

ENFORCING CORPORATE ENVIRONMENTAL RESPONSIBILITY:
SEEKING RELIEF FOR ENVIRONMENTAL DAMAGE UNDER THE
ALIEN TORT STATUTE

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EXECUTIVE SUMMARY

Despite the rise in multinational corporations, foreign direct investment, and the consequent potential of corporate actors to have profound human and ecological impacts, few international or domestic legal mechanisms exist to hold multinational corporations accountable for environmental degradation or associated impacts on human health and safety. The past few decades have seen an increasing number of private sector efforts to hold American-based corporations accountable for their behavior outside of the United States. However, these have encountered a number of obstacles. When corporate actors operate beyond the boundaries of U.S. laws, the mechanisms for providing compensation for victims of corporate environmental abuses are few and often mired with judicial, political, and economic difficulties.

U.S. Code Title 28 § 1350, the Alien Tort Statute, enacted under the Judiciary Act of 1789, provides the federal courts with jurisdiction over tort claims¹ that allege a violation of the law of nations brought by foreign nationals against Americans or citizens of other nations residing in the U.S. While used rarely since its enactment, the Alien Tort Statute has become an important vehicle since 1980 for the adjudication of human rights claims alleging that U.S. laws should apply extra-territorially to address the behavior of U.S. citizens and corporations in other countries. Recently, the ATS has been used more and more to bring suits against corporations, occasionally for claims of environmental damage. The ATS theoretically constitutes one of the few ways for victims of international environmental and human rights abuses to bring extra-territorial claims against US corporations. Due to the nation-centered framework of international law, the considerable power and influence of MNCs, and the occasional lack of an effective and fair judicial system in the country in which the abuse occurs, the ATS provides a much-needed avenue for private individuals to attempt to enforce corporate responsibility.

This thesis examines the extent to which corporations can be held accountable for environmental harms occurring in foreign nations and seeks to show that international law as it stands does not adequately support environmental rights and responsibility. Recent ATS cases have revealed that environmental damage, without transboundary implications, is not yet considered a violation of customary international law. Specifically, in the case of *Sarei v. Rio Tinto, PLC*, the court explains that claims of environmental damage are not cognizable under the ATS and therefore do not constitute legitimate claims. However, claims of human rights violations appear to have greater potential for using the ATS to establish jurisdiction in U.S. federal courts. Thus, structuring claims of environmental damage through the framework of human rights may prove more promising. I conclude that environmental degradation should be considered within the scope of the ATS and that of customary international law, as it has the potential to drastically endanger human security and affect the right of communities to pursue their chosen ways of life.

¹ “A tort is a civil (as opposed to a criminal) wrong, other than a breach of contract, that causes injury for which the victim may sue to recover damages.” Torts may result from negligent or intentional acts. Henry Cohen and Vanessa K. Burrows, “Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes.” *Congressional Research Service* (2008): 1.

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INTRODUCTION

The power and reach of multinational corporations has intensified to an unprecedented extent in recent years and with it, concern over the need to regulate these actors. In the past few decades, the degree of foreign investment has substantially increased and in 2001, fifty-one of the one hundred largest economies were not nations but private corporations.² While environmental regulation in the United States, though far from faultless, has come to occupy an important and critical position in national and local spheres, the level of environmental governance in other countries can be considerably different. Of concern is the extent of regulation on environmentally damaging activities in developing nations where corporate entities are at times allowed substantial freedom in pursuing their respective commercial interests. In recognizing the significant impact that corporations can have on the environmental wellbeing of a nation, and the often severe consequences of their activities, we are led to question the extent to which there exist mechanisms to enforce corporate environmental responsibility for actions occurring in foreign nations with limited environmental regulation.

Environmental devastation by multinational corporations can have severe and lasting effects for communities living within or around affected areas. The nature of ecosystems is such that an environment occasionally requires years, even decades, to recover from serious contamination or drastic changes in the landscape. While some cases of environmental damage by MNCs in developing nations become widely known to the developed world, as

² John H. Dunning and Sarianna M. Lundan, *Multinational Enterprises and the Global Economy*. 2nd ed. Cheltenham, UK: Edward Elger Publishing Limited, 2008: 17; Oddny Wiggen and Lene Bomann-Larsen, "Addressing side-effect harm in the business context: Conceptual and practical challenges." in *Responsibility in World Business: Managing Harmful Side-effects of Corporate Activity*. United Nations University Press, 2004: 3.

with Union Carbide in Bhopal, India, the gravity of these situations should bring about a consideration of how many less severe, but still significant, instances of corporate environmental abuse remain unnoticed and unpublicized.

Examples of corporate misconduct can be found around the world and the frequency and severity with which they occur establish the value and necessity of revealing avenues to hold corporations accountable for the negative impacts of their activities.

ENVIRONMENTAL DEGRADATION:

NIGERIA, PAPUA NEW GUINEA, AND VIETNAM

In Nigeria, the once rich ecosystem of the Niger Delta has been devastated by the exploration and production of its substantial petroleum reserves. Polluted water, damage to wildlife, oil spills, the constant presence of gas flares, and fundamental changes to the landscape from the construction of pipelines, oil refineries and canals represent a few of the environmental impacts caused by large oil companies like Royal Dutch Shell. And, moreover, these do not represent the human side to the devastation: numerous adverse physical health effects and disruptions to major sources of subsistence and ways of life.³ Shell has produced over \$30 billion of oil from Ogoniland, one of the most oil-rich regions of the Niger Delta.⁴ Although the vast oil reserves of Nigeria have benefited Shell, consumers, and the Nigerian government, for the Ogoni people and other communities of the Niger Delta, oil extraction and production has scarred and devastated the environment upon which many depend. The violence and conflict that have characterized areas of the Niger Delta, resulting largely from the ecologically and socially damaging effects of the crude

³ Joshua P. Eaton, "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Rights to a Healthy Environment." *Boston University International Law Journal* 15 (1997): 264-269.

⁴ Eaton, 265.

oil industry, also implicate corporate actors and illustrate the critical need for corporate accountability.⁵

In Bougainville, off of the main island of Papua New Guinea, the mining company, Rio Tinto, has been entangled in conflict with residents since it sought to begin its mining operations. In the vein of Shell in Nigeria, Rio Tinto has been connected to political and social violence as well as being directly responsible for severe environmental degradation. The environmental impacts include destruction of the rainforest, water pollution from mining waste, wildlife impacts, and damage to cropland. And yet, the environmental devastation, though severe, is not the extent of the Rio Tinto's impact on Bougainville. Following years of protests over the social and environmental injustices by residents of Bougainville, the government of Papua New Guinea, at the request of Rio Tinto, sent the military to suppress the demonstrations. 15,000 residents of Bougainville died during the civil war that ensued.⁶

In Vietnam, the circumstances of this case of corporate involvement contrasts markedly with more typical cases of environmental degradation. During the Vietnam War, chemical companies like Dow Chemical produced a series of powerful, toxic herbicides, the most infamous being Agent Orange. These herbicides, supplied by American chemical companies, were sprayed by the U.S. military over areas of Vietnam as a means of deforestation.⁷ It is estimated that for Agent Orange alone, around 45,677,937 liters were

⁵ Okechukwu Ibeanu, "Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria." *Environmental Change & Security Project Report* 6 (2000): 19.

⁶ Borchien Lai, "The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?" *Northwestern Journal of International Law and Business* 26 (2005): 148-149.

⁷ Jeanne Mager Stellman, et al. "The extent and patterns of usage of Agent Orange and other herbicides in Vietnam." *Nature* 422 (2003): 681-687.

sprayed over Vietnam between 1965 and 1970.⁸ Aside from the ecological impact of severe deforestation, Agent Orange contained the highly toxic chemical, dioxin, which had lasting health impacts on both U.S. soldiers and Vietnamese exposed to Agent Orange, as well as on their children and grandchildren. The U.S Department of Veterans Affairs currently recognizes, among others, chloracne, Hodgkin's disease, prostate cancer, and respiratory cancers as connected to Agent Orange exposure, although there continues to be debate over the inclusion of other conditions.⁹ A recent study in 2001, finding increased levels of dioxin in blood samples from a group of Vietnamese, reveals that the impact of Agent Orange is even now continuing.¹⁰

This issue is complicated by questions of corporate liability in times of war. As the government ordered and controlled the production of the chemical herbicide, the manufacturers have claimed, successfully, that they are not liable as they acted based on specific government instructions deemed necessary during wartime.¹¹

INTERNATIONAL RECOGNITION OF ENVIRONMENTAL RIGHTS?

Understanding the importance of environmentally responsible corporate activities necessarily involves recognizing the environment's importance for human livelihood and security. Recent trends in the global community demonstrate movements toward an increasingly established appreciation for the vital role that the environment plays in human security and development. The *Rio Declaration*, a product of the United Nations Conference

⁸ Stellman, 682.

⁹ Alvin L. Young, "Vietnam and Agent Orange Revisited." *Environmental Science and Pollution Research* 9.3 (2002): 159.

¹⁰ Arnold Schecter, et al. "Recent Dioxin Contamination From Agent Orange in Residents of a Southern Vietnam City." *Journal of Occupational and Environmental Management* 43.5 (2001): 435. See also L. Wayne Dwernychuk, et al. "Dioxin reservoirs in southern Viet Nam—A legacy of Agent Orange." *Chemosphere* 47.2 (2002): 117-137.

¹¹ William J. Blechman, "Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?" *University of Miami Law Review* 36 (1982): 491-493.

on Environment and Development, is one example of this and in Principle Four states, “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”¹² According to the final report of the UN Commission on Human Security, human security is “to protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment... It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.”¹³ The environment is increasingly recognized as inherently linked to current and future human needs and while declarations of this kind are nonbinding agreements, legally requiring no action, the development of resolutions can indicate the acknowledgement of internationally and nationally shared values.

Although an appreciation of the fundamental importance of the environment can be found in international resolutions and policies, even within the Rio Declaration the tension between environmental and economic motivations is evident. Principle 2 maintains that, “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and development policies...”¹⁴ The sovereign right to use resources according to economic and development needs is proclaimed even as environmental sustainability and responsibility are endorsed. This assertion reflects one of the most critical features of a discussion of corporate responsibility and liability in foreign nations, namely balancing

¹² United Nations Conference on Environment and Development, “Rio Declaration on Environment and Development.” June 1993. (last accessed March 24, 2010 <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>)

¹³ United Nations Trust Fund for Human Security, Commission on Human Security, *Human Security Now*. New York, May 2003. (last accessed March 24, 2010 <http://www.humansecurity-chs.org/finalreport/English/FinalReport.pdf>)

¹⁴ UN, “Rio Declaration.”

frequently disparate views regarding the need to enforce environmental regulation and the right of sovereign nations to pursue their own agenda, even when it involves attracting foreign investment at the cost of environmental degradation.

Moreover, international resolutions certainly do not imply that environmental standards are enforced, only that their value is recognized. Indeed, a common phenomenon of international law is that global agreement on the condemnation of certain actions may be achieved even while these same actions continue to occur. Regulation is thus a necessary step in promoting environmental norms, as is gaining an understanding of the current state of regulation. Principle 13 of the Rio Declaration reinforces this in asserting:

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction...¹⁵

The statement above not only supports the need for regulatory mechanisms, but also raises another important aspect of regulation: providing compensation for victims of environmental abuse. This speaks directly to the heart of this analysis, that is to say, examining the extent to which liability and compensation currently exist for environmental damage and the degree to which these mechanisms have been successful in promoting environmental responsibility. As the Rio Declaration indicates, liability and compensation for environmental harms are recognized and, at least at present, necessary components of environmental regulatory frameworks.

Despite assertions of the importance of environmental security, environmentally damaging corporate activities nevertheless continue to occur, particularly in instances where

¹⁵ UN Rio Declaration.

those affected have little political or economic power to balance the influence of large multinational corporations (MNCs).¹⁶ Legal battles that have resulted from cases involving ecological and health impacts, as demonstrated through the examples of Nigeria, Papua New Guinea, and Vietnam, are indicative of the need and desire to impose corporate responsibility.

CORPORATE RESPONSIBILITY INITIATIVES

It is important, however, to avoid perpetuating caricatures of MNCs and their involvement with environmental abuses, in order to attempt to gain a more inclusive understanding of corporate activities. To that end, recognizing the extent to which corporate-led, and NGO-led soft law mechanisms have emerged in the past few decades helps to widen the lens through which we examine international environmental regulation. Corporate citizenship initiatives have become increasingly more common in the past few decades and include a variety of soft law mechanisms to promote sustainable and socially responsibly business practices.

A number of factors work together to induce and motivate corporations to observe corporate citizenship programs. Response to public pressure and consumer preference for environmentally and socially sustainable services and products is an important motivator for corporate citizenship, one that can foster customer loyalty and help a company remain competitive in global markets.¹⁷ Rondinelli et al. also identifies lower costs, less risks, and

¹⁶ For the purposes of this paper, a multinational corporation or enterprise (also called a transnational corporation) is defined as, “an enterprise that engages in foreign direct investment (FDI) and owns, or, in some way, controls value-added activities in more than one country.” John H. Dunning and Sarianna M. Lundan, *Multinational Enterprises and the Global Economy*. 2nd ed. Cheltenham, UK: Edward Elger Publishing Limited, 2008: 3.

¹⁷ Dennis Rondinelli and Michael Berry, “Environmental Citizenship in Multinational Corporations: Social Responsibility and Sustainable development.” *European Management Journal* 18.1 (2000): 74.

more efficient operations as well as, “greater access to capital, reduced operating costs, financial performance, and enhanced brand image,” as important incentives for participating in corporate social responsibility programs.¹⁸ Another significant factor in corporate citizenship is reduced regulatory oversight as a result of corporate-led initiatives. Although this cannot be said to occur in all cases, by actively engaging in promoting responsible business practices, corporations are able to maintain control of their practices and avoid regulatory supervision, while attracting consumer interest and loyalty. Indeed, some argue that the proliferation of Corporate Social Responsibility (CSR) initiatives and campaigns is an exercise in strategically avoiding increased formal regulation, and moreover, representative of a general movement toward the “privatization of regulatory structures.”¹⁹ While corporate-led initiatives may be attractive for a number of reasons, and some CSR programs are undoubtedly representative of real efforts to promote responsibility in the commercial sector, the voluntary nature of soft law mechanisms remains problematic, as it cannot ensure that environmental rights abuses will not occur. Therefore, it is important to understand the various CSR initiatives that have emerged in the past few decades, yet despite the proliferation of corporate-led soft laws, formal regulation continues to be necessary.

THE ALIEN TORT STATUTE

In 1980, the case of *Filartiga v. Pena-Irala* triggered a flood of lawsuits using the Alien Tort Statute (ATS) to the federal courts for international human rights claims.²⁰ Having been employed only rarely since its creation as part of the Judiciary Act of 1789, *Filartiga*

¹⁸ Rondinelli, 74.

¹⁹ Ronen Shamir, “Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility.” *Law and Society Association, University of Massachusetts Law and Society Review* 38 (2004): 660; Robert J. Fowler, “International Environmental Standards For Transnational Corporations.” *Environmental Law Journal* 25 (1995): 4.

²⁰ 630 F. 2d. 876 (2d Cir. 1980).

signaled a new and controversial stage for the ATS. In the past three decades, the ATS has become a significant element in human rights and international law debates. In brief, the ATS provides jurisdiction to U.S. federal courts to hear allegations of violations of the law of nations, allowing foreign nationals to engage in tort litigation against American citizens, including U.S. corporations, and other foreign nationals in cases of alleged breaches of international law. The recent history of litigation under the ATS suggests that the statute may eventually provide an avenue for foreign nationals to seek redress for corporate violations of human and environmental rights.²¹ Although CSR initiatives reflect a trend toward the institutionalization of social and environmental responsibility in corporate structures, the very fact that a growing number of plaintiffs have brought ATS claims to US courts alleging violations of environmental and human rights signifies the importance of understanding how the legal regulatory structure can enforce corporate responsibility, as well as the ever-present need for regulations. Even with CSR initiatives, the possibility of environmental damage and human harm still exists and therefore necessitates the existence of concrete mechanisms that provide compensation for injured parties.

APPROACH

This paper is an analysis of international environmental responsibility in the context of U.S. and multinational corporations, endeavoring to answer the question: To what extent can international and domestic legal mechanisms lead to corporate environmental responsibility for actions taken by U.S. corporations in foreign countries? Much of the research and analysis is grounded in a legal approach and while there are other valuable ways

²¹ Shamir, 638.

to address this issue, a legal analysis allows for a theoretical and practical evaluation of the existence and success of mechanisms to enforce corporate environmental responsibility.

It should be noted here that the U.S. is the predominant focus of this paper, both in terms of the companies that are examined and for the focus on the ATS. The ATS is by many accounts a unique piece of legislation and the nature of U.S. courts makes filing a lawsuit for a tort through the ATS an attractive option for citizens of foreign countries, resulting in a multitude of cases involving foreign plaintiffs.

This analysis begins with a review of the structure and principles of international law and international environmental law, including an overview of nonbinding, soft law elements. From this international perspective, the paper shifts to an examination of the history of the Alien Tort Statute, the domestic mechanism for holding non-governmental actors accountable for acts occurring outside of the U.S. Following this background, the ATS is examined further through recent cases involving corporations and environmental damage, analyzing the extent to which environmental claims are cognizable under the ATS. Lastly, alternative solutions and developments will be discussed with the aim of identifying ways in which corporate environmental responsibility may be encouraged and enforced.

CHAPTER 2

AN OVERVIEW OF INTERNATIONAL AND SOFT LAW

INTERNATIONAL LAW

A highly developed and substantial system of legal instruments, international law has evolved and expanded considerably since the end of the Second World War as the range of issues it affects has broadened. Along with this increase in scope has come the establishment of a complex bureaucracy and set of procedures concerned with upholding the structure and principles of international law. While experts have debated and proposed a number of reasons to explain why nations choose to participate in and abide by the international legal system, it is likely a combination of reasons, not the least of which is that following international laws also grants a nation some protection by those laws. Although international organizations like the United Nations facilitate the perpetuation and advancement of international law, it is self-enforcing in that there exists no principle government that oversees and enforces its regulations. Rather, nations are held accountable by each other through, for example punishments in the form of sanctions, and thus encouraged to observe international law, contributing to what one scholar terms an “effective decentralized system” of enforcement.²² In the reality of unequal global power distributions, however, coercion of dissenting states by the economically and politically influential has the danger of perpetuating these general inequalities in the legal system. Conversely, the dissent of a geopolitically powerful nation can hamper the progress of negotiations concerned with enacting a new international law.

²² Jonathon I. Charney, “Universal International Law.” *The American Journal of International Law* 87.4 (1993): 532.

The participation of all (or most) nations in contributing to the development of international laws presumably results in the codification of shared values, thereby limiting motives for instances of violation. Naturally, the reality of international affairs and actions paints a much more complicated picture, one that obscures even the form of a violation.²³ Nevertheless, the importance of international norms to regulate the actions of states in an increasingly interconnected world represents a vital reason for the existence of an enduring and comprehensive international legal system.

As a force that has traditionally sought to govern relations between nations, international law has, in the last century, come to expand its reach to private entities such as individuals and corporations. Before the first half of the twentieth century, individuals could be held responsible for a limited number of offenses involving other nations, one example being piracy.²⁴ Following World War II, the international community, recognizing the need to instate individual responsibility for acts of a severe and abhorrent nature, created the London Charter of the International Military Tribunal, also referred to as the Nuremberg Charter, in 1945 to establish the rules under which former members of the Nazi regime would be prosecuted. It is important to that appreciate that traditional notions of international law prior to 1945 did not recognize actions of a nation on its own people as a violation of international law, only those that implicated interstate relations. In the Nuremberg Charter, Article 6 of Section II explicitly states, “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.”²⁵ The offenses consisted of crimes against peace, war crimes, and

²³ See, e.g., War in Iraq; Patrick E. Tyler, “Annan Says Iraq War Was ‘Illegal.’” *New York Times*, September 16, 2004.

²⁴ Gary Komarow, “Individual Responsibility under International Law: The Nuremberg Principles of Domestic Legal Systems.” *The International and Comparative Law Quarterly* 29.1 (1980): 22.

²⁵ 82 UNTS 279 (last accessed March 11, 2010 <http://avalon.law.yale.edu/imt/imtconst.asp>)

crimes against humanity. The establishment of individual criminal responsibility had significant repercussions for the development of international law, contributing to not only the acknowledgment of private entities as governed by the law of nations but also of government authorization as no longer a wholly sufficient defense against individual responsibility. Another important effect of the Second World War, and of the subsequent adoption of the United Nations and Nuremberg Charters, was the formal recognition of basic human rights and universal rules that applied to all nations.²⁶

In a discussion of the mechanisms by which corporations may be held accountable for environmental harms committed in foreign states, the establishment of individual responsibilities and universal norms represents two developments that are instrumental to this process. Understandably, without these the experiences of individuals negatively affected by the presence of foreign corporations would remain largely unrecognized by international law when lacking the action and support of their government. This expansion of international law also implicates the challenges of balancing autonomy with increasing universal jurisdiction, wherein respect for national sovereignty is often an obstacle to the application and adjudication of international norms.

In the case of the United States, the role that international law should play in the domestic legal system continues to be debated. However, as Harold Koh, current legal advisor for the Department of State, explains, international and foreign law has a long history of application in U.S. law and that in debates on the merits of employing international law in domestic courts, this history should be recognized.²⁷ While from a practical point of view, he points out that a nation that ignores international law guarantees

²⁶ Charney, 543.

²⁷ Harold Hongju Koh, "International Law as Part of Our Law." *The American Journal of International Law* 98, no. 1 (2004): 45.

“constant frictions with the rest of the world,” he also highlights the idea that though the U.S. may currently represent a global power, at its formation, its continued existence rested in part on the “compatibility of its domestic law with the rules of the international system within which it sought acceptance.”²⁸ Thus, that the establishment of the judicial and legislative systems was very much informed by internationally accepted rules and procedures should figure in current discussions of the role of international law in domestic courts. At a conceptual level, regulations often depend on relative standards and therefore require comparisons in order to be realized.²⁹ As representations of global standards, international norms can act as an important yardstick when considering domestic law. Although the increased scope of international law undoubtedly further complicates the process of applying the law of nations to U.S. decisions and to the legal system, yet it does not take away from the fact that consideration of the opinions and laws agreed upon by the international community has formed, and will continue to form, an important part of our legal system. Furthermore, with globalization and the increasing interdependence of economic, social, and political factors around the world, the professed autonomy of the U.S. legal system continues to be called into question. As will be discussed later in more depth, the boundary between international and domestic law is especially applicable to the Alien Tort Statute and attempts to legislate corporate actions taking place in foreign nations generally.

The source of international law is a matter of debate and although there continues to be differing legal and scholarly opinions, the International Court of Justice (ICJ) represents one of the most important authorities regarding this issue. In the “Statute of the

²⁸ Koh, 2004: 44.

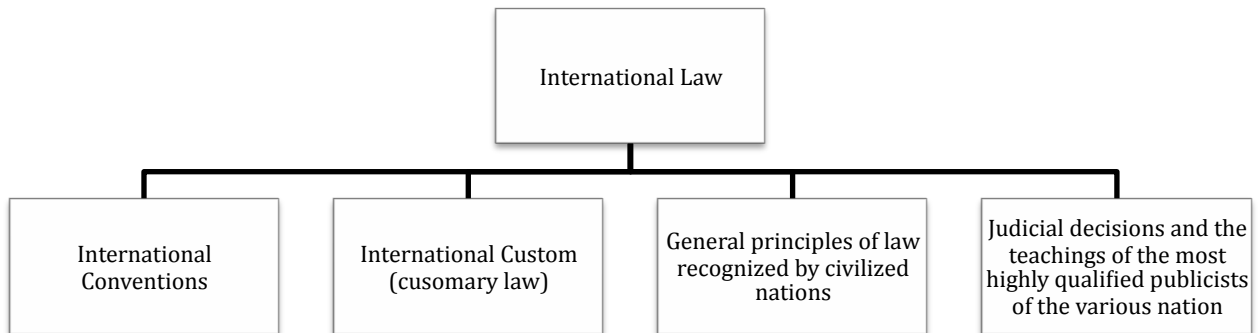
²⁹ Koh cites, among others, ‘cruel and unusual punishment’ (U.S. const. amend. VII) as a concept contingent upon a community standard, 46.

International Court of Justice” Article 38 states that the Court must decide the outcome of disputes in keeping with international law based on:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law³⁰ (see Figure 2.1).

For the purposes of this analysis, the definition of international law maintained by the ICJ will be discussed in order to understand the contemporary system that has developed since the formation of the UN as well as the relationship of this system to corporate regulation in environmental affairs.

FIGURE 2.1: SOURCES OF INTERNATIONAL LAW AS MANDATED BY THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE



³⁰ “Statute of the International Court of Justice.” United Nations, 18 April 1946, Article 38.

SOFT LAW

Soft laws are essentially mechanisms that involve agreements but that have no binding weight, as compared to hard law, and cannot legally obligate an actor to follow the features of the agreement even when they are party to them. Soft law can include United Nations resolutions and declarations but also corporate social responsibility initiatives and therefore cover a diverse and extensive range of different agreements. Yet, soft law initiatives can carry significant weight despite not being strictly legally binding. CSR is an important example of soft law as it is unable to force companies to comply, however, as stated previously, can be powerful in the sense that they influence corporations through accountability and public and shareholder demands. Deviating from agreed soft laws can severely damage a corporation's consumer base and ability to function. Soft law mechanisms can help institutionalize certain values, such as sustainability and environmental responsibility, and can help to steer these initiatives by containing "inspirational goals and aspirations that aim for the best possible scenario."³¹ Nolan et al. view soft law as a type of precursor to hard law because they can "serve as a testing ground for the development of new mechanisms of accountability."³²

In spite of the power of soft law, it is important to understand its significant drawbacks that make a sole reliance of soft law problematic for corporate responsibility. First, the great power of MNCs can dilute the power of accountability, one of the major forces that ensure compliance to soft law agreements. Though there are undoubtedly exceptions to this, a large and influential corporation is unlikely to be severely affected by a slight deviation from its soft law initiatives. Second, soft law mechanisms like CSR are

³¹Justine Nolan and Luke Taylor, "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?" *Journal of Business Ethics* 87 (2009): 434.

³²Nolan 2009, 434.

dependent on their agreement and acceptance by corporations. In this sense, businesses that refuse to participate in soft law can continue to operate outside of these obligations. Third, soft law cannot provide redress for those affected by these transgressions. In the reality of corporate actions, even with soft law agreements, environmental and human rights wrongdoings will occur, whether intentionally or unintentionally. In these cases, it is of critical importance to have a means of providing redress for victims of these abuses. As soft laws do not create legal grounds for seeking compensation, hard laws are a necessary component of regulation. Nolan et al. call attention to this succinctly when they write, “The continued use of such a variety of soft and hard law mechanisms is indicative of the fact that there is no ‘silver bullet’ mechanism to hold corporations accountable for violating human rights.”³³ Formal regulatory structures will continue to be essential as there is no definitive solution to actions that result in environmental damages.

INTERNATIONAL ENVIRONMENTAL LAW

The concept of environmental protection and responsibility occupies an often vague and contested place in the realm of international law, and many maintain the position that environmental problems carry unrecognized weight in numerous issues addressed by international law.³⁴ While the scope of environmental regulations continues to broaden substantially alongside increasing recognition of the capacity of environmental problems to pose significant threats to health and security, the successful implementation of environmental laws on an international scale yet remains in somewhat ambiguous and unspecified standing. The added difficulty of international environmental law is that much

³³ Nolan 2009, 434.

³⁴ See, e.g., Aurelie Lopez, “The Protection of Environmentally-displaced Persons in International Law,” *Environmental Law* 37 (2007): 365-409.

can be extrapolated from existing law, for example, human rights or economic law, even if it lacks overt reference to environmental rights or security. Thus, *international environmental law* has come to refer to the, “entire corpus of international law, public or private, relevant to environmental issues or problems.”³⁵ Rather than signifying an entirely new field of international law, this definition incorporates the application of existing law to environmental issues along with international laws specifically directed at the environment.

³⁵ Patricia Birnie and Alan Boyle, *International Law and the Environment*. (Oxford: Oxford University Press, 2nd ed. 2002), 1-2.

CHAPTER 3

SITUATING THE ALIEN TORT STATUTE

ORIGINS OF THE ATS

The Alien Tort Statute (ATS), also called the Alien Tort Claims Act (ATCA), is a long-standing legislative piece of the Judiciary Act of 1789, when the first congress of the newly formed nation established the judicial courts of the United States. Under U.S. Code Title 28 § 1350, the ATS provides that, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” (ed. 2006). Although there have been some changes to the statute, these have been mostly slight variations of the original text.³⁶ The current version dates back to the 1948 revision of the judicial code.³⁷

From 1789 until 1980, the ATS remained largely unused. One scholar has counted only twenty-one cases before 1980 in which a plaintiff invoked the ATS, nineteen of which were unsuccessful in asserting jurisdiction.³⁸ The relative neglect of the ATS prior to 1980 resulted in limited need for, and instances of, interpretations of the law. This, combined with the almost complete absence of legislative explanation at its institution, has resulted in a number of different interpretations of the purpose of the Alien Tort Statute.³⁹ Had *Filartiga*

³⁶ The original text of the statute declared that the district courts, “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), 712-713. In 1911, the federal judiciary was reorganized, the ATS renumbered clause 17 § 563 and amended to read, “The district courts shall have jurisdiction... [o]f all suits brought by any alien for a tort only, in violation of the law of nations, or of a treaty of the United States.” Jennifer K. Elsea, “The Alien Tort Statute: Legislative History and Executive Branch Views.” *Congressional Research Service, The Library of Congress* October 2, 2003: 9.

³⁷ Elsea, 9.

³⁸ Randall, “Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute.” *New York University Journal of International Law and Politics* 1 (1985): 23; Elsea, 2003, 15.

³⁹ Elsea, 13.

not created an opening for the use of the ATS for human rights claims, these debates would likely not have resulted over this minor and rarely used statute. As it was, the *Filartiga* case fundamentally altered the direction of the ATS, which has become one of the major vehicles for attempting to adjudicate human rights abuses that have occurred in other nations.

Limited explanations of the ATS have led many scholars, lawyers, and judges to look to the creation of the statute as a means of gaining some understanding over its purpose. A generally accepted view of the ATS centers on the idea that the statute was a means of avoiding significant political conflicts for the new and comparatively weak federal government.⁴⁰ By providing the federal judiciary with authority over foreign affairs, the ATS was meant to prevent significant and, perhaps diplomatically, damaging situations. One of the chief interpretations of the original intent concerning what constituted the law of nations was the condemnation of piracy and violations of safe conduct, and the protection of the rights of ambassadors.⁴¹ Many also point to two cases which likely acted as catalysts for the inclusion of the ATS into the Judiciary Act of 1789. The first involved the attack of a French consul, General Marbois, in Philadelphia by another Frenchman. Now termed the *Marbois Affair*, this situation proved difficult for the government, as it was pressured to rectify the situation through adjudication of the case. The second involved the arrest of a servant of a foreign diplomat by a New York police officer. As the arrest occurred in the home of the Dutch ambassador, it violated notions of diplomatic immunity.⁴² These two cases are widely believed to have concerned the federal government because of the potential for political unrest as a result of violations of the rights of foreign ambassadors in the U.S.

⁴⁰ Elsea, 12.

⁴¹ Donefer, Charles. "*Sarei v. Tinto* and the Possibility of Reading an Exhaustion Requirement into the Alien Tort Claims Act." *Northwestern Journal of International Human Rights* 6.1 (2007): 157.

⁴² Elsea, 11.

Thus, they are seen as leading to the creation of a means for the federal, rather than state, government to have authority over cases involving aliens to prevent political disputes that might prove detrimental to the growth and establishment of the nation.

EVOLUTION OF THE ATS THROUGH CASE LAW

In 1980, *Filartiga v. Pena-Irala* established the ATS as a means for foreign nationals to bring cases involving human rights abuses to U.S. courts. The case, which involved allegations of wrongful death and torture by a Paraguayan official, was brought to the U.S. by the victim's sister and father. Both the plaintiffs and defendant had immigrated to the U.S. prior to the case, allowing the plaintiffs to serve process. In *Filartiga*, the Second Circuit court overturned the district court's decision to dismiss the case, based on the fact that the ATS provided jurisdiction as torture, "...when committed under color of state authority, violates international law."⁴³ The court ruled that jurisdiction could be attained when three conditions were met. These conditions consisted of (1) a suit brought by a foreign national, (2) a tort, and (3) a violation of the law of nations.⁴⁴ Although according to the text of the ATS, a tortious suit may also claim a violation of a treaty to which the U.S. is party, the government's prevailing policy of declaring non-self-execution for international treaties prevents foreign nationals from bringing suits under those causes of action.⁴⁵ The implications of what essentially constitutes an exclusion of treaties as grounds for international tort litigation will be discussed later in greater depth.

⁴³ Elsea 2003, 16.

⁴⁴ 630 F.2d at 887

⁴⁵ See Sarah M. Morris, "Note: The intersection of equal and environmental protection: A new direction for environmental alien tort claims after *Sarei and Sosa*." *Columbia Human Rights Law Review* 41 (2009): Morris note 13., 353.

In response to *Filartiga*, Congress passed the Torture Victim Protection Act (TVPA) in 1990, creating a cause of action for a subset of ATS claims. The TVPA contrasts with the ATS in that it creates a cause of action for U.S. citizens as well as foreign nationals.⁴⁶ The creation of a cause of action is also highly significant for discussions of the ATS, as it has been ruled that the statute only provides jurisdiction, rather than creates a new cause of action under which suits can be brought.⁴⁷ In debates over the extent to which the statute should be employed, some point to the enactment of the TVPA as proof that when Congress deems a violation of international law as covered by the ATS, it creates legislation that identifies it specifically.⁴⁸ Consequently, without further congressional action, this view holds that the ATS should not be applied so widely.⁴⁹

Since this decisive case, lawyers and scholars have both praised and decried the new interpretation of the ATS, some viewing it as a triumph for human rights and others as a menacing threat to U.S. corporations and interests.⁵⁰ There has been much concern and debate over the statute owing to the fear that U.S. courts will be inundated with suits brought under the ATS. Scholarship on the statute has increased greatly and academics, lawyer, and the media have followed the progression of cases closely.⁵¹ However, as of 2004, only about two-dozen cases led to final judgments on the statute and only one resulted in the granting of significant damages.⁵² While there have been numerous ATS cases since 1980,

⁴⁶ Elsea 2003, 10.

⁴⁷ *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004), 724.

⁴⁸ Elsea 2003, 32.

⁴⁹ Elsea, 17 citing Judge Bork's concurring opinion in *Tel Oren v. Libya*, 726 F.2d 774 (D.C. Cir. 1984)

⁵⁰ Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor." *The American Journal of International Law* 83, no. 3 (1989): 461. Elsea, 4.

⁵¹ Morris, 278.

⁵² Beth Stephens, "Sosa v. Alvarez-Machain 'The Door Is Still Ajar' For Human Rights Litigation in U.S. Courts." *Brooklyn Law Review* 70 (2004): 533.

the fear that U.S. foreign policy interests will be jeopardized or that federal courts will be overwhelmed with tortious suits currently appears unwarranted.⁵³

The ATS has evolved considerably since its creation in 1789 and through case law, the scope of the ATS has alternately expanded and narrowed. The case of *Kadic v. Karadzic*, for example, represented an important step in the ATS as it opened it to actions against private actors.⁵⁴ The court ultimately recognized that, “subject matter jurisdiction exists for certain violations of the law of nations even when committed in a private capacity.”⁵⁵ The court determined that for certain acts in violation of international norms, including war crimes, genocide, and slave trade, state action is not required to bring ATS claims. The Second Circuit also outlined the basis for determining state action: “a private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.”⁵⁶ The incorporation of non-state entities into the territory of international law violations for the ATS is especially pertinent considering the power that large multinational corporations now possess around the world. As their activities can have significant impacts in foreign nations, the precedent of *Kadic* represents an important step in the evolution of ATS case law.

In the case of *Sosa v. Alvarez-Machain*, the Supreme Court ruled, for the first time, on the scope and meaning of the ATS. The case is significant for this reason; however, it is markedly different from typical ATS cases that allege human rights abuses and is somewhat peculiar as the case that defined the reach of a statute that has become an important human

⁵³ Elsea, 18. Morris, 278.

⁵⁴ 70 F. 3d 232, 239 (2d. Cir. 1995)

⁵⁵ Justin Lu, “Jurisdiction over Non-State Activity under the Alien Tort Claims Act.” *Columbia Journal of Transnational Law* 35 (1997): 532.

⁵⁶ 70 F. 3d 245.

rights law. In 1985, an agent of the Drug Enforcement Administration (DEA) was tortured, interrogated, and later murdered in Mexico. Humberto Alvarez-Machain, a Mexican physician, was believed to have acted to prolong his life with the aim of extending the torture and interrogation. Alvarez was later abducted by a group of Mexicans, including Jose Francisco Sosa, under orders of the DEA. Upon being abducted, Alvarez was held overnight and then brought to Texas where he was arrested.⁵⁷ In 1993, Alvarez brought suit under the ATS, seeking damages for an alleged violation of the law of nations.⁵⁸ The District Court awarded \$25,000 in damages to Alvarez, and the Ninth Circuit affirmed the ATS judgment.⁵⁹ The Supreme Court subsequently granted certiorari to the claim and reversed the judgment of the District Court, ruling that Alvarez was not entitled to a remedy under the statute.⁶⁰

In a decision by Justice Souter, the court held that, “the statute is in terms only jurisdictional.”⁶¹ The ATS was therefore finally determined to provide jurisdiction but not a new cause of action. Although the Court established the ATS as allowing federal courts jurisdiction for violations of the law of nations, it also confined what constituted a violation.⁶² Justice Souter’s opinion stated that, “...we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”⁶³ The opinion of the Court is decidedly cautionary and reflective of the unease surrounding the statute and the potential political,

⁵⁷ 542 U.S. 697-698.

⁵⁸ Alvarez also brought suit against the United States seeking damages under the Federal Tort Claims Act (FTCA) and alleging false arrest. 542 U.S. 698.

⁵⁹ 266 F.3d 1045 (2001).

⁶⁰ 542 U.S. 697.

⁶¹ 542 U.S. 712.

⁶² Morris, 276.

⁶³ 542 U.S. 712.

economic, and judicial ramifications of an expanded interpretation.⁶⁴ Basing its decision, to some extent, on the original intent of the Judiciary Act, the Court restricted the basis for claims. Accordingly, the decision goes on to say:

We assume, too, that no development in the two centuries... has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.⁶⁵

In defining the scope of the ATS, the Supreme Court also ruled that Alvarez's claim failed to meet the new requirements of the statute, which necessitated the violation be of a 'specificity comparable' to actions believed by the Court to have constituted the original impetus for creating the ATS. The three offenses are violation of safe conducts, infringement of the rights of ambassadors, and piracy.⁶⁶ The *Sosa* decision also precluded claims for, "violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."⁶⁷ Although the Court defined and restricted grounds for the ATS, they did not provide a clear standard for determining what constituted an international norm of the required specificity of content and acceptance.⁶⁸ Therefore, debate continues on whether the statute still retains the

⁶⁴ Stephens, 534.

⁶⁵ 542 U.S. 724-725.

⁶⁶ 542 U.S. 724.

⁶⁷ 542 U.S. 732.

⁶⁸ Shelli Stewart, "A Limited Future: The Alien Tort Claims Act Impacting Environmental Rights: Reconciling Past Possibilities with Future Limitations." *American Indian Law Review* 31.2 (2006/2007): 759.

potential to act as a valuable, and effective, avenue for seeking damages from corporate abuses.

Table 3.1 outlines some of the key cases and stages of the Alien Tort Statute and both the expansion and reduction of its scope since *Filartiga*. This evolution through case law has proved extremely significant for its use as a human and environmental rights law, and helps to illuminate future uses of the statute.

TABLE 3.1: TIMELINE OF SIGNIFICANT STAGES OF THE ATS – EVOLUTION OF CASE LAW

	Case	Significance
1980	<i>Filartiga v. Pena-Irala</i> 630 F. 2d. 876 (2d Cir. 1980).	Opened ATS for human rights cases.
1990	Enactment of the Torture Victim Protection Act (TVPA)	
1995	<i>Kadic v. Karadzic</i> F. 3d 232, 239 (2d. Cir. 1995)	Opened ATS for claims against private actors for certain violations of customary law (genocide, war crimes, or crimes against humanity).
2002	<i>Aguinda v. Texaco, Inc.</i> 303 F.3d 470 (2d Cir. 2002)	First case to grant jurisdiction to foreign nationals for environmental tort claims against an American corporation, however, it was dismissed on grounds of <i>forum non conveniens</i> . ⁶⁹
2002	<i>Wima v. Royal Dutch Petroleum Co.</i> (S.D.N.Y. Feb. 28, 2002)	Court determined that joint action was sufficient to bring an ATS case against a private actor even though plaintiffs did not allege employees were responsible for human rights abuses.
2002	<i>Doe v. Unocal</i> 395 F.3d 932 (9 th Cir. 2002)	Ninth Circuit allowed ATS claim because all allegations were <i>jus cogens</i> violations and found that, as such, they could be brought against a private actor without the ‘color of law’. ⁷⁰ Case settled out of court.
2004	<i>Sosa v. Alvarez-Machain</i> 542 U.S. 692 (2004)	Limited customary laws that could be used under the ATS as comparable to violation of safe conducts, infringement of the rights of ambassadors, and piracy. ATS found to provide jurisdiction to federal courts, not create a new cause of action.
2008	<i>Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.</i> 517 F.3d 104 (2d. Cir. 2008)	Claim was dismissed as the norm relied upon was not universally accepted at the time of the events, leaving the court without jurisdiction.
2009	<i>Sarei v. Rio Tinto PLC</i> 650 F. Supp. 2d 1004 (C.D. Cal. 2009)	Environmental degradation deemed insufficient to present violation of international norms. Court found that a prudential exhaustion requirement would be inappropriate for claims of crimes against humanity, war crimes, and racial discrimination.
2009	<i>Chavez v. Carranza</i> 321 Fed. Appx. 739 (6 th Cir. 2009)	Judgment awarding plaintiffs with compensatory and punitive damages affirmed.
2009	<i>Turedi v. Coca-Cola Co.</i> 343 Fed. Appx. 623 (2d. Cir. 2009)	Claim was dismissed on grounds of <i>forum non conveniens</i> . Court deemed that forum-shopping considerations served as substantial motivation for plaintiffs’ venue choice, which should therefore be not be granted special deference.
2009 (Dec.)	<i>Doe v. Constant</i> 08-4827-cv (2d. Cir. 2009)	Defendant found liable under the ATS and the TVPA and plaintiff awarded \$19 million in compensatory and punitive damages.

⁶⁹ Stewart, 756-757.

⁷⁰ Stewart, 760.

CHAPTER 4

A DOMESTIC MECHANISM FOR ADDRESSING CORPORATE ENVIRONMENTAL RESPONSIBILITY

BARRIERS TO THE ALIEN TORT STATUTE

As a domestic law, the ATS is significant as it allows the U.S. to adjudicate cases involving foreign nationals and acts by U.S. citizens occurring in foreign nations. The statute specifically grants jurisdiction to the federal courts for tort litigation concerning acts that violate the law of nations or a treaty of the U.S., and in this way, the success of such suits can be dependent on a general consensus of what constitutes a violation. The emphasis of international law continues to remain largely on the state and has therefore proven, at this time, inadequate for the adjudication of specific international cases involving private actors seeking redress for corporate abuses, despite some expansion of international law to non-state entities.⁷¹ One way to conceptualize the ATS is as a mechanism used to fill a void left by the inability and ineffectiveness of the current international legal system to adequately manage cases involving non-state actors.⁷² According to this, the ATS acts as a substitute for a system that currently lacks the power to enforce and realize compensation for damage brought about by corporate actions. As such, tort litigation in U.S. courts has become an appealing, and at times necessary, alternative to the weaknesses in international law.⁷³ Moreover, ATS litigation can be a means of encouraging corporations to be more aware of the countries in which they choose to operate, realizing that they may be held liable under

⁷¹ Robert McCorquodale and Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law." *The Modern Law Review* 70.4 (2007): 601.

⁷² Michael Koebele, *Corporate Responsibility Under the Alien Tort Statute: Enforcement of International Law Through US Torts Law* (Netherlands: Koninklijke Brill NV, 2009): 8.

⁷³ Joao C. J. G. de Medeiros, "How the Presumption Against Extraterritoriality Has Created a Gap in Environmental Protection at the 49th Parallel." *Minnesota Law Review* 92 (2007): 542.

the ATS for being connected with a foreign government in human and environmental rights abuse cases.⁷⁴ Instances of environmental degradation are placed in a particularly difficult position in that, while international environmental treaties exist, as indicated by the case of *Sarei v. Rio Tinto, PLC*, they currently fail to constitute a sufficient basis for a violation of the law of nations.⁷⁵

In endeavoring to understand how victims of environmental abuses can seek a remedy in an international context, concepts of national boundaries and state sovereignty are particularly relevant, as they constitute a formidable obstacle for the success of ATS litigation. Typically, national boundaries represent the line at which that nation's laws no longer apply. Moreover, state borders can act as negative externalities as, "polluters do not have to bear the true social costs of their activities – only the costs generated entirely within their home territories."⁷⁶ Although U.S. and other multinational corporations benefit from lower regulatory standards and costs in developing nations, this often comes at the expense of certain communities that lack access to formal political or legal protection in the countries where corporate activities are pursued.

Closely related to the dominance of national borders in framing international relations is the concept of state sovereignty, which is itself a complex issue involving numerous interpretations of the importance and place of sovereignty in an increasingly globalized world.⁷⁷ Opinions of state sovereignty vary considerably, from those who foresee

⁷⁴ Stewart, 761.

⁷⁵ *Sarei v. Rio Tinto, PLC* 650 F. Supp. 2d 1004 (2009); 63.

⁷⁶ De Medeiros, 529.

⁷⁷ See, e.g., Michael Ross Fowler and Julie Marie Bunck, "What constitutes the sovereign states?" *Review of International Studies* 22 (1996): 381-404. Alan James, "The Practice of Sovereign Statehood in Contemporary International Society." *Political Studies* 47 (1999): 457-473. Robert H. Jackson, *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990). W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law." *The American Journal of International Law* 84.4 (1990): 866-876.

the demise of a sovereignty rooted in national borders⁷⁸ to those who argue that national sovereignty will persist as an important framework for global interactions.⁷⁹ Nevertheless, as politically significant and historically embedded notions, national borders and state sovereignty have tremendous impact on the ways in which international laws are developed and enforced, as well as the ways domestic law can be applied to cases occurring in other nations. And yet, national borders should be recognized as constructions that are at once highly significant and changeable, thereby allowing room to question the degree to which sovereignty should limit accountability and borders prevent the remedy of abuses.

Essentially, a question inherent in this analysis is whether corporations should be allowed to perform certain actions overseas if U.S. laws prohibit them from committing these acts, and hold them liable in the event that they do.

The concept of national sovereignty involves a *presumption against extraterritoriality*, which signifies that although nations may claim extraterritorial jurisdiction, they are “presumed not to exercise this power unless they state their intent to do so.”⁸⁰ Situations in which extraterritorial application of U.S. law can be implemented successfully are few. In particular, the presumption against extraterritoriality can be overcome in situations where the action resulting in the case occurred in the U.S. or where adverse effects due to the action are felt in the U.S.⁸¹ As the extraterritorial application of domestic law is unlikely to occur in cases involving corporate abuses and foreign nationals, the ATS is distinctive as a mechanism clearly aimed at allowing citizens of other nations to seek remedies in U.S.

⁷⁸ Arjun Appaduri, “Sovereignty without territoriality: Notes for a Postnational Geography.” in Setha M. Low and Denise Lawrence-Zuniga, ed. *The anthropology of space and place: locating culture*. MA: Blackwell Publishing Ltd., 2003). Michael J. Shapiro, “Moral Geographies and the Ethics of Post-Sovereignty.” *Public Culture* 6 (1994): 479-502. Jessica T. Mathews, “Power Shift.” *Foreign Affairs* 76.1 (1997): 50-66.

⁷⁹ Stephen D. Krasner, “Sovereignty.” *Foreign Policy* 122 (2001): 20-29.

⁸⁰ De Medeiros, 549.

⁸¹ De Medeiros, 550.

courts. The presumption against extraterritoriality means that resolving corporate environmental abuse cases involving international actors through the ATS is one of few avenues available for foreign nationals.

Extraterritorial application of U.S. environmental statutes can be found in certain circumstances with for example, the Clean Air Act, the National Environmental Policy Act, and the Resource Recovery and Compensation Act – however these largely implicate cases involving transboundary environmental impacts such as water or air pollution.⁸² As cases like that of Shell in Nigeria or Rio Tinto in Papua New Guinea concern environmental devastation at a local or regional scale entirely within the political boundaries of another country, the ATS is unlikely to be effective. Refusal of a court to exercise jurisdiction in cases where environmental impacts are not felt domestically is another substantial barrier and one that prevents formal regulation of corporate environmental impacts outside of the U.S.⁸³

State sovereignty is made more complex by increasing globalization and the expansion of MNCs and their corporate structure, often comprised of parent companies with different ‘nationalities’ than their many subsidiaries and affiliates.⁸⁴ The structure allows for the diffusion of legal liability and complicates the ability of nations, and citizens, to hold corporations accountable for actions occurring outside of the U.S.⁸⁵ As corporate structures have become more intricate, the current system of international legal liability is no longer sufficient to regulate actors that are not easily recognized as under the jurisdiction of one

⁸² Ernest E. Smith, “The Oil Industry and the Extraterritorial Application of US Environmental Law,” in *Environmental Regulation of Oil and Gas* (UK: Kluwer Law International, 1998): 236.

⁸³ Smith, 240.

⁸⁴ McCorquodale, et al. 599.

⁸⁵ See, e.g. *Bauman v. DaimlerChrysler Corp.* 579 F.3d 1088 (9th Cir. 2009) in which liability is complicated by uncertainty over parent responsibility for actions of a foreign subsidiary.

nation. Indeed, “the notion of corporate nationality may become obsolete in a global economy.”⁸⁶ More critically, the extent to which MNCs have expanded and increased their dominance around the world has been seen by some as a sign that corporations have, “grown beyond the control of national governments and operate in a legal and moral vacuum...”⁸⁷ Ironically, national boundaries are becoming more obsolete for the flow of goods, communication, and the expansion of corporations because of multilateral trade agreements, and yet remain the dominant framework for international law and relations. Along with the continued predominance of a focus on state actors in international law, the ability of corporations to also move beyond the reach of national laws underscores the importance of examining successful mechanisms for legal enforcement of corporate responsibility.⁸⁸ This is particularly important for the environment as the value of environmental protection has yet to gain the international support that has been accorded to human rights and other customary laws.

For the ATS, the issue of national sovereignty presents a difficult hurdle for plaintiffs to overcome. Although hundreds of cases have been brought under the ATS since *Filartiga*, there are certain barriers to its success. Some of these implicate matters of sovereignty as the ATS occupies the difficult position of providing access to U.S. courts while continually being reined in to prevent liberal use. Additionally, the ATS implicates sensitive issues within a “larger debate concerning the role international law plays in U.S. law and the role national courts of all countries might play in enforcing international law.”⁸⁹ As the ATS allows for the adjudication of foreign nationals and events occurring in foreign nations, the

⁸⁶ Fowler 1995, 2.

⁸⁷ Fowler 1995, 2.

⁸⁸ Stewart, 749.

political implications of deciding over the actions of non-U.S. citizens, and occasionally the actions of foreign governmental officials, can hamper the ability of plaintiffs to obtain remedies for environmental or human rights abuses.

The Foreign Sovereign Immunities Act of 1976 (FSIA) states that, “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”⁹⁰ The FSIA has proven to be a difficult hurdle for ATS cases particularly as the ‘color of law’ requirement is necessary for all but the most severe violations of international law.⁹¹ Thus, somewhat paradoxically, state-sponsorship or association, although required for many ATS claims, also implicates the FSIA, which may grant a defendant immunity in the suit.

National sovereignty also raises the issue of the political question doctrine, which prevents the judicial branch from interfering with areas that are the sole responsibility of the executive branch, such as foreign relations.⁹² If an ATS suit introduces sensitive political questions that may intrude on the duties of the executive branch, this doctrine precludes the federal courts from claiming jurisdiction. As in the case of *Corrie v. Caterpillar*, the plaintiff’s claims against the defendant, the manufacturer of bulldozers used by the Israeli Defense Forces in the Palestinian Territories, necessitated questioning the U.S. government’s decision

⁸⁹ Elsea, 5.

⁹⁰ “The immunity of a foreign state from jurisdiction” U.S.C. 28 § 1604.

⁹¹ See *Kadic v. Karadzic*, F. 3d 232, 239 (2d. Cir. 1995)

⁹² See, e.g., Judge Robb’s concurring opinion in *Tel-Oren v. Libya*, 726 F.2d 774 at 826-827 (D.C. Cir. 1984)

to grant military aid to Israel.⁹³ The case was therefore dismissed for raising nonjusticiable political questions.

With respect to ATS claims of environmental degradation by MNCs, in the case of *Sarei v. Rio Tinto* the District Court for the Central District of California originally dismissed the plaintiffs' claims based on the political question doctrine, as it involved the government of Papua New Guinea.⁹⁴ Associations between corporations and national governments in these types of cases, where the government is cognizant of the environmental impacts of corporate activities, implicate the use of the political question doctrine and prevent the adjudication and resolution of environmental damage cases.

Other jurisdictional issues raised by the ATS include *forum non conveniens* (FNC), which grants a court the power to decline jurisdiction in favor of another court. If an adequate, alternative forum exists to hear the case, a federal court may rule that the alternative is better suited for the case and, "decline to exercise its jurisdiction... where it appears that for the convenience of the parties and the court, and in the interests of justice, the action should be tried in another forum."⁹⁵ A test consisting of two parts is generally applied to determine whether FNC motions are valid.⁹⁶ This test includes 1) determining whether an alternative forum exists and 2) weighing public and private interest factors. A forum may be deemed inadequate in the first part of the test if, "the plaintiff demonstrates that he would encounter exceptional legal, political or practical barriers in litigating in the

⁹³ *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir.)

⁹⁴ 221 F. Supp. 2d 1116, 1209.

⁹⁵ *Ford v. Brown*, 319 F.3d at 1237.

⁹⁶ *Wiva v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d. Cir. 2000).

other forum...”⁹⁷ As for the second part, private interests include such considerations as access to sources of proof, availability of witnesses, and enforceability of a judgment, while public interest factors include “congestion of courts and the difficulty of a court interpreting the law of another jurisdiction.”⁹⁸

In *Abdullabi v. Pfizer*, for example, the district court originally dismissed the case on FNC grounds, indicating that plaintiffs’ assertions that Nigerian courts lacked the necessary independence and impartiality were ineffective against the Court’s belief that a Nigerian court would be a more appropriate venue for adjudication of the case. Because the witnesses and evidence were in Nigeria and because the Court wished to prevent forum shopping, the case was dismissed.⁹⁹

Conversely, FNC motions can act as a way to prevent the influx of tort suits, feared by some as a danger to the possibility of being awarded higher compensatory and punitive damages in U.S. courts. Limited jurisdiction in the US. judicial system requires that a court, “...must first satisfy itself that there are sufficient ‘minimum contacts’ between the individual and the state...”¹⁰⁰ In *Turedi v. Coca-Cola Co.*, the defendant, a Turkish company, had no alleged contacts with the U.S. The opinion of the Second Circuit affirming the dismissal of the claims based on FNC addressed this, stating, “We agree such ‘facts give rise to a strong inference that forum-shopping considerations served as a substantial motivation in plaintiffs’ venue of choice in [the Southern] District.”¹⁰¹ As a result, the court did not

⁹⁷ *Turedi v. Coca Cola Co.*, 2006 WL 3187156 (S.D.N.Y.) from Charles Donefer, “*Sarei v. Rio Tinto* and the Possibility of Reading an Exhaustion Requirement into the Alien Tort Claims Act.” *Northwestern Journal of International Human Rights* 6.1 (2007): 163.

⁹⁸ Donefer, 163. Donefer also explains in n.71 that choice of law is not often an issue for ATS claims as they are based on international law rather than the specific domestic laws of another nation.

⁹⁹ Donefer, 164.

¹⁰⁰ De Medeiros, 546.

¹⁰¹ 343 Fed. Appx. 623 at 626 (2d. Cir. 2009)

grant special deference to the plaintiff's choice for a forum and dismissed the case on FNC grounds.

The process of determining FNC is highly significant for the types of cases brought under the ATS because of the often marginalized nature of plaintiffs' political, economic, and social positions. Without avenues for a fair and equitable trial in their home country, these actors are left with few means for recourse. Similarly, acknowledging that their own nation may not be an effective forum for hearing claims is particularly relevant as plaintiffs are often suing corporations that have acted in conjunction with the state (as necessitated by the color of law requirement for many ATS claims).

ATS cases involving environmental degradation by MNCs can be barred by the doctrine of forum non conveniens for the same reasons as in other ATS cases. Particularly for environmental claims, however, private interest factors present a particularly difficult obstacle to overcome as the evidence of environmental impacts remain within one nation. This makes the convenience of adjudicating the case in the country in which the tort occurred more apparent and thus courts are more likely to determine that the U.S. is an inconvenient forum for adjudication. Specifically, "This is so because the forum of the country where the tort took place is logically the most appropriate to analyze the physical damages caused by an environmental tort, because of its awareness and understanding of the local environment."¹⁰²

Finally, a significant barrier to the Alien Tort Statute is the ambiguities surrounding what constitutes customary international law. As explained previously, a general consensus of the standards that should be used to determine customary law is lacking in the legal

¹⁰² Roque Romero, "Using the Alien Tort Claims Act for Environmental Torts: The Problem of Definability of the Right to a Healthy Environment." *Energy Politics* 8 (2006): 18. 12-30

system although some proposals have been made.¹⁰³ The ATS allows for the use of treaties to which the U.S. is a party as a basis for claims, however, this has not proven to be a significant component in many of cases because of non-self-execution clauses and the U.S. government's preference for reservations and general reluctance to ratify binding international agreements.¹⁰⁴ Violations of customary law relating to human rights that have proven legitimate as a basis for tort claims include, "genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity."¹⁰⁵ However, without case precedent, it is often unclear as to whether a certain act will be deemed a violation of customary international law, and in the case of environmental harms, this is especially tenuous. Establishing a claim as one based in customary law is, nevertheless, a crucial step in the success of an ATS claim and plays a large part in determining whether future cases will prove more advantageous for victims of human and environmental rights abuses.

In sum, the most significant barriers for ATS claims and particularly for environmental torts are:

- National borders
- National Sovereignty – presumption against extraterritoriality
- Judicial considerations
 - Foreign Sovereign Immunities Act
 - Political question doctrine
 - Forum non conveniens
 - Availability of evidence and witnesses
 - Preventing forum shopping
- Lack of established customary law

¹⁰³ Hari M. Osofsky, "Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations." *Suffolk Transnational Law Review* 20 (1997): 349.

¹⁰⁴ Osofsky, 343.

¹⁰⁵ Elsea, 18-19.

While the ATS provides a unique and vital avenue for addressing human and environmental rights violations in foreign nations, jurisdictional issues more often than not, serve as the decisive factor in preventing an ATS claim from being successful.

Table 4.1 lists ATS cases involving corporate defendants heard in the courts of appeals from 2007 through 2009. Of about forty-seven cases involving ATS claims heard in the circuit courts during these three years, twenty-three concerned corporate defendants. Of these, three specifically discussed environmental claims – *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, *Sabu v. Union Carbide Corp.*, and *Sarei v. Rio Tinto, PLC* – although environmental damage or environmental health issues were implicated in others – *Ayemou v. AMVAC* and *Abagninin v. AMVAC*, alleging exposure to chemicals, and *Wawa v. Shell Petroleum Dev. Co. of Nig., Ltd.*, in which environmental degradation due to petroleum extraction led to protests by a group of Nigerians. In accordance with the various difficulties in succeeding with an ATS claim, fourteen of the cases in *Table 2* were dismissed and still others may prove unsuccessful even after being remanded back to the district courts.

TABLE 4.1: ALIEN TORT STATUTE CASES HEARD IN THE COURTS OF APPEALS INVOLVING CORPORATE DEFENDANTS FROM 2007 THROUGH 2009 (* INDICATES THAT THE APPEAL INVOLVED ENVIRONMENTAL CLAIMS)

Case		Outcome
<i>Doe v. Exxon Mobil Corp.</i> 473 F.3d 345 (D.C. Cir.)	Decided: Jan. 12, 2007	Defendants' appeal of judgment denying their motions to dismiss on the basis of the political question doctrine denied
<i>El-Masri v. United States</i> 479 F.3d 296 (4 th Cir.)	Decided: Mar. 2, 2007	Dismissed complaint under state secrets doctrine
<i>Hereros v. Deutsche Afrika-Linien GmbH & Co.</i> 232 Fed. Appx. 90 (3 rd Cir.)	Filed: April 10, 2007	Dismissed for failure to assert actionable claims and because claims were time-barred
<i>Ganguly v. Swiss Am. Secs.</i> 05-4351-cv (2d. Cir.)	Decided: Jul. 20, 2007	Dismissed for lack of subject matter jurisdiction
<i>Corrie v. Caterpillar</i> 503 F.3d 974 (9 th Cir.)	Filed: Sept. 17, 2007	Dismissed under the political question doctrine
<i>Khulumani v. Barclay Nat'l Bank Ltd.</i> 509 F.3d 148 (2d. Cir.)	Decided: Nov. 27, 2007	Dismissal of ATS claims vacated and case remanded
<i>Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.</i> 517 F.3d 104 (2d. Cir.) *	Decided: Feb. 22, 2008	Dismissed for failure to allege a violation of customary international law at the time it was committed
<i>Ayemou v. AMVAC Chem. Corp.</i> 312 Fed. Appx. 24 (9 th Cir.)	Filed: Aug. 20, 2008	Sua sponte remand order vacated and case remanded to district court
<i>Abagninin v. AMVAC Chem. Corp.</i> 545 F.3d 733 (9 th Cir.)	Filed: Sept. 24, 2008	Dismissed genocide claims for failure to allege specific intent, crimes against humanity for failure to allege state action
<i>Sabu v. Union Carbide Corp.</i> 584 F.3d 59 (2d. Cir.) *	Decided: Nov. 3, 2008	Vacated and remanded because district court erred when it converted defendants' motion to dismiss to a summary judgment motion
<i>Sarei v. Rio Tinto, PLC</i> 550 F.3d 822 (9 th Cir.) *	Filed: Dec. 16, 2008	Case remanded to district court to determine whether to impose an exhaustion requirement
<i>Romero v. Drummond Co.</i> 552 F.3d 1303 (11 th Cir.)	Decided: Dec. 22, 2008	Summary judgment granted to defendant; court ruled insufficient evidence of state action
<i>Abdullabi v. Pfizer, Inc.</i>	Decided: Jan. 30, 2009	Judgment dismissing for lack of jurisdiction under

563 F.3d 163 (2d. Cir.)		ATS reversed and remanded.
<i>Gange Chen v. China Cent. TV</i> 320 Fed. Appx. 71 (2d. Cir.)	Decided: Apr. 7, 2009	Dismissed for lack of subject matter jurisdiction based on Foreign Sovereign Immunities Act
<i>Wiwa v. Shell Petroleum Dev. Co. of Nig., Ltd.</i> 335 Fed. Appx. 81 (2d. Cir.)	Decided: Jun. 3, 2009	Dismissed for lack of personal jurisdiction vacated and case remanded to district court
<i>Turedi v. Coca-Cola Co.</i> 343 Fed. Appx. 623 (2d. Cir.)	Decided: Jul. 7, 2009	Dismissed on ground of forum non conveniens
<i>Sinaltrainal v. Coca-Cola Co.</i> 578 F.3d 1252 (11 th Cir.)	Decided: Aug. 11, 2009	ATS claims dismissed for lack of subject matter jurisdiction; TVPA claims dismissed for failure to state a claim upon which relief could be granted
<i>Villeda Aldana v. Del Monte Fresh Produce N.A., Inc.</i> 578 F.3d 1283 (11 th Cir.)	Decided: Aug. 13, 2009	Dismissed on grounds of forum non conveniens
<i>Bauman v. DaimlerChrysler Corp.</i> 579 F.3d 1088 (9 th Cir.)	Argued and submitted: Oct. 21, 2008 Filed: Aug. 28, 2009	Dismissed for lack of personal jurisdiction
<i>Mohamed v. Jeppesen Dataplan, Inc.</i> 579 F.3d 043 (9 th Cir.)	Argued and submitted: Feb. 9, 2009 Amended: Aug. 31, 2009 Rehearing, en banc, granted: Oct. 27, 2009	Still to be decided
<i>Saleb v. Titan Corp.</i> (D.C. Cir.)	Decided: Sept. 11, 2009	Dismissed for lack of settled international law
<i>Presbyterian Church of Sudan v. Talisman Energy, Inc.</i> 582 F.3d 244 (2d Cir.)	Decided: Oct. 2, 2009 Amended: Nov. 6, 2009	Summary judgment granted to defendant
<i>Doe v. Constant</i> 08-4827-cv (2d Cir.)	Decided: Dec. 1, 2009	Plaintiff awarded punitive and compensatory damages

THE INTERSECTION BETWEEN ENVIRONMENTAL AND HUMAN RIGHTS IN ATS CASES

In the case of *Sarei v. Rio Tinto, PLC*, plaintiffs, former and current residents of Papua New Guinea (PNG) filed suit against a mining company, Rio Tinto, alleging that the mining operations severely damaged the environment and impacted the health of the residents. The case involved the vicarious liability of the mining company in its interactions with the PNG military and government that were alleged to have committed racial discrimination, environmental devastation, war crimes, and other violations of customary law. More specifically, the plaintiffs allege that Rio Tinto's threats led the government to employ the military against the residents and the company is therefore partially responsible for crimes committed during the ensuing civil war in Papua New Guinea. Moreover, Rio Tinto and the PNG government were engaged in a joint venture in the mining operation.¹⁰⁶

The plaintiffs' case was based in the claim that the company had violated international norms:

“by appropriating land owned by indigenous people for the purpose of opening a mine, [and by] knowingly emitting and depositing volatile and highly toxic mine waste onto the land and into the water, thus destroying rivers and land that provided a way of life for the native people.”¹⁰⁷

The court concluded, however, that environmental damage was insufficient to satisfy the necessary standards for determining a violation of customary law. They asserted that, “the federal courts have continued to hold that, at present, claims that environmental damage or destruction has injured or threatened individuals' rights to life and health are not sufficiently

¹⁰⁶ 650 F. Supp. 2d 1004.

¹⁰⁷ *Id.* at 1024.

specific to give rise to ATCA jurisdiction.”¹⁰⁸ The plaintiffs also filed racial discrimination claims that, “they, as black workers, were paid lower wages than white workers and lived in ‘slave-like conditions.’”¹⁰⁹ The discrimination claims also implicated the environmental damage in arguing that the environmental destruction caused by the company’s activities, “resulted from its belief that the villagers and their land were ‘inferior and expendable.’”¹¹⁰ Although the court found the plaintiffs’ claims regarding the right to life and health as failing to meet the conditions required for establishing customary law, it substantively allowed the plaintiffs’ claims of racial discrimination.¹¹¹ As racial discrimination is more widely accepted and concrete, and thus more likely to be considered a part of customary international law, it may serve as a way through which environmental damage may be addressed. This case is informative as illuminating, not only the failure of environmental damage to constitute a violation of the law of nations, but also the ways in which environmental rights may be embedded in and extracted from human rights.

This intersection of environmental and human rights strikes at the core of this analysis. As shown previously, the ATS may appear a valuable and promising avenue for rectifying corporate abuses, yet its success has been prevented by a number of different jurisdictional and political concerns. Particularly in the case of environmental harms, the courts have clearly shown that international law has not yet adequately established ecological or environmental health impacts as violations of international norms. Human rights law is valuable in this argument because it may provide a means for allowing claims of environmental damage while reducing the chance that the courts will dismiss them.

¹⁰⁸ *Id.* at 1025.

¹⁰⁹ Morris, 288.

¹¹⁰ Morris, 288.

¹¹¹ Stewart, 757.

Human rights law is in most respects, a much more powerful and recognized source of international law than environmental law. Most importantly, it implicates the global community as it has come to be viewed as a universal standard, relevant to all peoples. The decision of the *Filartiga* articulates this clearly: “Indeed, for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.”¹¹² As a set of basic rights belonging to all humans, this source of law has allowed for more state interference than most other divisions of international law. Whereas international environmental law is largely based on issues concerning the transboundary movement of pollutants or wastes, human rights law for intrusion into events or issues that wholly occur within a state. As Stewart explains, “if environmental damage is characterized as a human rights violation, the internal behavior causing the damage would become an international matter creating a basis for intervention.”¹¹³ Thus, human rights law is highly relevant as a way of circumventing the yet state-centric system of international law and of addressing environmental damage even while universal acknowledgment of environmental rights remains unrecognized by courts.

The case of *Sarei v. Rio Tinto* represents one of the few instances in which a court explicitly addresses environmental claims. Although other cases involving corporate environmental responsibility have been filed under the ATS, including *Aguinda v. Texaco* and *Beanal v. Freeport-McMoRan, Inc.*, the court failed to adequately discuss the viability of environmental damage as a law of nations violation.¹¹⁴ Furthermore, the case is significant because it highlights the current inability of ATS litigation to enforce corporate

¹¹² Stephens, 536.

¹¹³ 753-4.

¹¹⁴ Osofsky, 352-353.

environmental responsibility, although it demonstrates the possibility of extracting environmental rights from human rights law and the potential use of this source of law for encouraging corporations to pursue their commercial interests in an environmentally responsible manner.

CONCLUSION

UNDERSTANDING THE LIMITATIONS OF THE ATS

The ATS has encountered numerous problems when put to use for human and environmental rights issues. But, while there are a number of barriers to the ATS, it serves as a mechanism for addressing human and environmental rights abuses and, in many ways, acts as a substitute for the lack of significant and enforceable international environmental regulation.¹¹⁵ In other words, it is far from a complete and ideal solution for aliens seeking a remedy for harms incurred as a result of corporate actions, however, it fills a gap left by the lack of substantial international corporate regulation.

For the time being, the ATS does not offer a clear way for victims of environmental degradation to seek compensation. The limitations of the ATS are clear and whether from judicial barriers, political interests, or the refusal to recognize certain rights, they serve as considerable obstacles to successful ATS claims based on environmental devastation.

This analysis has also shown that while the ATS may be flawed, the possibility of incorporating environmental claims into human rights claims represents a way of circumventing the constraints of tort suits based on environmental damage. Moreover, it has shown that these two – environmental and human rights – intersect in ways that suggest 1) claims of environmental devastation can be more successfully structured through the rhetoric and framework of human rights and 2) courts can and should equate environmental devastation with human rights violations. Taking into consideration the potential for environmental damage to have severe and lasting impacts on an ecosystem, the resulting

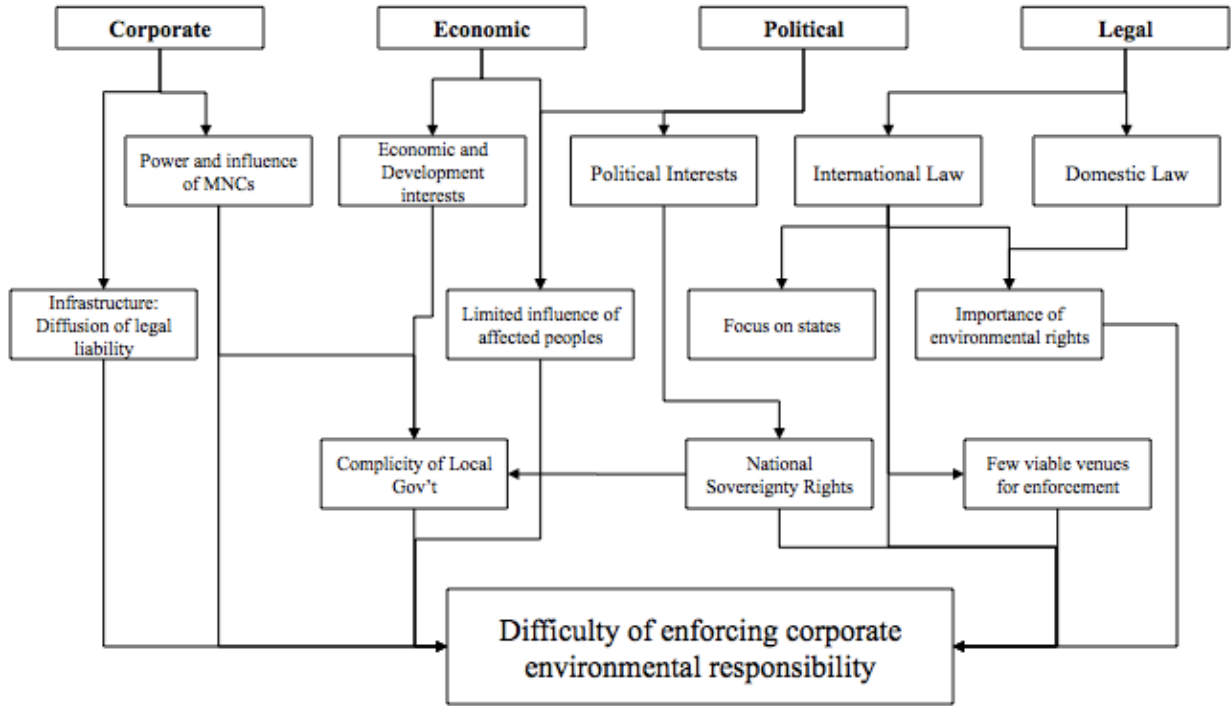
¹¹⁵ McCorquodale: 601.

harm to established and valued ways of life, and the consequent risk of bringing about equally devastating social and political conflicts, environmental degradation clearly has many human rights implications.

LESSONS FROM THE ATS

The failures of the ATS illuminate not only the lack of corporate environmental regulation in an international context, but also the various forces that make enforcement of international environmental responsibility particularly challenging. As discussed previously, the power of large MNCs, the economic motivations of less developed nations, and the uncertainty of environmental rights in the international legal system (as well as in the domestic laws of some nations) all contribute to this difficulty. These aspects are not, however, the only ones that create problems for international environmental regulatory systems. The focus of international law on nations rather than private individuals and the political unwillingness of nations to involve themselves in events occurring wholly within another nation are other factors that create further challenges for claims of environmental degradation. Figure 5.1 reveals the key factors in this issue. Recognizing the forces that act as obstacles to international environmental regulations for corporate actors, and the ways in which these forces interact with each other, can help us to understand how these barriers may be addressed. This issue is made particularly interesting for the complexity of the factors involved and moreover, because finding avenues through which corporations may be held accountable necessarily entails reflecting on and recognizing the still vague position that the environment occupies within international norms.

FIGURE 5.1: FACTORS CONTRIBUTING TO THE DIFFICULTY OF ENFORCING CORPORATE ENVIRONMENTAL RESPONSIBILITY FOR ACTIONS OCCURRING IN FOREIGN NATIONS



ENVIRONMENTAL PROTECTION THROUGH BILATERAL AND INTERNATIONAL AGREEMENTS?

Other sources allowing for the enforcement of corporate environmental responsibility may be found in international agreements that specifically include provisions for environmental protection. Included in this category is the North American Agreement for Environmental Cooperation (NAAEC) or the environmental side agreement to the North American Free Trade Agreement. The environmental side agreement allows citizens to submit petitions to the North American Commission for Environmental Cooperation (CEC) regarding the failure of the enforcement of an environmental law, which is

comparable to U.S. citizen suit jurisdiction.¹¹⁶ While presenting an important step in allowing for private actors to promote the enforcement of environmental laws and of corporate responsibility, the citizen suit provision may only result in a factual record of the environmental harm.¹¹⁷ This has the effect of increasing transparency and of creating a public record, however, it does not necessitate a remedy or automatically result in the remediation of a site.

In addition, the CEC process fails to provide private actors with the ability to enforce remediation or seek remedies for harms they have sustained.¹¹⁸ Although it is important to acknowledge that the CEC process recognizes the importance of environmental protection in trade agreements, it is still far from a complete and comprehensive solution to the difficulties in balancing environmental and economic interests. Indeed for the environmental side agreement of NAFTA, “the remedy available to such plaintiffs is merely a ‘spotlight remedy’ that does not provide concrete relief – the environmental court only has the power to publish findings.”¹¹⁹ The failure of the side agreement to provide anything more than publicity encourages parties to seek remedies through filing claims in domestic courts in the U.S., Canada, or Mexico where the injury occurred or to explore avenues such as the ATS.

Another model that has been suggested is an international court for the environment, which would fill the gap in an international system that still focuses predominantly on states. The ICJ, while able to hear disputes involving environmental

¹¹⁶ Tseming Yang, “The effectiveness of the NAFTA environmental side agreement’s citizen submission process: a case study of Metales y Derivados.” *University of Colorado Law Review* 76 (2005): 444.

¹¹⁷ Yang, 453.

¹¹⁸ Yang, 478.

¹¹⁹ De Medeiros, 541.

claims between nations, cannot be accessed by private parties. Plans for an international environmental court include the ability of the court to hear disputes between private and public parties.¹²⁰ Proposals such as this can be traced back to 1999 and would focus on:

- (i) adjudicating upon significant environmental disputes involving the responsibility of members of the international community;
- (ii) adjudicating upon disputes between private and public parties with an appreciable magnitude (at the discretion of the President of the Court);
- (iii) ordering emergency, injunctive and preventative measures as necessary;
- (iv) mediating and arbitrating environmental disputes;
- (v) instituting investigations, where necessary, to address environmental problems of international significance.¹²¹

While a world environment organization would help to address those problems that currently prevent the ability of private parties to seek remedies for harms committed by MNCs, it appears unlikely that a court of this type will be established in the near future.

Until environmental rights are recognized as a part of customary international law, it is likely that the same arguments that hamper the ability of plaintiffs to successfully bring claims for environmental damage to U.S. courts will hinder the establishment of a court to which all nations would be required to answer.

RECOMMENDATIONS

This analysis has demonstrated that the U.S. courts' interpretation of the ATS is in transition. The ATS has been successfully used in recent years by foreign nationals seeking to prosecute claims of human rights abuse under color of law. As a result, international environmental litigators have attempted to use the ATS to litigate against US-based corporations for environmental and human rights abuses. However, the limited success of

¹²⁰ Stephen Hockman, "An International Court for the Environment." *Environmental Law Review* 11 (2009): 2.

¹²¹ Hockman, 2.

plaintiffs indicates that the ATS cannot be relied upon as the one mechanism for seeking compensatory and punitive damages from US corporations that allegedly cause harm in other nations with or without color of law. The ATS may prove more successful for environmental claims if they are framed as human rights claims, however, the lack of formal, comprehensive international recognition of the importance of the environment will remain a significant barrier to international corporate accountability. Without a shift toward recognizing the importance of environmental security, these problems will continue to remain largely unrecognized.

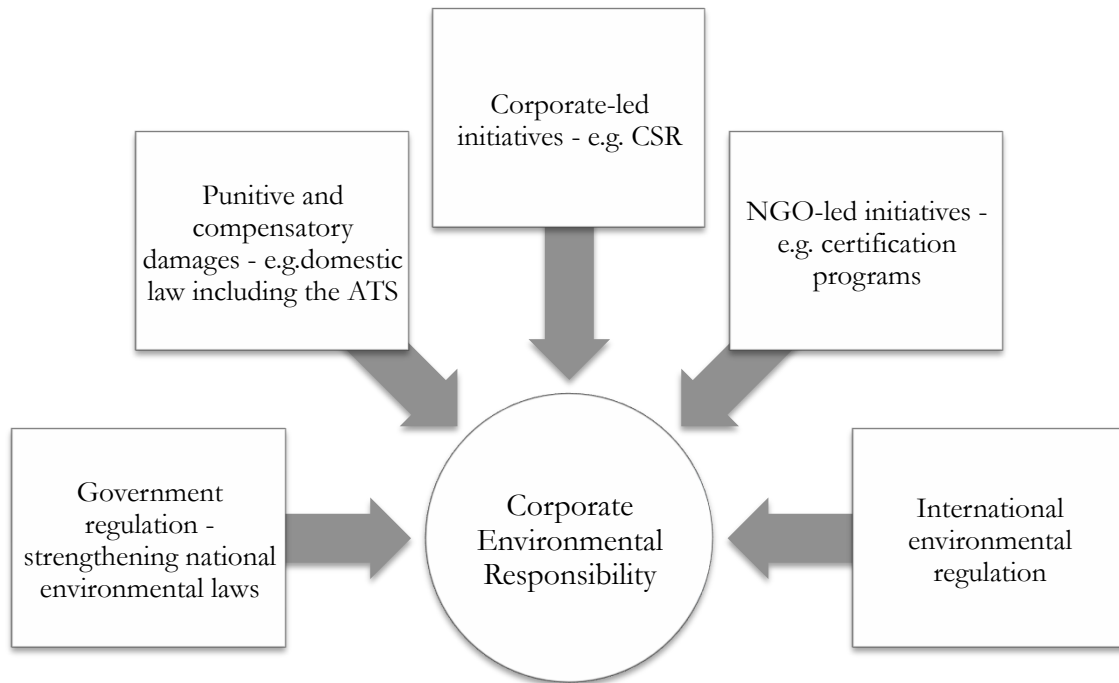
In sum, the ATS cannot constitute a ‘global solution’ for enforcing corporate environmental responsibility.¹²² As one mechanism, however, the ATS can be understood in a larger framework of efforts to influence corporate behavior. While a formal, legal solution for seeking relief may be attractive to victims, in order to see a much larger and more profound shift in the ways both corporations and citizens conceive of corporate behavior and activities, multiple mechanisms, working in conjunction with each other, will prove important for gaining this end (Figure 5.2).

This analysis also serves to question whether environmental regulation is best served at a national level. Substantial international environmental laws that address not only transboundary impacts but also elevate the environment to the level of an international or global good will be necessary to counter the impacts of large multinational corporations on the environments of developing nations. By establishing international consensus on the importance of the environment – similar to the way human rights are now considered – this movement will help to eliminate the ‘race to the bottom’ between developing nations in

¹²² Lai, 139.

which environmental health is forfeited for the sake of the economic gains of attracting foreign investment.¹²³

FIGURE 5.2: MECHANISMS FOR INFLUENCING CORPORATE BEHAVIOR



¹²³ James Boeving, "Half Full... Or Completely Empty?: Environmental Alien Tort Claims Post *Sosa v. Alvarez-Machain*." *Georgetown International Environmental Law Review* 18 (2005): 113.

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INTERNATIONAL TREATIES

International treaties or conventions are formal agreements that legally bind the participating parties and constitute one of the major sources of international law.¹²⁴ The establishment of the UN in 1945 has fundamentally affected the framework of international law in a number of different ways, most of which are beyond the scope of this analysis. Pertinent to this discussion, among those mentioned above, is the considerable growth in importance and breadth of multilateral treaties in the twentieth century.¹²⁵ While treaties legally obligate the parties to adhere to the rules of the convention, they have no authority to impose the resulting regulations on non-party nations. Similarly, parties may limit the extent of their participation by specifying reservations that allow legitimate refusal of compliance under certain conditions. International law has traditionally focused on and involved state actors, as opposed to non-state actors such as individuals or corporations. Here, it is important to note that treaties recognize and bind nations only, although, by becoming party to an agreement, the citizens of the nation concerned are also bound to its policies. Treaties existing between two parties are referred to as contract treaties or bilateral agreements, while treaties involving issues of a more general nature that interest and bring together a large number of states are referred to as multilateral treaties or international conventions.¹²⁶ Subsequent references to treaties will concentrate on the latter form unless specified.

¹²⁴ As with many features of the legal system, the term treaty may often be used interchangeably with convention, protocol

¹²⁵ Charney, 529.

¹²⁶ Christopher C. Joyner, *International law in the 21st century: rules for global governance*. (USA: Rowman and Littlefield Publishers, Inc., 2005), 11.

Although international treaties bind nations and their subjects, in truth the structure of these agreements is much less simple. There are a number of conditions that affect the enforcement of treaties domestically. Self-executing treaties are those that automatically become part of domestic law and for which no further congressional action is required.¹²⁷ Upon ratification and entry into force, the treaty is then binding on a nation's subjects and displaces any domestic laws that are at odds with the new treaty. With some countries, certain international laws are necessarily self-executing. Non-self-executing, on the other hand, indicates that while a nation may sign a treaty, for its terms to be enforceable in domestic courts additional legislation must be enacted to bring national laws into compliance. A treaty may be deemed to be non-self-executing by a state, however a nation can also indicate reservations or conditions for ratification, such as the condition of non-self-execution.¹²⁸ The U.S. in particular has often employed a non-self-execution condition, requiring that domestic laws be enacted before the treaty can take effect. The U.S. used conditional consent relating to non-self-execution in a number of instances prior to the advent of the rise in multilateral treaties after WWII, although some scholars note that these "international non-self-execution clauses" differ from modern non-self-execution clauses because they halt the binding of a nation to the treaty as opposed to preventing implementation in domestic courts.¹²⁹ The point is nevertheless that while there is significant disagreement about whether conditional consent clauses should be allowed in international treaties, the U.S. has continually used them for the purpose, in part, of

¹²⁷ Curtis A. Bradley and Jack T. Goldsmith, "Treaties, Human Rights, and Conditional Consent." *University of Pennsylvania Law Review* 149.2 (2000): 400.

¹²⁸ Conditions may also be termed amendment, reservation, understanding, declaration, or proviso, see Bradley, 404.

¹²⁹ Barkley, 408.

maintaining its sovereign authority while allowing for participation in the international legal system.

The source of treaty obligation, that is, what compels nations to abide by international treaties, is an amalgamation of multiple forces, including the risk of sanctions and international censure, and moral recognition of a treaty's rules as necessary and just. In legal terms, the obligation stems from the law norm, *pacta sunt servanda*,¹³⁰ which requires that once a nation enters into a treaty, it must from then on meet the conditions of the treaty. *Pacta sunt servanda* implies that changes in government or circumstance cannot remove a nation's legal obligation to the treaty.¹³¹ In this way, the norm represents a crucial factor in establishing and enforcing treaties, namely that if treaties could be discarded with changes in political parties, they would be essentially rendered useless. However, this also clearly affects the willingness of nations to enter into treaties if, under different circumstances, it may not be in their best interests.

Central to the subject of treaties in relation to international law as a whole is the connection between international treaties and customary law. The 1969 Vienna Convention on the Law of Treaties is the sole regulating force for written international treaties and has been in effect since 1980. In article 38, the agreement declares that an international treaty may come to bind non-party states through its development into customary law.¹³² The 1982 UN Convention on the Law of the Sea and the Geneva Conventions, for example, have become incorporated into the body of customary law.¹³³ The Vienna Convention also

¹³⁰ Meaning 'agreements must be kept.' SOURCE

¹³¹ Charney, 533.

¹³² Article 38 *Rules in a treaty becoming binding on third States through international custom*: Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such. United Nations, *Treaty Series*, vol 1155.

¹³³ Birnie, 14.

encompasses the notion of *jus cogens*, or peremptory norms, in articles 53 and 64, which void treaties that conflict with existing norms of the international community and any existing treaties in conflict with a newly emerged peremptory norm, respectively.¹³⁴ Thus, an international treaty, ostensibly binding only those states party to the convention, can play a significant role in forming international law applying to all states.

CUSTOMARY LAW

In understanding the structure of international law, the concept of *customary law* must be addressed, as it is a frequent feature of the international law discourse regarding commonly accepted rules by which nations may be governed and disputes decided. Customary law is, in itself however, a highly debated issue for a number of reasons that will be discussed. Generally, customary law concerns the common and consistent practices of states, arising from the belief in a legal obligation.¹³⁵ Herein lie two key elements of customary law that have been, and will likely continue to be, the root of disagreements and challenges to this source of international law. The first, state practice, indicates that custom derives from long-standing and general practices of nations. The second, often termed *opinio juris*, indicates that for practice to become custom, it must derive from a nation's belief in a legal mandate to abide by it.¹³⁶

¹³⁴ Article 53 *Treaties conflicting with a peremptory norm of general international law (jus cogens)*: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 *Emergence of a new peremptory norm of general international law ("jus cogens")*: If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

¹³⁵ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*. (Oxford: Oxford University Press, 2005), 23.

¹³⁶ Derived from *opinio juris sive necessitatis* meaning 'opinion that an act is necessary by rule of law.' *Black's Law Dictionary*, 7th ed., s.v. "*opinio juris sive necessitatis*."

These two elements are controversial as there is a distinct lack of consensus with respect to what constitutes a state practice and to the appropriate method for determining if the source of the practice results from a belief in legal obligation. In brief, the necessary frequency and consistency with which a state must follow a practice for it to be considered custom is undefined, as is the global prevalence of the practice, and some have posited that general state practices result more from other motivations, such as self-interest, rather than legal obligation.¹³⁷ This has the effect not only of allowing courts and lawyers the ability to define, at their discretion, certain practices as part of the body of customary law, but also of granting more import to the practices of influential and powerful nations. For instance, on occasion nonbinding international frameworks are used to signify customary law, blurring the line between voluntary and obligatory legal mechanisms.¹³⁸ In addition, the *opinio juris* requirement is to a certain extent paradoxical, as it makes the establishment of legal obligation dependent on a prior belief in it.

In a frequently cited decision by the United States Supreme Court in the case of *The Paquete Habana* in 1900, the Court stated that:

“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations...”¹³⁹

The opinion of the Supreme Court in this case not only indicates the recognition of customary law as a principle element of international law but also establishes it as a

¹³⁷ Goldsmith, 28.

¹³⁸ Goldsmith, 23.

¹³⁹ 175 U.S. 677, 700 (1900).

significant, at times even vital, part of domestic law.¹⁴⁰ Aside from the ambiguity of what can be deemed customary law in general, the exact role that customary law should play in the U.S., as well as the importance of executive, legislative, and judicial decisions compared to customary law, remains unclear. Since precedent is instrumental to the legal system, though the opinion of the Supreme Court in *The Paquete Habana* did not offer concrete specifications for the use of customary international law, it does yet shape its position in domestic courts.

GENERAL PRINCIPLES OF INTERNATIONAL LAW

As the precise meaning of this third source of international law, *general principles recognized by civilized nations*, in the statute of the ICJ is imprecise, there has been much debate over the type and source of principles that are intended to be used. Domestic law seems to comprise a large portion of the basis for possible general principles and so the uniformity of national regulations in various states can be indicative of its status as a general principle. However, this source of law is seldom used by the ICJ, resulting in a lack of comprehensive guidance on this issue and moreover when used, it is done ambiguously without reference to how they are determined as such.¹⁴¹

¹⁴⁰ Justice Blackmun goes further to say, "...the import of *The Paquete Habana* is clear: Customary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling." Harry A. Blackmun, "The Supreme Court and the Law of Nations." *The Yale Law Journal* 104 No. 1 (1994): 40.

¹⁴¹ Charney, 535-6.