, the Joint Action Test, the Symbiotic Relationship Test and the Public Function Test. See Herz, *supra* note 171, at 558-561.

¹⁷⁵ *Forti*, 672 F. Supp. at 1546.

¹⁷⁶ See, *Beanal*, 969 F.Supp. 362.

¹⁷⁷ *Id.* at 379.

¹⁷⁸ *Id.* at 378.

¹⁷⁹ *Id.* at 377.

¹⁸⁰ *Id.* at 379.

¹⁸¹ *Id.* at 377 and 379.

Plaintiffs typically need a true sense of the relationship between the state and the MNC to show that the corporation's conduct is attributable to the action of a state. Hence, plaintiffs will need to engage in a fact-bound inquiry, which may not always be feasible. In fact, in many of the poor countries where MNCs undertake their projects, the lack of transparency, oversight and accountability of host governments to their people renders the traceability of foreign direct investments almost impossible. It is extremely difficult to know the nature of the concession granted and the terms and conditions of the oil, mining or logging extraction licenses. Even more difficult to know are the financial benefits shared by the host government and the MNC. Because understanding the opaque relation between these two actors is extremely challenging, the state-action requirement in ATCA litigation certainly constitutes the most rebutting obstacle.

In practice MNCs often invest in their national counterparts, generally subsidized by the host government.¹⁸² Therefore, an MNC and its state-owned national counterpart jointly carry out the destructive exploitation and extraction activities, and share an economic benefit under a joint venture. In practical terms, MNCs are significantly involved and actually participating in the violation of international environmental law, thus satisfying the joint-action or the nexus test.¹⁸³

IV. THE PROHIBITION OF SIGNIFICANT CROSS-BORDER ENVIRONMENTAL DAMAGE IS ACTIONABLE UNDER THE ALIEN TORT CLAIMS ACT

Profiting from weak environmental regulations has been shown to be dangerously shortsighted.¹⁸⁴ Environmental pollution in a given place may return through the biosphere or global trade to injure the economy and environment of various nations, including MNCs' home countries.¹⁸⁵ Hence, govern-

¹⁸² See, e.g., *Doe v. Unocal* 963 F.Supp.880 (C.D. Cal. 1997) and Earthrights International, *supra* note 50; *Anguida v. Texaco* 945 F.Supp. 625 (2nd Cir. DC. 1996); *Sarei*, 221 F. Supp. at 1121.

¹⁸³ See Herz, *supra* note 171, at 561 n110.

¹⁸⁴ See SHRADER-FRECHETTE *supra* note 16, at 181-182 and accompanying text.

¹⁸⁵ *Id.*

ments and citizens in the developed countries can find a substantial interest in the recognition of the principle of prohibition of transboundary pollution.¹⁸⁶ This third section proves that the principle of prohibition of significant transboundary environmental harm constitutes customary international law and is enforceable in U.S. courts under the ATCA.

A. THE OBLIGATION NOT TO CAUSE SIGNIFICANT
TRANSBOUNDARY ENVIRONMENTAL DAMAGES REFLECTS A
GENERAL RULE OF CUSTOMARY INTERNATIONAL LAW

Bearing in mind the traditional definition of custom in international law,¹⁸⁷ this sub-section shows that consistent state practice exists regarding the principle of prohibition of transboundary pollution. This principle is well anchored in international law because it is premised on state sovereignty. The most authoritative international precedents deal with transboundary pollution and have been upheld by declarations of states in international conferences. Lastly, the increasingly recognized proactive mechanism of Environmental Impact Assessments (EIAs) shows that states have begun to act according to the duty to prohibit transboundary pollution.

1. *Defining the Principle of Prohibition of Transboundary
Pollution as a Conducive Element of State Sovereignty*

Arguably, there is not a general duty to protect the environment under international law.¹⁸⁸ While governments may be

¹⁸⁶ Transboundary pollution generally implies two types of problems, which are similar in the sense that they both involve harmful transnational effects. The first one involves the global commons, such as ocean pollution, ozone depletion, and global warming, so that activities carried out in a certain number of countries contribute to a common harm. The second one involves activities contained within one country's borders but affect another country's territory. See Neff, *supra* note 22, at 48.

¹⁸⁷ See the Statute of the International Court of Justice, art. 38(1)(b); Restatement (Third) § 102(2).

¹⁸⁸ Jean Wu, *International Law Pursuing International Environmental Tort Claims Under the ATCA: Beanal v. Freeport-McMoRan*, 28 Ecology L.Q. 487, 488-489 n7 (2001). (International environmental law instruments face various problems including the fact that: (1) they typically require legislative ratification before they are enforceable; (2) once ratified, they often lack effective enforcement mechanisms; (3) they usually prescribe only general principles rather than specific guidelines; (4) countries submit to their jurisdiction only voluntarily; and (5) there are often no incentives to comply with the goals of the declarations).

compelled to respect such a duty under national law, international law only recognizes nation-states' sovereign right to exploit their own natural resources pursuant to their own environmental policies.¹⁸⁹ This sacrosanct entitlement, however, is not absolute. A state's use of natural resources within its own territory is not restricted only to the extent that it does not interfere with the interests of other states enjoying the same right.¹⁹⁰ Hence, the principle of state sovereignty implies both the right of an independent exploitation of existing natural resources and the right to inviolability of the national territory.¹⁹¹ From this principle follows the notion that every nation-state has a correlative duty to refrain from causing transboundary harm to another state.¹⁹²

2. *International Precedents Dealing with Transboundary Pollution*

The earliest cases and treaties in international environmental law dealt with instances of transboundary pollution.¹⁹³ First, international decisions clearly establish this principle. The Trail Smelter arbitration between the U.S. and Canada is frequently cited for its role in laying down the basic principle of

¹⁸⁹ The most significant statement regarding permanent sovereignty over natural resources is recorded in the UN General Assembly Resolution 1803 (XVII) (G.A. Res. 1803, U.N. GAOR, 17th Sess., 1194th plen.mtg., Supp. No.17, at 15, U.N. Doc. A/5217 (1962), reprinted in 9 United Nations Resolutions: General Assembly 107-08 (Dusan J. Djonovich ed., 1974), quoted in Antony Anghie, "The Heart of My Home": Colonialism, Environmental Damage and the Nauru Case, 34 Harv. Int'l L.J. 445, 473 (1993). See, Stockholm Declaration principle 21, Rio Declaration principle 2, Convention on Biodiversity principle 3, African Charter on Human and Peoples' Rights article 21.4 and of the African Charter on Human and Peoples' Rights, UNCLOS article 193.

¹⁹⁰ Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 Env'tl. L. 1187, 1207-1210 (1996).

¹⁹¹ Stockholm Declaration principle 21, UN Conference on the Human Environment, Stockholm Declaration, June 16, 1972, UN Doc. A/CONF.48/14, princ.21, 11 ILM 1416 (1972). The nations of the world reaffirmed Principle 21 in only slightly modified form as Principle 2 of the 1992 Rio Declaration. See UN Conference on the Environment and Development, Rio Declaration on Environment and Development, June 14, 1992, UN Doc. A/CONF.151/5/Rev.1, princ.2, 31 ILM 874 (1992).

¹⁹² For a definition of "transboundary environmental harm", see Neff *supra* note 186.

¹⁹³ ANTHONY D'AMATO & KIRSTEN ENGEL, INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 93 (Anderson Publishing Company). Available at: <http://anthonydamato.law.northwestern.edu/ILC-2001/Books.htm> (last visited, March 21, 2004).

international liability for transnational pollution.¹⁹⁴ In the Corfu Channel Case, the International Court of Justice noted that the principle of sovereignty embodies the obligation on a state “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹⁹⁵ The Arbitral Tribunal in the Lac Lanoux Case reaffirmed that a state has an obligation, when exercising its rights, to consider the interests and respect the rights of another state.¹⁹⁶ Finally, the 1974 Nuclear Tests Case also provides relevant views on the issue.¹⁹⁷ Because France rejected the jurisdiction of the International Court of Justice, the case could not proceed to the merits.¹⁹⁸ Six judges, however, formulated separate or dissenting opinions, and tried to determine whether sovereignty should prevail over the obligation not to cause significant transboundary harm. In a frequently cited dissenting opinion, Judge de Castro recalled the Trail Smelter award, and held:

If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighboring properties of noxious fumes, the consequence must be drawn, by an obvious analogy, that the applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radioactive fall-out on its territory.¹⁹⁹

3. *Declarations of States in International Forums Confirmed Such Precedents*

Declarations of States in international forums also constitute evidence that the international community endorses the principle of not causing significant cross-border environmental harm. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, although regarded as soft law instruments,²⁰⁰ are nonetheless founded on well-settled state practice,

¹⁹⁴ The Trail Smelter Case, 1941 (U.S. v. Canada), 3 R. Int'l Arb. Awards 1905 (1938) at 1965.

¹⁹⁵ The Corfu Channel Case, UK v. Albania (1949) ICJ 4 at 22.

¹⁹⁶ Lac Lanoux Arbitration, Spain v. France, 12 R.I.A.A. 281, 314-317 (Nov. 16, 1957).

¹⁹⁷ The 1974 Nuclear Tests Cases, Australia v. France (1974) ICJ 253.

¹⁹⁸ *Id.* at 255 para.4 and 272.

¹⁹⁹ *Id.* at 388-389 (Diss. Op. de Castro).

²⁰⁰ Soft law instruments include declarations, codes of conduct, guidelines and other promulgations of the political organs of the United Nations system, operational

at least in the field of water pollution.²⁰¹ During the 1972 Stockholm Conference on the Human Environment, a proposal was made to delete the language in Principle 21, which specified that states had “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states.”²⁰² The proposal was rejected, and Principle 21 was adopted by a vote of 103 to zero, with twelve abstentions. By unanimously adopting Principle 21 and rejecting the proposed amendment, the states have explicitly recognized that preserving the environment is a legitimate limitation upon their own sovereignty.

4. *State Practice and Environmental Impact Assessments*

In addition to soft law instruments, considered “declaratory” but which nonetheless indicate political pronouncements, and to some degree represent official decisions of states, state practice further demonstrates that the obligation not to cause transboundary environmental damage is not a mere chimera. Evidence that in practice states have started to act according to the duty to prohibit transboundary pollution comes from the increasingly recognized active mechanism of Environmental Impact Assessments (hereinafter “EIA”).²⁰³ Under traditional approaches, an activity could proceed unless an adverse impact was established. Now, a tendency favors environmental pro-

directives of the multilateral development institutions, and resolutions and other statements by non-governmental organizations. Although they do not possess the strict characteristic of recognized enforceability as commonly understood for law, depending on the circumstances, they may possess significant normative weight. In another words, and as fittingly described by Professor Dupuy, soft law is either “not yet law or not only law”. See generally Pierre-Marie Dupuy, *Soft Law and International Law of the Environment*, 12 Mich. J. Int’l. L. 420, 421 (1991) in HUNTER *supra* note 1, at 349.

²⁰¹ See D’AMATO & ENGEL *supra* note 193, at 97. See also, The Helsinki Rules, art. 10 and Montreal Rules art. 3, adopted by the International Law Association at its Fifty-second and Sixtieth Conference. See also, the 1997 UN Convention on Non-navigable Uses of Transboundary Watercourses.

²⁰² Oscar Schachter, *The Emergence of International Environmental Law*, J. Int’l Affairs 457, 458 (1991) (concluding that the concerns of some governments, that emphasis on the environment would be used to limit their sovereignty, did not prevail), quoted in Perrez, *supra* note 190, at 1201 n38.

²⁰³ According to the United Nations Environmental Statistics Glossary, an Environment Impact Assessment is defined as: *an analytical process that systematically examines the possible environmental consequences of the implementation of projects, programmes and policies.* See, <http://unstats.un.org/unsd/ENVIRONMENTGL/default.asp> (last visited, March 21, 2004).

tection as a priority, and compensation when it has failed.²⁰⁴ EIAs have increasingly developed in domestic legal systems. The U.S. was the first country to institute EIAs, in the National Environmental Policy Act of 1969 (NEPA).²⁰⁵ Ten years later, in 1979, the Carter Administration extended NEPA's application outside U.S. borders and possibly to the Global Commons.²⁰⁶ Executive Order 12,114 requires federal agencies and departments to establish procedures "to facilitate environmental cooperation with foreign nations" when undertaking "major" actions with significant environmental effects outside of domestic borders.²⁰⁷ Likewise, the Restatement (Third) section 601 makes it mandatory to prevent injuries to the environment of another state, therefore reaffirming transboundary EIA mechanisms.²⁰⁸ EIAs are now part of the domestic environmental law of about a hundred developed and developing nations.²⁰⁹ In addition, recent developments in international environmental law support the practice as well.²¹⁰

²⁰⁴ See e.g., the ILC's decision of dividing its work on "International liability for injurious consequences arising out of acts not prohibited by international law" into two parts, one on prevention of transboundary harm and one on liability for transboundary harm, and to address prevention first. Experts believe this decision enabled the ILC to proceed much more rapidly, see John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 A.J.I.L. 291, 308 (2002).

²⁰⁵ 42 U.S.C. § 4332(2)(F) (1988) NEPA. NEPA was passed by Congress in 1969 and seeks to ensure that government decision-making takes account of the environmental consequences expected to result from government actions and approvals. Section 112 of NEPA mandates an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c).

²⁰⁶ *Environmental Defense Fund (EDF) v. Massey* 986 F.2d 528, 531-535 (D.C.Cir.1993).

²⁰⁷ Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (1979), reprinted in 42 U.S.C. § 4321 (1982).

²⁰⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 601.

²⁰⁹ Knox, *supra* note 204, at 297 n36, quoting ANNIE DONNELLY ET AL., A DIRECTORY OF IMPACT ASSESSMENT GUIDELINES (2d ed. 1998) (listing impact assessment guidelines from over ninety countries); BARRY SADLER, ENVIRONMENTAL ASSESSMENT IN A CHANGING WORLD: EVALUATING PRACTICE TO IMPROVE PERFORMANCE 25 (1996) (estimating that more than one hundred countries have national EIA systems); MARCEIL YEATER & LAL KURUKULASURIYA, ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATION IN DEVELOPING COUNTRIES 257, 259 in UNEP'S NEW WAY FORWARD: ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT (Sun Lin & Lal Kurukulasuriya eds., 1995) (estimating that about seventy developing countries have EIA legislation of some kind).

²¹⁰ See, Rio Declaration principle 17; UNCLOS art. 204-6; Convention on Biodiversity art. 14(1)(a); 1991 Madrid Protocol on Environmental Protection to the Antarctic Annex I;

Preparing an EIA, however, is not mandatory throughout the world, but only reveals a consistent pattern in states practice. It follows that a MNC does not violate the law of nations when it undertakes a massive logging project without preparing an EIA. In fact, what violates the law of nations is the significant transboundary harm. To prove that states feel bound by the duty to refrain from causing such transboundary harm, I will now show that the multiplication of liability and compensation regimes related to environmental damages indicates the states' acceptance of the rule as law.

B. RESPONSIBILITY AND LIABILITY FOR TRANSBOUNDARY ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL LAW, OR THE EVIDENCE OF A COLLECTIVE OPINIO JURIS

Once consistent state practice is established, the second element of custom, *opinio juris*, requires a showing that nation-states feel bound by the duty to refrain from causing transboundary pollution.²¹¹ This sub-section first addresses existing and emergent liability schemes for transboundary environmental damage, and then shows that the notion of environmental damage is clearly discernable, such that liability regimes related to environmental harm have gained in efficiency.

1. *General Trends in Liability for Environmental Damage under International Law*

The multiplication of liability regimes for transboundary damages and the possibility for victims to obtain redress indicate that states have begun to act in accordance with a rule by which the states believe they are bound. Currently, numerous global and regional agreements address the concepts of liability and compensation in relation to environmental damage.²¹² Most

the World Bank's Operational Directive (O.D) 4.01 (1991) on environmental assessment, and most prominently the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) held by the United Nations Economic Commission for Europe *reprinted in* 30 ILM 800 (1991).

²¹¹ For a definition of "opinio juris", see OPPENHEIM *supra* note 107.

²¹² Approximately twenty-seven multilateral environmental agreements (MEAs), two draft multilateral environmental agreements, twenty-six regional environmental agreements, and twenty-six national environmental laws, from all the continents and cases bordering on liability and compensation have been considered and reviewed. See *Paper on Liability and Compensation Regimes Related to Environmental Damage*,

of these conventions and protocols, however, were developed under the auspices of international organizations with specific missions, and thus are limited to particular areas and discrete issues.²¹³ In the meantime, the International Law Commission (ILC)²¹⁴ engaged in the Herculean task of drafting a framework convention on “international liability for injurious consequences arising out of acts not prohibited by international law,” which it finally completed in August 2001.²¹⁵

From these formidable law-making efforts, certain patterns of liability for environmental damages have emerged. First, a large majority of countries have opted for strict civil liability schemes as the preferred way to address international liability and compensation in the environmental context.²¹⁶ In international law, civil liability is usually opposed to state responsibility.²¹⁷ The former creates a relationship between the person liable and the person injured, whereas, the latter creates a relationship between the state perpetrator of the inter-

Review by UNEP Secretariat, www.unep.org/DEPI/LiabilityandCompensation.asp (last visited, March 21, 2004) (hereinafter “Paper on Liability and Compensation Regimes”).

²¹³ *E.g.*, the United Nations (UN), the United Nations Economic Commission for Europe (UNECE), the International Maritime Organization (IMO), the International Atomic Energy Agency (IAEA), and the Organization for the Economic Cooperation and Development (OECD); but this list is not exhaustive, *see generally*, Paper on Liability and Compensation Regimes, *supra* note 212, listing the various international organizations which have hosted major multilateral environmental conventions.

²¹⁴ The International Law Commission (ILC) is a United Nations body devoted to the progressive development of international law and its codification. It is composed of thirty-four experts representing the world’s principal legal systems. They are elected by the U.N. General Assembly to serve in their personal capacity rather than as representatives of governments, *available at* <http://www.un.org/law/ilc/index.htm>.

²¹⁵ Draft Articles on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (first part on the Prevention of Transboundary Harm from Hazardous Activities) is subject of a separate ILC study, the first phase of which was completed in 2001. *See*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* ILC 53d Report, UN GAOR, 56th Sess., Supp. No. 10, at 370-436, 366, quoted in Knox, *supra* note 204, at 308 n114.

²¹⁶ Francisco Orrego Vicuna, *Responsibility and Liability for Environmental Damage under International Law: Issues and Trends*, 10 *Geo. Int’l Env’tl. L. Rev.* 279, 286.

²¹⁷ *See generally* S.C McCaffrey, *The Work of the International Law Commission relating to Transboundary Environmental Harm*, 20 *N.Y.U. J. Int’l L. & Pol.* 715 (1988); Julio Barboza, *International Liability for the Injurious Consequences of Acts not Prohibited by International Law and Protection of the Environment*, 247 *Recueil Des Cours*, Académie de Droit International, 295-405 (1994), quoted in Vicuna, *supra* note 216, at 281 n10.

nationally wrongful act and the residents of the injured state.²¹⁸ Although some hybrid systems exist, states have been willing to shift the costs of prevention and reparation of environmental damage to those persons who are in the best position to prevent such harm and internalize the costs of pollution damage.²¹⁹ In this sense, the states endorse the well-known polluter-pays principle.²²⁰

Strict civil-liability regimes are premised on the prima-facie responsibility of the polluter, subject to available defenses.²²¹ Strict civil-liability regimes, as opposed to absolute and fault-based liabilities, ease the burden of proof for the plaintiff who does not need to establish a nexus between the activity and the damage caused.²²² Strict civil-liability operates on the basis of the objective fact of harm.²²³ Typically, under a strict civil-liability regime, a polluter will escape liability if pursuant to an act of God,²²⁴ war or hostilities,²²⁵ or the intentional or grossly negligent acts or omissions of a third party.²²⁶

Finally, while the exact definition of “environmental damage” has long been lacking, international organizations have developed a general working definition of the term.²²⁷ After an extensive review of international, regional, and state legisla-

²¹⁸ Lefeber, R. *Transboundary Environmental Interference and the Origin of State Liability*. Kluwer Law International, 15 (1996), quoted in Paper on Liability and Compensation Regimes, *supra* note 208, at 26.

²¹⁹ The extension of liability regimes for environmental damages to private operators will be studied in sub-section C (2), *infra*.

²²⁰ European Environmental Bureau. *Environmental Liability: Concerning the Need for a European Directive on Environmental Liability*. 1997. Chapter 1. www.eeb.org/archive/liabilityuk.htm (last visited, march 21, 2004). The polluter pays principle is premised on the idea that states should take all actions necessary to ensure that polluters bear the full environmental costs of their activities. The principle is thus designed to internalize environmental externalities. It integrates environmental protection and economic activities, by ensuring that the full environmental and social costs (costs associated with pollution, resource degradation, and environmental harm) are reflected in the ultimate market price for a good or a service, *see* HUNTER, *supra* note 1, at 412.

²²¹ Vicuna *supra* note 216, at 286.

²²² Fault-based liability implies the burden of proving that the perpetrator acted with intent or that he/she acted negligently or without due care. Absolute liability would allow no exception at all. *See Id.*

²²³ *Id.*

²²⁴ *See* Paper on Liability and Compensation Regimes, *supra* note 212, at 28.

²²⁵ *See Id.*

²²⁶ *See Id.*

²²⁷ *Id.*

tion and practice, a UNEP Working Group of Experts on Liability and Compensation for Environmental Damage defined “environmental damage” as “a change that has measurable adverse impact on the quality of a particular environment or any of its components, including its use and non-use values, and its ability to support and sustain an acceptable quality of life and viable ecological balance.”²²⁸

When suits are brought under the ATCA for violation of international environmental norms, the adverse effects of MNC’s activities could easily qualify for environmental damage, under the definition of the working group. Yet, every human activity has an impact on the environment. The key question is, at what degree will the impact constitute significant damage?

2. *What Kind of Environmental Damage?*

Although the threshold of damage remains a complex question, this paragraph overcomes such uncertainty. A plethora of environmental experts has made proposals to clarify the threshold applicable to environmental damage.²²⁹ Yet, no authoritative interpretation exists to define what amounts to “significant” damage. Since the concept of transboundary EIA typically contains this “significant-threshold” language, it is first relevant to look into EIA practices to see what triggers environmental impact assessments, and by analogy what significant damages are prohibited under the principle of avoiding significant transboundary environmental harm. Another powerful interpretative instrument is to inquire about environmental protection during wartime. Indeed, the existence of wartime environmental protections shows that international

²²⁸ *Id.* at 27, quoting *Liability and Compensation for Environmental Damage: Compilation of Documents*, United Nations Environment Programme. Nairobi, 1998.

²²⁹ See generally: EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 75 (Art. 10) (1987) ; International Law Association, Rules of International Law Applicable to Transboundary Pollution, Art. 3(1), in 60 ILA, CONFERENCE REPORT (1982). Also see Kamen Sachariew, *The Definition of Thresholds of Tolerance for Transboundary Environmental Injury Under International Law: Development and Present Status*, 37 NETH. INT’L L. REV. 193, 196 (1990) (concluding that since the Stockholm Conference, “significant” is the most common term “used to describe the threshold of tolerable transboundary environmental harm or interference”), quoted in Knox, *supra* note 204, at 293 n14.

law affords minimum safeguards in relation to environmental defense. Inquiring about what kind of environmental harm is prohibited during armed conflicts serves definitional purposes, and indicates the compulsory nature of minimal environmental protection.

i. The Significant Threshold and the EIA Procedure

The 1991 Espoo Convention is the unique hard-law body of international law that specifically addresses transboundary EIA.²³⁰ It is thus one of the most authoritative sources to look at in order to determine what constitutes a “significant” environmental damage. Annex I lists activities automatically subject to the EIA procedure. The list refers to the most known polluting activities.²³¹ Annex III further mandates the preparation of an EIA for “activities of environmental significance, which are not listed in Appendix I.” The Convention defines “activities of environmental significance” as activities likely to have significant adverse transboundary impacts by virtue of size, location, or effects.²³² In most ATCA cases where plaintiffs allege serious environmental damage, the activities carried out by MNCs, which caused such damages, directly fall within the scope of the Espoo Convention Annex I.²³³ Although paralleling the scope of the Espoo Convention with the environmental damages suffered by ATCA plaintiffs is purely indicative, the choice of the analogy has a double advantage. It first shows that a certain number of countries have sat together at the same table, including the U.S. as a signatory party, and have set up procedural obligations to prevent transboundary envi-

²³⁰ Convention on Environmental Impact in a Transboundary Context, Feb.25, 1991, 30 ILM 800 (1991), known as the Espoo Convention. The Espoo Convention requires its parties to assess the transboundary environmental effects of certain actions within their jurisdiction and to notify and consult with potentially affected states about those effects. For the full text of the convention see <http://www.unece.org/env/eia/> As of October 29, 2003, of forty-four countries eligible to join the Espoo Convention, forty had ratified it and the remaining four (including the U.S and Russia) had signed it.

²³¹ The Convention on Environmental Impact in a Transboundary Context, Feb.25, 1991, 30 ILM 800 (1991), Annex I.

²³² The Convention on Environmental Impact in a Transboundary Context, Feb.25, 1991, 30 ILM 800 (1991), Annex III.

²³³ See *Aguinda v. Texaco, Inc.* 945 F. Supp. 625; *Jota v. Texaco, Inc.* Dkt. No. 94 Civ. 9266 (S.D.N.Y. filed Dec. 28, 1994); *Beanal, et al. v. Freeport-McMoran, Inc., et al.*, 969 F. Supp. 362; *Sarei v. Rio Tinto*, 221 F.Supp.2d 1116; *Doe v. Unocal*, 248 F.3d 915.

ronmental damages, thus agreeing on their sovereign right to exploit their own natural resources, provided they do not harm areas beyond their jurisdiction. Second, the EIA mechanism requires assessing environmental impacts for a certain category of damages only, which is consistent with the fact that certain levels of pollution are tolerated as long as significant transboundary damage does not occur. The activities listed in Annex I of the Espoo Convention and the criteria used in Annex III to determine the significance of a project outside Annex I, are valuable in ascertaining what kind of significant transboundary environmental harm constitutes a violation of the law of nations.

ii. The Significant Threshold and Wartime Protection

Wartime environmental protection also provides a possible interpretation of what constitutes significant (transboundary) environmental harm. Indeed, wartime protections are usually considered the minimum safeguards that international law affords. Various human rights treaties contain wartime, national security, or public order necessity exceptions.²³⁴ Freedom of press, expression or association, for instance, may be restricted in exceptional circumstances. The 1977 Protocol Additional to the 1949 Geneva Convention, however, provides a minimum core of environmental protection, which countries are prohibited from disregarding at all times.²³⁵ This minimum core of environmental protection derives from international humanitarian law. Although environmental wartime protection is not directly aimed at the prohibition of significant transboundary harm, it nonetheless supports the premise that even during wartime, widespread environmental pollution, whether or not it crosses borders, is prohibited when it affects human life. Textually, the Additional Protocol bans means of warfare “that

²³⁴ See Herz, *supra* note 171, at 587 n.270, quoting JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 211 (1992).

²³⁵ The Geneva Conventions are part of the body of international humanitarian law that deals with how war is conducted. The law is laid out in a number of documents, the most important of which are four 1949 Geneva Conventions, two 1977 additions to them called protocols, and other treaties, such as the Hague Convention of 1907. The Geneva Conventions cover wounded, sick and shipwrecked soldiers and sailors, prisoners of war, and civilians, *see generally*, the Red Cross website, available at www.redcross.org (last visited, March 21, 2004).

may be expected to cause widespread, long term and severe damage to the natural environment and thereby to prejudice the health or survival of the population.²³⁶ The “widespread, long term and severe” language is further echoed in Article 1 of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (hereinafter “ENMOD”).²³⁷ Accordingly, two international conventions, one that the U.S. has signed and the other that it has ratified, use the same “widespread, long term and severe” language. They both stipulate that environmental degradation during wartime is to a certain extent permitted, as long as the consequences for the human environment are not widespread, long-lasting and severe. These three qualifying adjectives are now conferred to the word “significant.” According to the report of the Conference of the Committee on Disarmament aimed at clarifying the ENMOD Convention's language, the word “long-lasting” was defined as approximately one season, and “severe damage” was defined as harm to human health or a significant disruption to natural or economic resources.²³⁸ The U.S. Army War College's Center for Strategic Leadership, also issued an interpretative declaration. It stated that the word “widespread” referred to several hundred square kilometers, “long-term” to decades, and “severe” as prejudicing the health or survival of the population.²³⁹ Although the UN Committee on Disarmament did not specify what it meant by “widespread” environment damage, as far as the last two adjectives are concerned, the U.S. Army's interpretation clearly appears narrower.

²³⁶ Protocol Additional (I) to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 55(1). The Protocol received one hundred and sixty one ratifications and five signatures (without ratifications).

²³⁷ The U.S. ratified the ENMOD Convention on January 17, 1980. The U.S. has ratified the four Geneva Conventions relative to the Protection of Civilian Persons in Time of War of August 12, 1949 on 02.08.1955. The U.S. has only signed the 1977 Protocol Additional to the Geneva Conventions, (12.12.1977). Available at <http://www.icrc.org/ihl> (last visited, March 21, 2004).

²³⁸ *Understandings Relating to Article 1: Report of the Conference of the Committee on Disarmament*, U.N. GAOR, 31st Sess., Supp. No. 27, vol. I, at 91, U.N. Doc A/31/27 (1976).

²³⁹ Earthrights International's amicus brief for *Beanal* (quoting the International & Operational Law Dep't., U.S. Army, *Operational Law Handbook* chapt.5-8 (1995)), (hereinafter “US Army”), available at www.earthrights.org/beanal/amicus.shtml (last visited, March 21, 2004).

Regardless of which interpretation the courts follow, in every ATC case based on environmental claims, the damages suffered satisfy the stricter construction. Indeed, the victims of environmental abuses are often indigenous populations whose lives and cultures are extremely dependent on the surrounding environment. Massive pollution directly jeopardizes their survival. In the case of Beanal or Sarei, the mine tailings resulted in several mountains being hollowed, rivers being diverted and generally the topography of the area being altered.²⁴⁰ These environmental harms not only satisfy the “decades” narrow interpretation of the U.S. Army, but also represent irreparable and uncompensable damages. Both cases involve widespread pollution. The Sarei decision shows the potential effect of discharging toxic chemicals into rivers. The dumping, in itself, can be done at a given place, but the environmental damages can still be suffered hundred of kilometers away. This is why Sarei’s claim was successful. The pollution resulting from Rio Tinto’s activities reached Empress Augusta Bay and even the Pacific Ocean.²⁴¹

Therefore, by looking at transboundary EIAs and environmental protection during wartime, it can now be affirmed that the prohibition of significant cross-border environmental damages is customary international law. In Beanal, the environmental claims were based on the Polluter Pays Principle, the Precautionary Principle and the Proximity Principle.²⁴² The district court rejected the three claims. The court nonetheless stated that had the environmental damages been “transboundary,” it might not have reached the same decision.²⁴³ The Second Circuit in *Jota v. Texaco* also heard a claim based on cross-border environmental harm from Texaco’s oil extraction activities in Ecuador and the subsequent pollution caused in the Peruvian Amazon.²⁴⁴ Plaintiffs had a strong claim that Texaco failed to take measures, to the extent practicable, to prevent significant injury to the environment of another state because Texaco released toxins directly into rivers that flow to Peru

²⁴⁰ See, *Beanal* 197 F.3d at 167; *Sarei* 221 F.Supp. at 1122.

²⁴¹ See *Sarei* 221 F.Supp. at 1162.

²⁴² *Beanal*, 197 F.3d at 166.

²⁴³ *Id.* at 167.

²⁴⁴ *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998), *cert. denied*, *Aguinda v. Texaco Inc.*, 303 F.3d 470 (2d Cir. 2002).

rather than following prevailing industry practice of pumping wastes back into emptied wells. Regrettably, the court did not reach the merits, and dismissed the case on forum non-conveniens.²⁴⁵

C. VICTIMS OF TRANSBOUNDARY ENVIRONMENTAL HARM
HAVE A CAUSE OF ACTION AND DO NOT NEED TO SHOW
STATE ACTION

This section responds to two of the hurdles expressed earlier in this Comment. In the context of liability for transboundary environmental harm, this section shows that cross-border environmental victims have a cause of action. It also argues that these victims do not need to show state action for MNCs liability to attach because the customary nature of the principle of prohibition of transboundary pollution specifically provides for direct civil liability to non-state actors.

1. *The Obligation to Prohibit Significant Transboundary Environmental Damage Provides a Cause of Action*

Under U.S. law, a cause of action must first recognize legal rights that a litigant claims have been invaded, which furnishes a basis for a litigant's claim for judicial relief.²⁴⁶ A cause of action may also indicate that the plaintiff is a member of the class of litigants who may, as a matter of law, appropriately invoke the power of the court.²⁴⁷ Focusing on the first definition, we will see that the customary obligation to prohibit cross-border environmental harm provides a direct cause of action under the first definition.²⁴⁸

A cause of action, under the first definition, arises when the plaintiff has a federal right, the violation of which furnishes a basis for judicial relief.²⁴⁹ The relevant question is whether international law, as accepted by the United States,

²⁴⁵ *Aguinda*, 303 F.3d at 477-480.

²⁴⁶ *Davis v. Passman*, 442 U.S. 228, 237 (1979).

²⁴⁷ *Id.* at 239.

²⁴⁸ Although these two definitions can have distinct applications, it is generally believed that they are both related. See Anthony d'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of The Law of Nations Is Seriously Mistaken*, 79 A.J.I.L. 92, 95 (1985).

²⁴⁹ *Passman*, 442 U.S. at 237 (quoted in *Id.*).

recognizes the right of the plaintiff to be free from environmental injuries caused by pollution, which originated in another state? Put differently, does international law recognize a legal right of individuals to obtain redress for transboundary environmental damage? As developed earlier in Part IV, section B of this Comment, civil liability regimes under international law tends to facilitate direct access of the individual to effective remedies.²⁵⁰ Such regimes create a relationship between the person liable and the person injured. They provide for equal access to domestic courts and remedies by national and foreign entities on a non-discriminatory basis.²⁵¹ In addition, private international law solutions have systematically emerged.²⁵² They are aimed at building cooperation between courts and adopting uniform principles related to questions of jurisdiction and applicable law. Therefore, international law recognizes the legal right of individuals to obtain redress for transboundary environmental damage. U.S law also supports this practice. The Restatement (Third) section 602 provides

²⁵⁰ Regarding the U.S. position on the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, encompassing broader concepts than the customary principle of prohibition of significant transboundary environmental harm, Eric Rosand, legal adviser at the U.S. Mission to the United Nations, made the following statement, "Although work can and should proceed in these regional and sectoral contexts, we do not perceive a desire among States to develop a global liability regime. Further efforts that take into account and support such regional and sectoral efforts, however, are welcome." Eric Rosand, Statement on the Report of the International Law Commission, U.S. UN Press Release # 173 (02) (Nov. 1, 2002) available at www.un.int/usa/02_173.htm (last visited March, 21, 2004).

²⁵¹ See, e.g., OECD, Recommendation of the Council for the Implementation of a Regime of Equal Right of Access and Non-discrimination in Relation to Transboundary Pollution, May 17, 1977, 16 I.L.M. 977 (1977), available at <http://www.fao.org/DOCREP/005/W9549E/w9549e06.htm#bm06> (last visited, Jan. 15, 2004) The Organization for Economic Cooperation and Development (OECD) groups 30 member countries (including the United States) sharing a commitment to democratic government and the market economy. The OECD plays a prominent role in fostering good governance in the public service and in corporate activity. It helps governments to ensure the responsiveness of key economic areas with sectoral monitoring. The OECD produces internationally agreed instruments, decisions and recommendations to promote rules of the game in areas where multilateral agreement is necessary for individual countries to make progress in a globalized economy, see www.oecd.org (last visited, March 21, 2004).

²⁵² See, e.g., The 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1990 O.J. (C. 189) 1; the 1988 Lugano Convention on the same matter, 1988 O.J. (L 319) 9, and the current work of the Hague Conference on Private International Law, Conclusions of the Working Group Meeting on Enforcement of Judgments, Nov. 19, 1992, quoted in Vicuna, *supra* note 216, at 306.

that “a state responsible for [transboundary] pollution can fulfill its obligation to inhabitants of other states who suffered injuries by giving them access to its tribunals for adjudication of their claims.”²⁵³ It follows that the U.S. recognizes in cross-border environmental victims a federal right enforceable in U.S. courts, based on the customary prohibition of transboundary pollution. Without examining plaintiffs’ rights of action under the second definition, we can simply affirm that transboundary environmental plaintiffs have a cause of action for the purpose of ATCA.

2. *Victims of Transboundary Pollution Do Not Need to Show State Action*

The exemption from the burden of proving state action is a simple consequence of plaintiffs’ direct cause of action. The increasing emergence of civil liability regimes under domestic law and the governing rules of international law as expressed in a number of special conventions, aimed at providing remedies to transboundary environmental victims, have also contributed to the enlarged application of liability in respect of private and other operators.²⁵⁴ Under the existing responsibility and liability regimes, states have been willing to shift the cost of compensating harm caused by risk-creating activities to the actual operator who benefited from the activity.²⁵⁵ This general trend is illustrated by various liability regimes for specific activities.²⁵⁶ In practice, a process of combined civil liability and traditional state responsibility has begun. The operators are normally assigned primary liability (strict liability), while states have a residual or secondary liability (for instance by way of contribution to international funds).²⁵⁷ Furthermore,

²⁵³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 602 cmt.b.

²⁵⁴ Orrego Vicuna, *supra* note 216, at 287.

²⁵⁵ *Id.* (quoting the International Law Commission, Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law, UN Doc. A/CN. 4/471, June 23, 1995).

²⁵⁶ See generally, Thomas Gehring and Markus Jachtenfuchs, *Liability for Transboundary Environmental Damage: Towards a General Liability Regime*, 4 EJIL (1993) 92-106, at 97 etc...

²⁵⁷ See, e.g., liability regimes for oil pollution damage, the nuclear ship convention. See generally: Orrego Vicuna, *supra* note 216, at 287. See also Gehring and Jachtenfuchs *supra* note 256.

if the Restatement (Third) section 602 creates a cause of action for private plaintiffs, it conversely permits a private polluter to endure liability without a showing of state action. Ultimately, the exemption from showing state action is based on the most basic precepts of all legal systems: that “legal actors should be responsible for the harm they do to others.” The only time the provisions of the Restatement (Third) section 602 were argued before a court was in the Jota case, in an amicus brief presented on behalf of the Ashanga plaintiffs.²⁵⁸ Unfortunately, the Second Circuit did not reach the issue and dismissed the case on forum non-conveniens.²⁵⁹ Therefore, a promising open door remains for future plaintiffs alleging cross-border environmental harm.

D. THE “SILENT VICTORY” OF *SAREI V. RIO TINTO*: A NINTH CIRCUIT DISTRICT COURT JUDGE IMPLIEDLY ENDORSES THE OBLIGATION NOT TO CAUSE SIGNIFICANT TRANSBOUNDARY ENVIRONMENTAL HARM

Sarei v. Rio Tinto, represents the first case in the history of the ATCA whereby a court recognized that massive environmental pollution could be a violation of the law of nations.²⁶⁰ This section analyzes the Ninth Circuit’s decision as a proxy for claims based on the obligation not to cause transboundary environmental harm. Although a timid step forward, the *Sarei* decision shows that the viability of certain environmental claims under the ATCA is no longer mere fantasy.

In *Sarei v. Rio Tinto*, the plaintiffs from the Bougainville island of Papua New-Guinea contended that Rio Tinto’s operation of the Panguna mine destroyed the land, polluted the environment, and as a result, impaired the mental and physical health of the islanders.²⁶¹ During the years of the mine’s opera-

²⁵⁸ Amicus Brief presented by EarthRights International, available at <http://www.earthrights.org/texaco/amicus.shtml> (last visited March 21, 2004).

²⁵⁹ *Aguinda*, 303 F.3d 470.

²⁶⁰ *Sarei*, 221 F. Supp. 2d at 1162.

²⁶¹ “By 1972, construction was complete, and operations at the Panguna Mine commenced. The mine pit was approximately one-half kilometer deep and seven kilometers wide. Each day, approximately 300,000 tons of ore and waste rock were blasted, excavated, and removed from the pit.” *Id.* at 1122. “Mining operations in Bougainville polluted not only the island’s waterways, but also its atmosphere. Dust clouds from the mining operations combined with emissions from the copper concentrator, created a poisonous mix, which polluted the air. As a result of this air pollution, the number of

tions, billions of tons of toxic mine waste were generated and dumped onto the land and into pristine waters, filling major rivers with tailings, polluting Empress Augusta Bay dozens of miles away, and the Pacific Ocean as well.²⁶² Plaintiffs alleged that, by so acting, Rio Tinto violated two articles of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The relevant provisions of UNCLOS are: (1) that “states take “all measures... that are necessary to prevent, reduce and control pollution of the marine environment’ that involves “hazards to human health, living resources and marine life through the introduction of substances into the marine environment;” and (2) that states “adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources.”²⁶³ Plaintiffs allege that billions of tons of toxic wastes generated as tailings by Rio Tinto were dumped into the Jaba River.²⁶⁴ The plaintiffs also contend that one half of the tailings have remained in the valley, while finer portions have been carried into the Empress Augusta Bay.²⁶⁵ Finally, the plaintiffs assert that by the mid-1980s, some 8000 hectares of Empress Augusta Bay were covered with tailings to a copper concentration greater than 500 parts per million. Not surprisingly, fish did not take long before dying or disappearing, and with them the major source of food of the Bougainville people.²⁶⁶ Had this case proceeded to the merits, the Bougainville people’s success in their action would have presented scientific evidence showing that the presence of residues of toxic wastes in the Pacific Ocean actually came from Rio Tinto’s mine. As the defendants rightly argued, UNCLOS applies to “high seas” or the global commons.

The District Court first inquired about the customary status of UNCLOS.²⁶⁷ Given that unlike Papua New-Guinea,

Bougainvilleans suffering from respiratory infections and asthma purportedly increased. Additionally, pollution from the mine changed the land’s climate, damaged its crops, caused fish to develop ulcerations and die, and forced many animals out of their habitats. The diminished food supply that resulted purportedly caused many Bougainvilleans to suffer health problems.” *Id.* at 1124.

²⁶² *Sarei* 221 F. Supp. 2d at 1161.

²⁶³ UNCLOS art. 194 (2); UNCLOS art. 207.

²⁶⁴ *Sarei* 221 F. Supp. 2d at 1162.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Sarei* 221 F. Supp. 2d at 1161.

the U.S is not a party to UNCLOS,²⁶⁸ the court examined whether or not UNCLOS represented customary international law. In a rather succinct way, the court justified the customary character of the Convention on four grounds.²⁶⁹ First, the Convention has been ratified by a large number of countries (166 nations). Second, the U.S. president signed the Convention (although it was not ratified by the Senate). Third, the court cited a 1992 Supreme Court case stating, “The U.S has not ratified UNCLOS, but it has recognized that its baseline provisions reflect customary international law”.²⁷⁰ Finally, the court quoted a Puerto Rico district court decision, which stated, “[t]here is a consensus among commentators that the provisions of UNCLOS III reflect customary international law, and are thus binding on all other nations, signatory and non-signatory.”²⁷¹

A closer look at the facts of the case clearly shows that the significant impact of the land-based pollution beyond twelve nautical miles from the Bay and into the Pacific Ocean accounts for a great part in the District Court’s decision. This holding is very important for future ATCA cases challenging MNCs’ behavior regarding their environmental practices abroad. The idea that the impacts of certain activities on a local environment can be carried thousands of miles away is relatively new. As we learn more about global circulatory systems-atmospheric, river or ocean- we begin to understand the implications of transboundary pollution. In almost every instance where the ATCA could apply, MNCs’ operations damage the human environment of a given region so substantially that the pollution resulting from such operations is very likely to cross borders, account for degradation of the atmosphere or, by way of river flows, reach the open sea.

Regrettably, the court made no reference to the “specific, definable and obligatory” standards, nor to what kind of “base-

²⁶⁸ For the current status of the Convention (ratifications, accessions, successions, signatures) see, http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last visited, March 21, 2004).

²⁶⁹ *Sarei* 221 F. Supp. 2d at 1161.

²⁷⁰ *United States v. State of Alaska*, 503 U.S. 569, 588 (1992), quoted in *Sarei* 221 F. Supp. 2d at 1161.

²⁷¹ *United States v. Royal Caribbean Cruises*, 24 F. Supp. 2d 155, 159 (D.P.R. 1997) quoted in *Sarei* 221 F. Supp. 2d at 1161.

line provisions” the U.S. recognizes as “customary law.” The court simply affirmed that UNCLOS “appears to represent the law of nations.”²⁷² This elliptic construction supports the idea that the “specific, definable and obligatory” standards are not the most relevant criteria, so that state practice and *opinio juris* constitute the most adequate tests to qualify for customary international law.

Had this case proceeded to the merits, the Bougainville people’s success in their action would have presented scientific evidence showing that toxic wastes in the Pacific Ocean actually came from Rio Tinto’s mine. As the defendants rightly argued, UNCLOS applies to “high seas,” which means twelve nautical miles off the coast.²⁷³ Although, the environmental claim was ultimately barred by the act-of-state doctrine, Judge Morrow’s ruling represents a great victory for the victims of such violations and for those who have long written and advocated this advancement in international environmental law.

V. CONCLUSION

The ATCA is certainly one of the richest and most complex pieces of legislation on the books. It combines areas of law as diverse as civil procedure, tort law, constitutional law, international law, human rights and environment law while mixing with critical issues such as infringement upon the separation of powers doctrine. Lawyers with imagination and courageous judges have found in the ATCA the most valuable way to pursue justice, in areas of law where the political will is still lacking and where the thirst for fat profits continues to control elected people.

This Comment undertook a thorough analysis of environmental and human rights claims under the ATCA. Although the main analytical part of this Comment focused on the prohibition of significant cross-border environmental harm, one should nonetheless note that on the environmental human rights side, many advances are underway. The right to a minimally adequate environment is one of them. It recognizes that every human being has the right to live in an environment

²⁷² *Sarei* Supp. 2d at 1161.

²⁷³ UNCLOS art. 3.

of decent quality. Governments do not confer this right; Nature does.

U.S. courts are not yet inclined to recognize to a third generation of human rights.²⁷⁴ In that sense, a parallel can be drawn with U.S. Civil Rights law. Indeed, courts are still reluctant to grant relief to victims of environmental racism. As such, enforcing the well-accepted principle of prohibition of significant transboundary harm is the first step to take before the final victory. As demonstrated throughout this Comment, the way remains sowed with obstacles. Using the ATCA to hold corporations accountable for their actions overseas is not easy. The act is used sparingly because it is fraught with restrictions on who, how, where, and why the law can be used. The evidence is hard to gather and gaining jurisdiction is difficult. That is why it is rare that a case actually makes it to trial or, much less, is won. None of these barriers, however, is insurmountable.

Although numerous cases alleging corporate complicity in environmental and human rights abuses have been dismissed on procedural matters, the statute is nonetheless acting for corporations as the Sword of Damocles. MNCs must ensure that their projects do not perpetuate the most egregious environmental human rights violations. That, in turn, could help improve the U.S. relationship with communities around the world, to the long-term political and economic benefit of the U.S.

²⁷⁴ Generally, civil and political rights are considered first generation of human rights, economic, social and cultural rights, second generation and the right to development and the right to a healthy environment would be part of the third generation of human rights. See generally, Jennifer A. Downs, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 Duke J. Comp. & Int'l L. 351 (1993).