

# SEX AND GLOBALIZATION<sup>1</sup>

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Berta E. Hernández-Truyol<sup>2</sup>

## INTRODUCTION

For some time now, I have focused on a mission to bring together the separate discourses of the human rights and trade fields—certainly not to blend them, but to raise awareness of their myriad interconnections. Indeed, human rights and trade are interlocking pieces of the puzzle we call international law and cannot possibly remain sequestered in the “splendid isolation”<sup>3</sup> in which they have existed since their inception as disciplines.

Commencing during the latter part of the twentieth century, internationalism has been undergoing a dramatic transformation: globalization—a powerful and dynamic force, generally seen as a gender neutral economic phenomenon that includes the international movement of commodities, money, information, and people as well as the infrastructures that allow those movements.<sup>4</sup> International trade is central to the idea of globalization, and technology has revolutionized the underlying human interaction. Formerly distant places are as close as our fingertips with the stroke of a computer keyboard, or only as far as an airplane ride. While once it took much planning (including translations) and time—hours, days, months—to communicate with places at opposite ends of the globe, today we are increasingly using a single language (English) across our myriad borders, and, with computers, communication across borders and time zones around the world takes only a matter of seconds.

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<sup>1</sup> This essay is based upon a presentation made at the “Latinas/os and the Law: Is Our Past Also Our Future?” conference held at Indiana University School of Law—Bloomington on March 29-30, 2007, and is part of a larger book project on the intersection of trade norms and human rights. The book, tentatively titled *TRADE AND HUMAN RIGHTS—GLOBAL LAWS, LOCAL LIVES*, co-authored with Stephen J. Powell, is forthcoming from New York University Press, with an anticipated publication date of Fall 2008. Many thanks to Luis Fuentes-Rohwer and Christiana Ochoa for their invitation to participate in this exciting conference.

<sup>2</sup> Levin, Mabie & Levin Professor of Law, University of Florida Fredric G. Levin College of Law; LL.M., New York University School of Law, 1982; J.D., Albany Law School of Union University, 1978; B.A., Cornell University, 1974. Many thanks to Professor Stephen J. Powell for his collaboration and to Cindy Zimmerman for her word processing and editing genius. Thanks also to Veronica Arenas (UF J.D. '07) for her research assistance.

<sup>3</sup> This defining phrase was first used by Professors Robert Howse and Makau Mutua in *PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION* (2000), available at <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html>.

<sup>4</sup> Berta E. Hernández-Truyol, *Human Rights, Globalization, and Culture: Centering Personhood in International Narrative*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 353, 353 (Berta E. Hernández-Truyol ed., 2002). “Globalization . . . is the process by which movements of capital, information, and persons within and across national borders serve to influence local norms, traditions, processes of learning, the exchange of information and goods, and lifestyles.” *Id.* at 358.

These realities of globalization enable increasing familiarity with cultures, customs, and religions not long ago deemed obscure.<sup>5</sup> Yet, not all the consequences of this compression of space and culture are desirable or favorable. The closeness of peoples and familiarity with diverse cultures has not automatically resulted in an embrace of differences, of the “other.” Rather, globalization, perhaps unwittingly, has inflamed religious, national, ethnic, and racial hatreds and strife, as well as sex and gender subordination and marginalization.

Moreover, not everyone is sharing in the economic benefits of globalization. Simultaneously coexisting with any apparent progress is the stubborn persistence of poverty, hunger, illiteracy, war, and disease—all social conditions that disproportionately affect women in their roles as providers of food and child care and as transmitters of culture. Significantly, however, globalization has a positive potential in this context as well. A recent World Bank study noted that globalization, because it creates money and jobs, is a powerful force for poverty reduction as societies and economies around the world are becoming more integrated.<sup>6</sup>

Certain “astonishing facts,”<sup>7</sup> presented by former Secretary General of the United Nations Kofi Annan almost a decade ago, starkly reveal the disparate levels of human existence and provide a glimpse into the impact of globalization on personhood. The richest fifth of the world’s people consume eighty-six percent of all goods and services, while the poorest fifth consume just 1.3%; the three richest people in the world have assets that exceed the combined gross domestic product of the forty-eight least developed countries; and the world’s 225 richest individuals, of whom sixty are *Estado Unidenses*,<sup>8</sup> have a combined wealth equal to the annual income of the poorest forty-seven percent of the world’s population. In the United States, we spend \$2 billion more a year (\$8 billion total) on cosmetics than the estimated cost of providing basic education for everyone in the world. *Estado Unidenses* and Europeans together spend \$17 billion a year on pet food—\$4 billion more than the estimated additional annual cost of providing basic health and nutrition for everyone in the world. Of the 4.4 billion people in developing countries, nearly three-fifths lack access to safe sewers, a third have no access to clean water, a quarter do not have adequate housing, and a fifth have no access to modern health services of any kind.

Ten years after Kofi Annan first brought these facts to light, the economic divide fueled by globalization persists notwithstanding the World Bank’s observation about its wealth creation potential. While world trade

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<sup>5</sup> *Id.* at 353-54.

<sup>6</sup> PAUL COLLIER & DAVID DOLLAR, WORLD BANK, GLOBALIZATION, GROWTH, AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY 1 (2002).

<sup>7</sup> Barbara Crosette, *Kofi Annan’s Astonishing Facts*, N.Y. TIMES, Feb. 27, 1998, at D16; see also U.N. DEV. PROG., HUMAN DEVELOPMENT REPORT 1998 (1998).

<sup>8</sup> I use *Estado Unidenses* to refer to persons who are U.S. nationals. Because this essay, as well as the book from which it is derived, is about the Americas, I use this term—rather than “American,” which could well refer to anyone from the Americas—to refer to persons from the United States.

has increased at the astounding rate of nearly 400% in the past dozen years, almost 1 billion people continue to survive on less than two dollars per day and even that is not considered abject poverty; a one dollar per day figure merits that classification.<sup>9</sup> Women comprise seventy percent of the world's poor.<sup>10</sup> Plainly, many in the global community are far from living in conditions minimally necessary for human thriving. This is particularly true for racial and ethnic minorities and women (particularly when they are also racial and ethnic minorities) in first world states, most people in third world states, and indigenous people in all states—North and South, East and West alike. These populations are experiencing a widespread pattern of inequality in access to education, health, nutrition, and participation in the political and economic sphere.

Bolivia provides a specific example that highlights how globalization both has promoted and harmed human rights causes. There, while trade in natural gas with Brazil has enriched the country's European-descended white elite, ninety percent of the rural and predominantly indigenous-descended Bolivians live in utter poverty without access to even basic sanitation, much less a secondary education.<sup>11</sup>

Another reality similarly serves to highlight the economic disparities that continue with and are exacerbated by globalization. International trade has expanded to absorb at least twenty percent of the gross domestic product of every developed nation. Simultaneously, however, the World Food Program of the United Nations was forced to expand operations to feed twice as many hungry people in 2006 as in the previous year.<sup>12</sup>

While the World Bank may be correct that absolute poverty has been driven downward by trade's economic growth,<sup>13</sup> some places and people have benefited more than others. For example, while the number of Asia's

<sup>9</sup> See generally BERTA E. HERNÁNDEZ-TRUYOL, *Getting Started: A General Introduction*, in *TRADE AND HUMAN RIGHTS* (forthcoming 2008) (analyzing data from Organisation for Economic Co-Operation and Development, [http://www.oecd.org/statsportal/0,2639,en\\_2825\\_293564\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/statsportal/0,2639,en_2825_293564_1_1_1_1_1,00.html)).

<sup>10</sup> Amnesty Int'l USA, Economic, Social and Cultural Rights (ESCR) and Women: A Fact Sheet (July 20, 2005), <http://www.amnestyusa.org/women/pdf/economicrights.pdf>.

<sup>11</sup> AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 54-56 (2003).

<sup>12</sup> Compare World Food Prog., Facts & Figures, HIV/AIDS & Emergencies: Compounding Crises (June 2006), available at [http://www.wfp.org/food\\_aid/doc/39149\\_Emergencies.pdf](http://www.wfp.org/food_aid/doc/39149_Emergencies.pdf), with World Food Prog., Breaking Out of the Poverty Trap, [http://www.wfp.org/food\\_aid/introduction/index.asp?section=12&sub\\_section=1](http://www.wfp.org/food_aid/introduction/index.asp?section=12&sub_section=1) (last visited Apr. 1, 2008). See also *Morning Edition: For Niger, Improved Health Care May Cut Famine* (NPR radio broadcast, Oct. 31, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4982368> (Ofeibea Quist-Arcton reporting that, "In sub-Saharan Africa, the United Nations World Food Program reports that it is struggling to feed a record forty-three million people—twice the number of just ten years ago.").

<sup>13</sup> It merits mentioning that there is a great deal of debate about the econometric measures that are used to measure abjection. See U.N. DEV. PROG., *HUMAN DEVELOPMENT REPORT: MILLENNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY* 42 Box 2.3 (2003), available at <http://hdr.undp.org/en/reports/global/hdr2003/>.

poor dropped dramatically, Africa's poverty levels increased. At present, sixty-six percent of the world's poor are in Africa.<sup>14</sup>

Thus, in any study of globalization, especially if one endeavors to pursue its benefits for all persons, not just the elite around the world, one must be aware of and seek to remedy its patent deficiencies in the myriad intersections of trade and human rights. Particular attention needs to be drawn to the impact of globalization on areas such as the environment, health, labor, trafficking, women, the global economy, indigenous populations, and poverty. The thesis of the book on which this essay is based is that viable alternatives exist to create structures and craft dialogues that can bridge the seemingly impassable divide between trade and human rights and will consequently move us forward to an era of fruitful integration of these spheres for the well-being of humankind generally and womankind specifically.

This essay is developed in three parts. First, I briefly describe the main source of international law—treaties—and locate both the trade agreements and the human rights agreements in that framework. Next, I provide a brief history of the splendid isolation of the trade and human rights disciplines and show that, far from being disconnected, they ought to be integrated. I close by focusing on some specific examples showing the gendered impact of globalization and suggest two methodological approaches—an incorporationist and a contextualist approach—that can be utilized to bridge the divide. The incorporationist model proposes that the Morals Clause in the General Agreement on Tariffs and Trade<sup>15</sup> (GATT) imports human rights principles and values into that agreement. The contextualist approach recognizes that trade law does not exist in a vacuum; rather, it co-exists with other international laws that have to be taken into account in interpreting those laws.

## I. INTERNATIONAL LAW FOUNDATION

The Statute of the International Court of Justice, in Article 38(1), sets out the sources of international law.<sup>16</sup> Treaties,<sup>17</sup> the first listed source, are

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<sup>14</sup> William Watson, *A Global World Is a More Equal World*, NAT'L POST ONLINE, May 29, 2002, <http://www.columbia.edu/~xs23/papers/worldistribution/NationalPostComment.htm>.

<sup>15</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>16</sup> Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute] (listing the sources as (a) "international conventions;" (b) "international custom;" (c) "general principles of law recognized by civilized nations;" and (d) "judicial decisions and the teachings of the most highly qualified publicists of the various nations").

<sup>17</sup> See Vienna Convention on the Law of Treaties, art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention] (providing four requirements for an instrument to be a "treaty:" (1) it must be an international agreement; (2) concluded between states; (3) in written form; and (4) governed by international law). This Convention is universally viewed as codifying customary norms of international law.

the most frequently used tool for international law making.<sup>18</sup>

In the United States, there are two important constitutional provisions pertaining to treaties that are also relevant to the trade and human rights intersection. Article II of the U.S. Constitution gives the President the power to make treaties with the advice and consent of a two-thirds super majority of the Senate.<sup>19</sup> Thus, the constitutionally established treaty power in the United States is one of executive–congressional co-determination. However, as a matter of historical reality and judicial fiat, two other types of agreements, both of which would satisfy the international usage of the word treaty, are interchangeable with and effectively functional equivalents of Article II treaties.<sup>20</sup> One is the sole executive agreement; the other is the executive agreement plus a joint resolution requiring a simple majority vote in each chamber of Congress. The U.S. Department of State endorses these alternative approaches noting that there are

three constitutional bases for international agreements other than treaties . . . [:] (1) Agreements Pursuant to Treaty . . . ; (2) Agreements Pursuant to Legislation . . . ; and (3) Agreements Pursuant to the Constitutional Authority of the President . . . [including authority] as Chief Executive . . . [,] to receive ambassadors and other public ministers[,]. . . as “Commander-in-Chief”[,]. . . and . . . to “take care that the laws be faithfully executed.”<sup>21</sup>

The other U.S. constitutional provision that is relevant in a discussion of international treaties is the Supremacy Clause, in Article VI. That provision states that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>22</sup>

This brief mention of treaties and relevant U.S. constitutional provisions is pertinent because the World Trade Organization’s constitutive document<sup>23</sup> and the GATT,<sup>24</sup> which sets out trade rules, as well as the numerous

<sup>18</sup> See BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 93 (2007).

<sup>19</sup> U.S. CONST. art. II, § 2, cl. 2. (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

<sup>20</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1, 18 (1957) (“[A]n Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”); *United States v. Pink*, 315 U.S. 203 (1942) (upholding the validity of presidential executive international agreements against the claim that Article II required the participation of the Senate for the conclusion of such agreements).

<sup>21</sup> U.S. DEP’T OF STATE, *SUPPLEMENTARY HANDBOOK ON THE C-175 PROCESS: ROUTINE SCIENCE & TECH. AGREEMENTS*, app. A § 721.2(b) (2001), available at <http://www.state.gov/g/oes/rls/rpts/175/1319.htm>.

<sup>22</sup> U.S. CONST. art. VI, cl. 2.

<sup>23</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

<sup>24</sup> GATT, *supra* note 15.

pertinent human rights agreements—such as the International Covenant on Civil and Political Rights<sup>25</sup> (ICCPR); the International Covenant on Economic, Social, and Cultural Rights<sup>26</sup> (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women<sup>27</sup> (CEDAW); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);<sup>28</sup> and the Convention on the Rights of the Child<sup>29</sup> (CRC)—are treaties and thus are part of the body of international law as well as U.S. law. When ratified, these treaties constitute the “supreme Law of the Land.”<sup>30</sup>

## II. TRADE AND HUMAN RIGHTS

The fields of trade law and human rights laws—both custom-based<sup>31</sup> and as embodied in the treaties listed above—have existed in splendid isolation from one another. That is anomalous given not only the interconnections this essay notes but also the origins of these fields. The idea of human rights and the idea of international trade started to be formalized after the First World War. Thereafter, the atrocities of the Second World War inspired rapid evolution and concretization of both legal disciplines.

The economic downturns and isolation that led to unchecked nationalism and the tribalism that resulted in unfathomable eradication of human life signaled the watershed moment for both rapid growth of the human rights movement and swift creation of global economic institutions such as the International Bank for Reconstruction and Development, known as the World Bank, and the International Monetary Fund. The Universal Declaration of Human Rights<sup>32</sup> and the GATT continue to serve as the key documents governing human rights and trade, respectively. Very telling with regard to their parallel origins is that the documents celebrated their fiftieth anniversaries slightly over one year apart at the end of the twentieth century. Each instrument has inspired long series of negotiations leading to the instrument's ever broader reach, a complex web of regional and global institutions, and ever tighter limitations on state action. Yet, notwithstanding the

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<sup>25</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>26</sup> International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>27</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW].

<sup>28</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter ICERD].

<sup>29</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989) [hereinafter CRC].

<sup>30</sup> U.S. CONST. art. VI, cl. 2.

<sup>31</sup> See ICJ Statute, *supra* note 16, at art. 38(1)(b) (listing “international custom” as a source of international law).

<sup>32</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

multiple intersections, these treaties in two fields so central to human thriving have seldom even acknowledged the existence of the other.

Evolution in these fields shows a total absence of any effort at coordination by the states negotiating them to make the world not only a richer, but a better place. The surprising part about this isolationist reality is that in the post-Second World War universe the countries participating in both the development of the human rights ideas and the trade ideas were the same. Most likely, given the way diplomacy works, it was the same people attending both sets of meetings, discussing the two sets of ideas, engaging in negotiations, setting the policies, and drawing the blueprints. That reality notwithstanding, the two regimes evolved in wicked isolation from each other—with different formats, different structures, different goals, and even different languages.

In part because of this isolation, the world trade regime that has developed has been charged with working a “profound dehumanization and systematic banalization of civilization.”<sup>33</sup> Many underscore that the economic growth presumptively generated by globalization is in stark contrast with the “hundreds of millions of people [who are still] denied the basic human rights provided for by the United Nations.”<sup>34</sup>

The proposed approach of this Article eschews such polarization. Rather, by reading, analyzing, and construing the legal frameworks for both disciplines as integrated instead of isolated, it shows that we can promote trade and still observe human rights. For example, the GATT sets out the rules for trade that are designed to allow states to make full use of their comparative advantage by removing impediments to the free movement of goods, primarily through non-discrimination provisions.<sup>35</sup> These extensive rules, while promoting free trade, do not allow unfettered action. Article XX contains ten exceptions to the non-discrimination rule that expressly allow a state to discriminate to protect public morals, to conserve exhaustible natural resources, to protect human, animal, or plant life or health, and to preserve national treasures.<sup>36</sup> Article XX(a)’s protection of public morals provides

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<sup>33</sup> Marc Cooper, *From Protest to Politics*, THE NATION, Mar. 11, 2002 (quoting the elected governor of Brazil’s Rio Grande do Sul state, Olivio Dutra, at the Second Annual World Social Forum in 2002), available at <http://www.thenation.com/doc/20020311/cooper>.

<sup>34</sup> Warren Allmand, *Preface* to ROBERT HOWSE & MAKUA MUTUA, PROTECTING RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION 3 (2000).

<sup>35</sup> The Most Favored Nation Clause requires WTO Members to provide the same treatment to imports from all Members that it gives to its most favored trading partner. GATT, *supra* note 15, at pt. I. The National Treatment Clause requires that foreign goods face equal conditions of competition in the market as like domestic products. *Id.* at pt. II.

<sup>36</sup> *Id.* at art. XX (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (c) relating to the importations or exportations of gold or silver; (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . ; (e) relating to the products of prison labour; (f)

human rights norms an *entrée* into the trade regime. Over the years states have restricted trade on the basis of the “immorality” of activities in other countries, e.g., prohibiting trade with countries that permit slavery and banning child pornography.<sup>37</sup> Trade restrictions based on “immorality” of activities should also reach the products of immoral acts by a foreign government against its citizens, such as products made by indentured children or from countries that deny freedom of the press, the right to emigrate, or that have a consistent pattern of gross violations of human rights such as the failure to enforce gender-based and other non-discrimination norms.

Numerous human rights principles are relevant to the trade intersection concerning sex. The two basic human rights agreements, the ICCPR<sup>38</sup> and the ICESCR,<sup>39</sup> prohibit discrimination on the basis of sex, among other classifications<sup>40</sup>—a protected right ostensibly being trampled by trade and globalization. The CEDAW provides a wholesale protection of women’s equality, including from cultural tropes that are pretextually deployed to

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imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement . . . ; (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry . . . ; (j) essential to the acquisition or distribution of products in general or local short supply . . .”).

<sup>37</sup> See STEVE CHARNOVITZ, *The Moral Exception in Trade Policy*, in TRADE LAW AND GLOBAL GOVERNANCE 325, 346 (2002).

<sup>38</sup> In addition to numerous provisions for protection of procedural rights, the ICCPR protects certain civil and political rights, including the right to life. It includes a general disapprobation of the death penalty and an outright prohibition against imposing the death penalty on pregnant women and minors, ICCPR, *supra* note 25, at art. 6; the prohibition against torture or cruel and inhumane degrading punishment, *id.* at art. 7; the prohibition against slavery and servitude, *id.* at art. 8; the right to liberty and security of the person, *id.* at art. 9; the inherent dignity of the human person, *id.* at art. 10; the right to liberty of movement, including freedom to choose residence, *id.* at art. 12; the right to personhood, *id.* at art. 16; the right to privacy *id.* at art. 17; the right to freedom of thought, conscience, and religion, *id.* at art. 18; the right to hold opinions without interference and freedom of expression, *id.* at art. 19; the prohibition of war propaganda, *id.* at art. 20; the right to peaceful assembly, *id.* at art. 21; the right to freedom of association, *id.* at art. 22; the right to protection of the family, *id.* at art. 23; the right of children not to be discriminated on any category as earlier listed, *id.* at art. 24; the right to take part in the conduct of public affairs of the state, *id.* at art. 25; and the right to protection of culture, *id.* at art. 27.

<sup>39</sup> The ICESCR protects various economic, social, and cultural rights, specifically including: the right to work, ICESCR *supra* note 26, at art. 6; favorable conditions of work, *id.* at art. 7; form trade unions, *id.* at art. 8; social security, *id.* at art. 9; protection of the family, *id.* at art. 10; adequate standard of living including adequate food, clothing, and housing, *id.* at art. 11; health, *id.* at art. 12; education, *id.* at art. 13; and take part of cultural life, *id.* at art. 15.

<sup>40</sup> ICCPR, *supra* note 25, at art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICESCR, *supra* note 26, at art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

keep women in subordinated status.<sup>41</sup> The CRC specifically protects girl-children by prohibiting discrimination on the basis of sex as well as on myriad substantive areas.<sup>42</sup> Other treaties relevant to trade include ones prohibiting torture,<sup>43</sup> genocide,<sup>44</sup> slavery,<sup>45</sup> and trafficking.<sup>46</sup>

A major problem that remains for the legal advocate of human rights concerned with restraints imposed by trade rules is that, as the existing chilling economic reality suggests, human rights law is universally embraced in theory but does not always translate to real life. This is especially true for the human rights principles most likely to intersect with the trade rules, such as the abuse of core labor rights, including a ban on products made by inden-

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<sup>41</sup> CEDAW, *supra* note 27, at art. 5(a). The CEDAW prohibits sex discrimination in both the public and private sphere; recognizes that women's subordination—social, cultural, political, and economic—is the result of not only public but also private acts; denounces cultural tropes that result in the subordination of women; and particularly significantly prohibits discrimination in labor.

<sup>42</sup> CRC, *supra* note 29, at art. 2. The CRC provides children with protections on myriad grounds including protection from work, *id.* at art. 32; entitlement to an education, *id.*, arts. 28 & 29; and prohibition of cultural tropes that discriminate, *id.* at art. 30. Significantly, the Beijing Declaration and Platform for Action specifically addresses concerns of persistent inequality of women and girl-children notwithstanding the prohibitions against sex discrimination in the CEDAW and the CRC. Beijing Declaration and Platform for Action, Fourth World Conference on Women, Beijing, China, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995). At paragraph 259 it provides:

[I]n many countries available indicators show that the girl child is discriminated against from the earliest stages of life, through her childhood and into adulthood. In some areas of the world, men outnumber women by 5 in every 100. The reasons for the discrepancy include, among other things, harmful attitudes and practices, such as female genital mutilation, son preference—which results in female infanticide and prenatal sex selection—early marriage, including child marriage, violence against women, sexual exploitation, sexual abuse, discrimination against girls in food allocation and other practices related to health and well-being. As a result, fewer girls than boys survive into adulthood.

Moreover, it acknowledges that girls are often treated as inferior—an attitude that has lifelong repercussions of second-class citizenship and marginalization, *id.* ¶ 26, and girls continue to be molded into that gender roles that perpetuate women's subordination as well as social and cultural stereotypes, *id.* ¶¶ 262 & 265. Based on these and other observations, strategic objectives were developed at the Conference for states to seek to eliminate “all forms of discrimination against the girl-child,” (Strategic Objective L.1) including “negative cultural attitudes and practices” (Strategic Objective L.2) and discrimination in education (Strategic Observation L.4), and to improve health and nutrition (Strategic Objective L.5). It also urges the states to work to eliminate “economic exploitation” (Strategic Observation L.6) and “violence against the girl child” (Strategic Objective L.7). See The Girl-child Diagnosis, UN Fourth World Conference on Women: Platform for Action, <http://www.un.org/womenwatch/daw/beijing/platform/girl.htm#diagnosis> (last visited Apr. 1, 2008).

<sup>43</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

<sup>44</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), at 174, U.N. Doc. A/810 (Dec. 9, 1948).

<sup>45</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, Sept. 25, 1926, 60 L.N.T.S. 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *adopted* Apr. 30, 1956, 226 U.N.T.S. 3.

<sup>46</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317 (IV), U.N. Doc. A/1251 (Dec. 2, 1949).

tured children; the protection of the health and safety of indigenous populations, including trade restrictions aimed at preserving the natural resources on which their future relies; or the role of women and children in society.

Let me make one last important point before I get to a specific example of an existing problem that can be at least ameliorated if not solved by the recognition of the ubiquity of human rights in trade. My embrace of the idea that the trade system does not, indeed cannot, exist in isolation of the human rights system should not be interpreted as my blanket embrace of the existing human rights model. To the contrary, I have noted—often for the record—that we should not idealize the human rights system in its present configuration as it is racialized, gendered, colonialist, imperialist, western/northern, and heteropatriarchal. The human rights model that I envision in creating intersections with the trade regime is a reformed one that is inclusive, is culturally sensitive, and strives for real, not imagined, equality and justice. Such a reformed human rights vision, when it intersects with the trade regime, will result in a system that bears a resemblance of a human face.

### III. USING THE HUMAN RIGHTS TOOLS: SEX AND GLOBALIZATION

Finally, to elucidate the problem of the fields' isolation, this essay focuses on the intersection of trade with sex/gender. This is of critical importance to Latinas both within the United States, who find their citizenship doubly second-class because of their sex and their ethnicity, and for Latinas in America Latina, for their second-class status based on sex.<sup>47</sup> Of course, Latinas often are further subordinated for other protected traits in their multidimensional selves, such as race, language, accent, class, religion, and sexuality.

As I mentioned earlier, both the ICCPR and the ICESCR prohibit sex discrimination. The ICCPR also protects culture, and the non-discrimination clauses of both documents prohibit discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. The CEDAW, aimed at bettering the condition of women around the world, focuses on work, one of the key intersections of gender and trade in the public and private spheres. The Convention includes explicit protections for women workers, such as a mandate that they be guaranteed social security, equal pay for work of equal value, maternity leave with pay and without loss of benefits or seniority, and family

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<sup>47</sup> See generally Berta Esperanza Hernández-Truyol, *Borders (En)Gendered—Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997) [hereinafter *Borders (En)Gendered*]; Berta E. Hernández-Truyol, *Las Olvidadas (The Forgotten Ones): Gendered in Justice/Gendered Injustice—Latinas, Fronteras, and the Law*, 1 J. GENDER, RACE & JUST. 353 (1998); M. Patricia Fernández-Kelly, *Immigration, Poverty, and Transnationalism: The Changing Terms of Citizenship in a Global Economy*, in MORAL IMPERIALISM, *supra* note 4, at 337.

health insurance.<sup>48</sup> Also relevant to the role of women and trade is the provision in the Beijing Declaration and Platform for Action calling on all governments to “ensure that national policies related to international and regional trade agreements do not adversely impact women’s new and traditional economic activities.”<sup>49</sup>

With respect to our hemisphere, there are significant documents prohibiting discrimination against women (the Charter of the Organization of American States<sup>50</sup> and the American Convention on Human Rights<sup>51</sup>) and establishing norms against violence against women (the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women).<sup>52</sup> I include a mention of violence in this discussion of the trade and human rights intersection because, from a human rights perspective, it is logical to expand the idea of violence to include economic violence.<sup>53</sup> Hunger, homelessness, illiteracy, unemployment, and undercompensation are violent realities that deprive women and their children of health and life. In addition, it is important to note that in the Americas as well as in the rest of the world the persistent and pervasive problem of violence against women often is exacerbated and inflamed both by culture and trade.

Given the above-discussed human rights non-discrimination mandates, the trade system exists in a world of at least theoretical legal equality of women and men. Nonetheless, trade theorists and practitioners contend that there is nothing gendered about trade—i.e., trade is gender neutral—so there is no need for special protection of women in the trade regime. This stance is held even though issues of hunger, poverty, malnutrition, and maternal and infant health are, in reality, gendered. One example that contradicts the trade perspective’s claim of its non-gendered nature is the North American Free Trade Agreement’s labor side agreement,<sup>54</sup> which specifically makes

<sup>48</sup> CEDAW, *supra* note 27, art. 11.

<sup>49</sup> Beijing Declaration and Platform for Action, *supra* note 42.

<sup>50</sup> Charter of the Organization of American States, art. 3(1) (“The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.”).

<sup>51</sup> Organization of American States, American Convention on Human Rights, art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”).

<sup>52</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belem do Para”), art. 1, 33 I.L.M. 1534 (1994) (“[V]iolence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”).

<sup>53</sup> See Berta E. Hernández-Truyol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607 (1997).

<sup>54</sup> North American Agreement on Labor Cooperation, Annex 1(7) & (8), Sept. 14, 1993, 32 I.L.M. 1499.

non-discrimination and equal pay for equal work principles applicable to women. Indeed, as this essay discusses below, trade is most plainly gendered in its consequences; its promise of prosperity has eluded women all around the globe.

Focusing on the Americas, the cultural environment for women—the *machista/marianista* paradigm—is relevant. The man is the public figure belonging in government and work; the woman the private person belonging at home.<sup>55</sup> While this remains the model at home, globalization and its trends have taken women from the home into the so-called productive economic sector. However, they have yet to enjoy the fruits of the economic benefits that trade promises. Women constitute seventy percent of the world's absolute poor; women work two-thirds of the world's working hours, yet earn only one-tenth of the world's income; and women own less than one percent of the world's property.<sup>56</sup> Although recent research reveals that a minuscule number of women earn on par with men, the overwhelming majority of the world's women continue to earn significantly less than men.<sup>57</sup> These facts are grounded in the reality of global gendered work segregation, which places women in the lower compensated, so-called pink collar jobs.<sup>58</sup>

It is women, particularly ethnic and racial minority women, who are most likely to be found working countless hours on the global assembly line. The terms and conditions of the global assembly line jobs—international and often local laws notwithstanding—are rooted in societal views of gender difference and of gender, class, and race hierarchies. Indeed, the Inter-American Development Bank has noted that the gains from trade “have been significantly superior for richer, more educated women who are not members of groups facing racial or ethnic discrimination.”<sup>59</sup> On the other hand, women have only a small percentage of the “sexy” and lucrative overseas jobs with U.S. multinationals.<sup>60</sup>

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<sup>55</sup> See Hernández-Truyol, *Borders (En)Gendered*, *supra* note 47.

<sup>56</sup> CANADA'S COALITION TO END GLOBAL POVERTY (CCIC), *Achieving Gender Equality, in MEETING THE GLOBAL CHALLENGE TO ELIMINATE POVERTY: A CANADIAN 10-POINT AGENDA 4* (2007), [http://www.ccic.ca/e/001/agenda\\_4\\_achieving\\_gender\\_equity.shtml](http://www.ccic.ca/e/001/agenda_4_achieving_gender_equity.shtml) (last visited Sept. 17, 2007).

<sup>57</sup> See *Equality Through Pay Equity*, TRADE UNION WORLD BRIEFING (Int'l Confederation of Free Trade Unions/ICFTU, Brussels, Belg.), Mar. 2003, at 1.

<sup>58</sup> See Berta E. Hernández-Truyol, *Law Is Not Enough*, 37 GEO. WASH. INT'L. L. REV. 1031 (2005) (reviewing ANNE-MARIE MOONEY COTTER, *GENDER INJUSTICE: AN INTERNATIONAL COMPARATIVE ANALYSIS OF EQUALITY IN EMPLOYMENT* (2004)).

<sup>59</sup> Claudia Piras, *An Overview of the Challenges and Policy Issues Facing Women in the Labor Force*, in *WOMEN AT WORK: CHALLENGES FOR LATIN AMERICA 3*, 21 (Claudia Piras ed., 2004).

<sup>60</sup> See Gretchen Lang, *Women Seize Opportunities in the Overseas Executive Suite*, INT'L HERALD TRIBUNE, Nov. 23, 2007, at 7 (“The percentage of women in international business has been low for many years. As recently as 2000, only 13 percent of the expatriate managers pooled by the relocation service company GMAC for its widely watched ‘Global Relocation Trends’ survey were women, and researchers said they did not expect the number to rise. In 2005, however, companies surveyed by GMAC reported that 23 percent of their expatriate managers were women.”).

Guatemala presents a good example of the cultural tropes at play, unimpeded by the hands-off approach of trade to gender, that keep women from enjoying the aspirational economic well-being that trade is anticipated to provide. A few “country realities” are telling. Since 2002, Guatemala has experienced a sharp rise in violence against women, including a tripling of female murder victims.<sup>61</sup> Its laws are complicit in the perpetuation of the problem because they provide that domestic violence cannot be prosecuted unless signs of injury are still visible ten days after the attack. Sexual assault is not defined as a crime, and sexual harassment is not specified as a crime in the penal code. Until 2004, marital rape was not a criminal offense, and the penal code allowed a man who raped a female over twelve years of age to escape punishment by marrying her.<sup>62</sup>

Significant to the trade perspective is the Guatemalan workplace environment, which reflects the socio-cultural environment of gender subordination and inequality. In the formal sector, there exists rampant discrimination that drives an even higher number of women to the informal sector where the regulation is lax, if at all existent.<sup>63</sup> Women’s main fields of employment are agriculture, manufacturing, commerce, and service. In these fields women earn less than men—the average annual wage for women in 2002 was fifty-eight percent to seventy-one percent of that of men—and are, for the most part, absent from the ranks of managers.<sup>64</sup> This pattern drives women to the *maquilas*<sup>65</sup> where, in 2004, women comprised eighty percent of all workers.

The Guatemalan *maquilas* themselves are not nirvana. To be sure, they hold the promise of better pay, but illegal discrimination and hostile conditions are prevalent—including longer work hours than men, wages half that of the men,<sup>66</sup> and pregnancy tests as a condition of hiring.<sup>67</sup> Documented

<sup>61</sup> Compare U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2006: GUATEMALA (2007) [hereinafter COUNTRY REPORT 2006] (reporting 603 female deaths in 2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78893.htm>, with U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003: GUATEMALA (2004) (reporting 244 female deaths in 2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27900.htm>.

<sup>62</sup> COUNTRY REPORT 2006, *supra* note 61.

<sup>63</sup> HUMAN RIGHTS WATCH, FROM THE HOUSEHOLD TO THE FACTORY: SEX DISCRIMINATION IN THE GUATEMALAN LABOR FORCE (2002) [hereinafter HRW], available at <http://hrw.org/reports/2002/guat/index.htm#TopOfPage>. For example, domestic workers fall under a separate labor code that waives the eight-hour workday and increases it to fourteen hours, and the workers do not have a right to the minimum wage, the right to a written employment contract, or the right to a full day’s rest on Sunday. Moreover, employers are not required to register with the labor ministry making labor violations possible and undetectable. *Id.* pt. I; see also COUNTRY REPORT 2006, *supra* note 61.

<sup>64</sup> COUNTRY REPORT 2006, *supra* note 61 (citing figures from the 2002 National Study on Income and Spending, the most recent available).

<sup>65</sup> *Maquilas* (as they are known in Guatemala) or *maquiladoras* are assembly-for-export industries.

<sup>66</sup> See *Guatemala: Country Overview*, MADRE.org, <http://www.madre.org/countries/Guatemala.html> (last visited Nov. 07, 2007).

<sup>67</sup> See *id.*; HRW, *supra* note 63, pt. V.

cases also reveal that some women are required to waive their right to have any more children before they are hired so as to limit their claim to the maternity leave to which they are legally entitled. There also exist intimidation and threats of reprisals in the workplace that operate to prevent women from joining unions. Sexual harassment is rampant. Notwithstanding proposals to criminalize such conduct in the workplace, Guatemala has failed to adopt legislation prohibiting it.

Guatemala is not alone as a state where the gendered impact of trade is patent. The situation is much the same in Mexico, although in Mexico the laws do prohibit sexual harassment.<sup>68</sup> As such, however, Mexico becomes an example where rules and realities do not converge.

Interestingly, in the cultural context, it appears that, notwithstanding the questionable conditions of the *maquilas*, *maquilas* do serve the purpose of giving women a new sense of self. The regular wage work and improved access to other public realms have had an impact on gender relations. Work provides to women a sense of empowerment and personal autonomy from working outside the home—even at the *maquilas*. Women workers gain more control over budgeting and other decisions within the home and get greater leverage in asking men to participate in household work.<sup>69</sup>

Women's increased independence contrasts with men's loss of control and domination over them and the household. Because of the *machista* climate, many men are uncomfortable with women's new social location. As one man expressed in an interview with a sociologist studying the *maquiladoras*, "[s]ince women started working at the *maquiladoras* they have lost all sense of decorum."<sup>70</sup> Perhaps such social attitudes are the reason for increased domestic violence.

Women workers' access to public resources and services allows them to become integrated into mainstream society; their increased participation creates the possibility of women emerging as more forceful and visible public actors. Yet, the privatization process has created immense holes in the proverbial social safety net, consequences that disproportionately affect women. Indeed, it is women who bear the brunt of neoliberal economic austerity measures that result in reduced health care, child care, education, and social security assistance. Women are affected in other ways as well. For example, trade in persons—trafficking—is linked increasingly to the trade regimes bolstered by their demand for cheap labor.<sup>71</sup> Thus, trade rules have heedlessly promoted a modern form of slavery for both men and women.

<sup>68</sup> See, e.g., Maria P. Fernández-Kelly, *Maquiladoras: The View from the Inside*, in THE WOMEN, GENDER & DEVELOPMENT READER 203 (Nalini Visvanathan et al. eds., 1997); Eliva R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729 (2000).

<sup>69</sup> See Fernández-Kelly, *supra* note 68, at 215.

<sup>70</sup> *Id.* at 214 (quoting male acquaintance in Mexico).

<sup>71</sup> See, e.g., Antonio M. Costa, *Foreword of the Executive Director*, in U.N. OFFICE ON DRUGS AND CRIME (UNODC), *TRAFFICKING IN PERSONS: GLOBAL PATTERNS* 10, 10-11 (2006), available at [http://www.unodc.org/pdf/traffickinginpersons\\_report\\_2006ver2.pdf](http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf).

But beyond that, trafficking for prostitution also follows trade routes, as trade workers take their demands for sex with them, and this effects a gendered outcome. In addition, current figures on the wage gap show increasing distance between the rich and the poor and growing income and purchasing power disparities, with the disparities more pronounced when data are disaggregated by sex.<sup>72</sup> So, from many angles, it becomes clear that trade is gendered, even if it may be facially neutral.

This essay has utilized gender as an example of a geography where the acceptance, incorporation, and deployment of human rights norms in the trade context can result in effecting (gendered) justice. There are myriad other locations where integrating human rights will serve the same end—promoting health, protecting the environment, alleviating the plight of indigenous populations, protection of cultural knowledge, and diminution of poverty. The gender-based examples show one patent reality: unbridled trade, which I call savage capitalism, may enrich a few but impoverishes many, especially women—not only economically, but also socially and culturally.

#### CONCLUSION

In conclusion, this work proposes two models in which the trade and human rights systems can be linked to make the justice promise of the human rights regime a reality. One way to link the regimes is an incorporationist model. This framework provides that the Article XX public morals clause in GATT can be read to incorporate fundamental human rights, such as the prohibition on sex discrimination, into the trade structure. The other alternative is the contextualist model. This paradigm dictates that the trade regime does not exist in a vacuum but rather in a complex web of international norms that form the basic framework of and must be respected in trade negotiations and agreements. This contextualizing of trade within human rights is consistent with a rule of construction that requires that all obligations—the body of law governing state actors—be interpreted as consistent (rather than in conflict) with each other.<sup>73</sup> A framework that recognizes, embraces, and performs trade and human rights as part of an integrated whole in the international legal structure, either through an incorporationist or a contextualist approach, is the only way to obtain gendered justice.

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<sup>72</sup> See David Dollar, *Globalization, Poverty, and Inequality Since 1980*, 20(2) *WORLD BANK RES. OBSERVER* 145 (2005).

<sup>73</sup> Vienna Convention, *supra* note 17, art. 31.

