

## CLI BACKGROUND PAPER NO. 9 (Executive Summary)

### Climate Change and Human Rights

by Pamela Stephens\*

International human rights of both present and future generations are impacted by global climate change.<sup>1</sup> Existing international human rights law does not create legal obligations sufficient to protect either, however. It is possible to identify human rights norms that could be argued to extend to the effects of climate change. In addition, it is possible to find human rights law that suggests that the rights of future generations are to be protected. However, the norms underlying this area are at present insufficiently established to create legal obligations. Given the lack of clarity and universal acceptance of these norms, major procedural limitations exist to bringing claims based upon them. Moreover, the slow process of norm development through litigation does not offer a sufficiently effective method of combating the harms of climate change.

Establishing human rights protections for future generations requires first establishing that such rights protect the present generation. Moreover, even if one were able to establish the existence of a particular norm under either treaty or customary international law, establishing that the content of that norm encompasses the effects of global climate change may still be problematic. This is so in large part because virtually all of the international human rights law considered here precedes concerns about global climate change and thus does not explicitly address these concerns. However, there do exist several human rights norms from which one might derive a claim encompassing the impacts of climate change on humans. These norms include: the right to life, the right to privacy, the rights of indigenous peoples,<sup>2</sup> and socio-economic rights, such as those to health, food, water, property and an adequate standard of living.<sup>3</sup>

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<sup>1</sup> See Intergovernmental Panel on Climate Change: 2007 Assessment Report, Summary for Policy Makers, available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

<sup>2</sup> On the perspectives of indigenous peoples regarding the ecological rights of future generations, see Section V of this Green Paper.

<sup>3</sup> See, e.g., Universal Declaration of Human Rights art. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess. 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to life, liberty, and security of person”), reprinted in 3 International Law & World Order: Basic Documents III.A.1 (Burns H. Weston & Jonathan C. Carlson eds., 1994-) (hereinafter “Weston & Carlson”); International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171, 56 U.S. Dep’t. State Bull. 107, reprinted in 6 I.L.M. 360 (1967) and 3 Weston & Carlson III.A.3 [hereinafter ICCPR] (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”); The European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5, reprinted in 3 Weston & Carlson III.B.2 [hereinafter European Convention] (“Everyone’s right to life shall be protected by law. . . .”); The American Convention on Human Rights art. 4, Nov. 22, 1969, 1114 U.N.T.S. 123, O.A.S.T.S. No. 36, O.A.S. Off. Rec. O.E.A./Ser. L/V/II.23 doc. 21 rev 6 (1979), reprinted in 9 I.L.M. 673 (1970) and 3 Weston & Carlson III.B.24 [hereinafter American Convention] (“1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.”); The African Charter on Human and Peoples’ Rights (Banjul Charter) art. 4, June 27, 1980, OAU Doc. CAB/LEG/67/3 rev. 5, reprinted in 21 ILM 58 (1982) and Weston & Carlson III.B.1 (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person.”). UDHR, art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”); European Convention art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”); American Convention art. 11 (“No one may be the object of arbitrary or abusive interference with his private life, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”); UDHR, art.17 (Right to Property), art. 25 (Right to Adequate Standard of Living); International Covenant on Economic Social and

For example, of the possible human rights norms that might be available for victims of global climate change, the right to life is the most widely acknowledged in both binding and non-binding international instruments. Clearly deprivation of human life in the form of summary execution fits within this language. Less clear is what else does. For victims of climate change to assert such a right, two conditions must be met: first, a broad definition of the right to life must be accepted; second, the longer term threat to human existence must be accepted as grounds for asserting the right. There is support for a broad interpretation of certain treaties which provide for the right to life, even within the context of environmental claims.<sup>4</sup> And outside of those treaties, signs are encouraging that such a norm might be emerging.<sup>5</sup> However, there is neither a sufficiently universal practice nor the *opinio juris* necessary to establish a customary international right to life encompassing environmental harms generally or the harms associated with climate change more particularly.

As an additional example of a norm that might be asserted to protect victims of climate change, there is legal recognition focusing upon the rights of indigenous peoples that appears to offer protection for an aggregate group of traditional human rights norms (right to life, right to property, right to health) and in so doing to implicate protection for future generations.<sup>6</sup> In a 1997 Report on the Human Rights Situation in Ecuador, the Inter-American Commission on Human Rights, which has been particularly vocal on this subject, stated:

Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally special protections for indigenous peoples may be required to ensure their physical and cultural survival—a right protected in a range of international instruments and conventions.<sup>7</sup>

Given that global climate change may well have a devastating impact on indigenous populations,<sup>8</sup> this is encouraging language and yet language limited to the interpretation by one entity of treaty-based law. It is not at all clear that a more generally accepted norm affording such protection exists as customary international law or even under other treaty regimes.

Thus, even well established international human rights treaty norms do not clearly encompass claims based upon global climate change. We are left then with the possibility of arguing, based upon binding and non-binding instruments and the practice of States, that one or more of these norms might have sufficiently developed content and sufficient acceptance in the international community outside treaties to form the basis of a human rights claim under

Cultural Rights, art. 11 (Rights to an Adequate Standard of Living and to be Free from Hunger), Dec. 16, 1966, 993 U.N.T.S. 3, reprinted in 6 I.L.M. 360 (1967) and 3 Weston & Carlson III.A.2; Convention on the Rights of the Child, art. 24 (right of the child to the enjoyment of the highest attainable standard of health and requiring the State to combat disease and malnutrition, “taking into consideration the dangers and risks of environmental pollution”), Nov. 20, 1989, 1577 U.N.T.S. 3, reprinted in 28 ILM 1448 (1989) and 3 Weston & Carlson III.D.3.

<sup>4</sup> See, e.g., U.N. Hum. Rts. Comm., General Comment 6, art. 6 of ICCPR (16th Sess., 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev. 1 at 6 (1994), and *Pueblo Yanomami v. Brazil* Case 7615, Inter-Am. C.H.R., Res. No. 12/85, OEA/ser. L/V/II.66, doc. 10 rev. 1 (Oct. 1, 1985).

<sup>5</sup> *Id.* See also, Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment under International Law*, 16 TUL. ENV'T'L L. J. 65 (2002).

<sup>6</sup> See Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/47/1 (Sept. 2007), reprinted in 46 ILM 10013 (2007).

<sup>7</sup> Int.-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/ser.L/V/II.96, doc. 10, rev. 1 ch. 9 (Apr. 24, 1997).

<sup>8</sup> See, e.g., Rosemary Reed, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL'Y J. 399 (2002); Randall S. Abate, *Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Human Rights*, 43A STAN. J. INT'L L. 3 (2007)

customary international law. The ability to establish that such customary international law norms exist is critically important in asserting such norms in United States courts because the U.S., to the extent it has ratified human rights treaties, has declared those treaties to be non-self-executing, meaning that no private rights of action exist to enforce the rights therein domestically.

To assert such a claim in the United States federal courts, several procedural hurdles must be cleared. Key among them are meeting the requirements of federal subject matter jurisdiction, standing to sue, and several other issues of justiciability, each of which provide the courts grounds for declining jurisdiction in certain circumstances. There is extensive case law, including a 2004 decision by the United States Supreme Court,<sup>9</sup> allowing international human rights claims to be brought in federal courts under the Alien Tort Statute [ATS].<sup>10</sup> That statute provides: “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.” The Supreme Court held in this case, *Sosa v. Alvarez-Machain*,<sup>11</sup> that the ATS provides for federal subject matter jurisdiction and allows a court to find a substantive cause of action based upon a violation of customary international law for a narrow range of human rights norms that are “specific, universal and obligatory.”

This was the most commonly accepted test under the ATS in the lower courts prior to the Supreme Court decision in *Sosa*; and in applying that test, the federal courts had generally rejected international environmental law claims asserted as human rights claims. In one such case, the Court of Appeals for the Second Circuit directly addressed the question of whether plaintiffs could bring an ATS claim based upon allegations that the defendant mining company’s Peruvian operations had caused serious lung disease in the local population.<sup>12</sup> After considering the existing customary international law, the court held that “the asserted ‘right to health’ and ‘right to life’ are insufficiently definite to constitute rules of customary international law.” The court examined non-binding international law and binding law to which the U.S. is not a party and held that “[f]ar from being ‘clear and unambiguous,’ the statements relied on by plaintiffs to define the rights to life and health are vague and amorphous.”<sup>13</sup> Failure to establish the clarity and general acceptance of a such norms means that the ATS would not likely be available to claimants as a jurisdictional basis for asserting global climate change claims in federal court.

While other possible jurisdictional bases for bringing international claims in federal courts exist, including general federal question jurisdiction and diversity jurisdiction, neither of these vehicles is well suited for asserting human rights claims based upon global climate change because of issues involving the establishment of the underlying cause of action. Nor are there readily apparent international or regional fora available to bring such claims. The U.S. is not party to the American Convention on Human Rights<sup>14</sup>—which is the binding inter-American regional human rights treaty and which creates the Inter-American Court of Human Rights—and therefore is not subject to the jurisdiction of that court. Furthermore, the U.S. is either not a party to international treaties that might create such a forum or has refused to accept, in the case of the International Covenant on Civil and Political Rights,<sup>15</sup> an optional protocol that would allow individual citizens to petition the Human Rights Committee under that treaty.

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<sup>9</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>10</sup> 28 U.S.C. §1350.

<sup>11</sup> *Sosa*, *supra* note 9.

<sup>12</sup> *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d. cir. 2003).

<sup>13</sup> *Id.* at 160.

<sup>14</sup> *Supra* note 3.

<sup>15</sup> *Id.*

In conclusion, while there are many international human rights norms that seem not only relevant, but also legally applicable to addressing the harms caused by global climate change, many difficulties remain. First, for the most part these norms lack the clarity, definiteness, and universal acceptance to be clearly established as legally enforceable norms in the U.S. federal courts. Absent those characteristics, these claims and the cases based upon them would be subject to dismissal for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Were the claims to make it past that threshold determination of jurisdiction, then standing and the other justiciability issues arising out of the act of state doctrine, the political question doctrine, and deference on the basis of international comity might also act to bar litigation. The emerging law with respect to human rights and climate change must be developed further and we must use the legal/political process for developing that international law. Litigation has a role to play in that process and might over the long run develop the law and remedies that will deal with the problems. But do we have the time to develop the law that way? Because of the necessarily slow nature of developing law incrementally through litigation and the urgent situation in which we find ourselves, litigation may serve more a prod to the policy process<sup>16</sup> than as a solution to the problem of global climate change—but it may be a necessary prod.

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<sup>16</sup> See, e.g., *Massachusetts v. EPA*, 127 S.Ct. 1348 (2007).

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*Human solidarity manifests itself not only in a spacial dimension—that is, in the space shared by all the peoples of the world,—but also in a temporal dimension—that is among the generations who succeed each other in the time, taking the past, present and future altogether. It is the notion of human solidarity, understood in this wide dimension, and never that of State sovereignty, [on] which lies . . . the basis of the whole contemporary thinking on the rights inherent to the human being.<sup>1</sup>*

#### A. Introduction

Much has been written about the growing impact of Global Climate Change on human rights as diverse as life, health, property and culture.<sup>2</sup> This paper addresses the broad question of the extent to which international human rights norms may be asserted to protect current and future generations from the effects of global climate change. Part B of the paper will consider potentially applicable norms in both treaty law and customary international law. Part C will explore the procedures for asserting such rights in the United States national courts and the substantive and procedural hurdles for doing so. The principal focus of this exploration will be claims in federal court under the Alien Tort Statute (ATS)<sup>3</sup> and under the general federal question statutory grant.<sup>4</sup> The possibility of raising these international human rights norms in state courts will also be considered. Part D will discuss raising such claims in a regional or international forum, in particular the Inter-American Commission on Human Rights, addressing again the substantive and procedural hurdles for doing so.

The paper concludes that while such claims may not be entirely foreclosed, they are unlikely to succeed until the international norms are clearer and more universally accepted. Standing and other justiciability issues will prove difficult to overcome in some of these cases, but the main obstacles will be subject matter jurisdiction and the related issue of failure to state a claim upon which relief may be granted in national courts and problems regarding lack of enforcement in the international fora.

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<sup>1</sup> Case of Bamaca-Vélasquez, Judgment of Nov. 25, 2000, INTER-AM. CT. H.R. (Ser. C) No. 70 (July 25, 2000), Separate Opinion of Judge A.A. Cancado Trindade.

<sup>2</sup> See, e.g., Rosemary Reed, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM. L. & POL'Y J. 399 (2002); Randall S. Abate, *Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Human Rights*, 43A STAN. J. INT'L. 3 (2007); Sara C. Aminzadeh, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L.REV. 231 (2007); Sheila Watt-Cloutier, *Global Warming and Human Rights*, <http://www.earthjustice.org/library/reports/global-warming-and-human-rights-report-to-the-IACHR.pdf>.

<sup>3</sup> 28 U.S.C. §1350 (2008).

<sup>4</sup> 28 U.S.C. §1331 (2008).

## B. Establishing Applicable Norms

This section proceeds on the basis of a couple of assumptions. First, I assume that generally speaking a prerequisite to establishing human rights protections for future generations will require establishing that such rights protect the present generation.<sup>5</sup> My second assumption is that elsewhere in the Green Paper the theoretical justifications for protecting intergenerational interests have been laid out and that those theoretical justifications will form a part of the context for asserting human rights claims. I would also assert one final caveat with regard to the rights discussed below (which may be evident), and that is that even if one were generally able to establish the existence of a particular norm under either treaty or customary international law, establishing that the content of that norm encompasses the effects of global climate change will still be problematic. Most of the international law discussed in this paper precedes concerns about global climate change and therefore those concerns are not explicitly addressed in that treaty law or elsewhere. Also, most international human rights law establishes the rights of individuals (or groups) versus governments, either requiring governments to do or to refrain from doing something. However, issues regarding global climate change frequently arise because of the actions of non-state actors.<sup>6</sup>

Having said all of that, let me further frame the nature of the discussion in this paper. One certainly could try to assert an international human right to be protected from the effects of global climate change. However, given the current development of the law in the environmental/human rights area, the probability of establishing such a norm at this time, seems extremely low.<sup>7</sup> So, the paper will not attempt to argue for such a “global” human right, but will instead seek to reframe existing human rights norms to encompass the impacts of climate change in humans.<sup>8</sup> Those norms which seem to be the most promising for this purpose will be emphasized, though others will certainly be referenced.

### 1. Right to Life

Of all of the possible human rights norms that might be available for victims of global climate change, the right to life is the most widely acknowledged in both binding and non-binding international instruments.<sup>9</sup> Clearly arbitrary

<sup>5</sup> There may be exceptions to this were one, for example to posit an express right for future generations to be free from present generation impact on the climate.

<sup>6</sup> See, Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT’L & COMP. L.REV. 273, 279 (2002).

<sup>7</sup> “Nearly all global and regional human rights bodies have considered the link between environmental degradation and internationally guaranteed human rights . In most instances, the complaints brought have not been based upon a specific right to a safe and environmentally sound environment, but rather upon rights to life, property, health, information, and family and home life.” ALEXANDRE KISS & DINAH SHELTON, *GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW* 240 (2007).

<sup>8</sup> This is an idea that has been raised by others. See, e.g., Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENV’L L.J. 65 (2002); Sara C. Aminzadeh, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT’L L. & COMP. L.REV. 231 (2007). “There are arguably three viable strategies for constructing a human rights-based approach to climate change: 1)the application of procedural rights found in international human rights law to climate change litigation; 2)the recognition of a distinct right to environmental well-being; and 3)the reinterpretation of existing human rights in the environmental context.” Aminzadeh, *supra*, at 245.

<sup>9</sup> See, e.g., Universal Declaration of Human Rights, art. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sessl 1st Plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948) [hereinafter UDHR], (“Everyone has the right to life, liberty, and security of person”); International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171, 56 U.S. Dep’t State Bull. 107, *reprinted in* 6 I.L.M. 360 (1967) [hereinafter ICCPR] (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”); The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter “European Convention”] (“ Everyone’s right to life shall be protected by law . . . .”); The American Convention on Human Rights, art. 4, Nov. 22, 1969, 1114 U.N.T.S. 123, O.A.S.T.S. No. 36, O.A.S. Off. Rec. O.E.A./Ser. L/V/II.23 doc. 21 rev 6 (1979), *reprinted in* 9 I.L.M. 673. [hereinafter “American Convention”] (“1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.”); The African

deprivation of life in the form of summary execution fits within this language. The question remains what else does? What must the right to life encompass in order to be useful to victims of climate change? While threats to human life may violate this right,<sup>10</sup> how imminent must the threat be? It seems to me that in order for victims of climate change to be in a position to assert such a right, two conditions must be met: first, a broad definition of the right to life must be accepted; and second, the longer term threat to human existence must be accepted as grounds for asserting the right.

There is evidence for the acceptance by the international community of a broad view of the right to life. The Inter-American Commission on Human Rights seems to have embraced such a broad view, at least in the context of indigenous peoples.<sup>11</sup> The ICCPR Committee on Human Rights, in General Comment 6, has stated:

[T]he Committee has noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.<sup>12</sup>

There are also scholars who argue for broad definitions of the right to life. For example, one human rights scholar would define that right as one that enables each individual to “have access to the means of survival; realize full life expectancy; avoid serious environmental risks to life; and to enjoy protection by the state against unwarranted deprivation of life.”<sup>13</sup>

The right to life has been asserted in cases raising environmental claims. The Inter-American Commission on Human Rights, applying the American Declaration of the Rights and Duties of Man,<sup>14</sup> considered the actions of the government of Brazil, which had constructed a highway through the Yanomami territory causing serious environmental harm and found an injury to the Yanomami as a group to their “rights to life, liberty and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and well-being.”<sup>15</sup>

In summary, while broad interpretations of some treaty language seems to support an argument under those treaties that the right to life might encompass harms caused by global climate change, nothing approaching consensus has been reached in this regard. Moreover, though signs are encouraging that such a norm might be emerging,<sup>16</sup> there is

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Charter on Human and Peoples’ Rights (Banjul Charter), art. 4, June 27, 1980, OAU Doc. CAB/LEG/67/3 rev.5, *reprinted in* 21 I.L.M. 58 (1982) [hereinafter African Charter] (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person.”).

<sup>10</sup> See, e.g., *K.N.L.H. v. Peru*, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003/Rev.1 (Aug. 14, 2006) (U.N. Hum. Rts. Comm.) (“It is not only taking a person’s life that violates article 6 of the Covenant but also placing a person’s life in grave danger, as in this case.”) (Dissenting Opinion by Committee Member Hipolito Solari-Yrigoyen.) (The majority chose not to address the Article 6 complaint, because it found that Article 7 on inhumane treatment applied.)

<sup>11</sup> See *infra* notes 18–46 and accompanying text.

<sup>12</sup> U.N. Hum. Rts. Comm., General Comment 6 of ICCPR (16th sess., 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev. 1 at 6 (1994).

<sup>13</sup> B.G. Ramcharan, *The Concept and Dimension of the Right to Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 7 (B.G. Ramcharan, ed., 1985). See also Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized under International Law? It Depends on the Source*, 12 *COLO. J. ENVTL. L & POL’Y* 1, 19 (2001).

<sup>14</sup> American Declaration of the Rights and Duties of Man, Mar. 30-May 2, 1948: OAS Res XXX, OAS Off Rec OEA/Ser.L/V/II.4 Rev.

<sup>15</sup> *Pueblo Yanomami v. Brazil*, Case 7615, Inter-Am. C.H.R., Res. No. 12/85, OEA/ser. L/V/II.66, doc. 10 rev. 1 (Oct. 1, 1985); see *Atapattu*, *supra* note 8, at 99–101.

neither a sufficiently universal practice nor the *opinio juris* to establish a customary international law rule of right to life that encompasses such environmental harms.<sup>17</sup>

## 2. Rights of Indigenous Peoples

What I would characterize as a cluster or an aggregate group of norms focused upon the rights of indigenous peoples has begun to emerge in both treaty and caselaw. This cluster draws upon traditional norms, right to life, right to property, right to health. I will consider these rights as a group under the heading of indigenous peoples' rights because: first, that is the way in which they are being asserted and upheld; and second, because the assertion of these norms may have special salience in the context of global climate change given the disparate impact of such change on island and other indigenous groups.<sup>18</sup> The special status of indigenous peoples in international law,<sup>19</sup> may present an opportunity to assert human rights claims on their behalf based upon the impacts of global climate change. And the recent Inuit petition<sup>20</sup> before the Inter-American Commission, may serve as a model for such claims. Professor James Anaya, grounding his argument in the right of self determination,<sup>21</sup> has characterized modern decisions regarding indigenous peoples as defining a right to cultural integrity.<sup>22</sup> Such a norm "goes beyond ensuring for indigenous *individuals* either the same civil and political freedoms accorded others within an existing state" and in addition "upholds the right of indigenous *groups* to maintain and freely develop their cultural identities in coexistence with other sectors of humanity."<sup>23</sup> Professor Anaya finds this to be a very broadly applicable right, arguing:

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<sup>16</sup> "Today, more than 100 constitutions throughout the world guarantee a right to a clean and healthy environment, impose a duty on the state to prevent environmental harm, or call for protection of the environment or natural resources. Constitutional environmental rights are increasingly being enforced by courts in countries from Argentina to India to South Africa. In addition, courts interpreting and enforcing other rights have recognized that violations of them may be the result of a degraded environment. International human rights tribunals also have come to view environmental protection as essential for the enjoyment of certain internationally guaranteed human rights, especially the rights to life, health, home life, and property." KISS & SHELTON, *supra* note 7, at 238.

<sup>17</sup> In order to establish that custom has become binding law, international law has traditionally looked to the nature and duration of custom and the way that custom is viewed by states. *See, e.g.*, RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES, §102(2). ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.") For a lengthy discussion of the process by which norms generally and environmental norms in particular become customary international law, see Hari Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 348-81 (1997).

<sup>18</sup> *See, e.g., supra* note 2; Abate, *supra* note 2; *see also* Intergovernmental Panel on Climate Change 2007 Assessment Report, Summary for Policy Makers, available at: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

<sup>19</sup> *See* Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/47/1 (Sept. 7, 2007); reprinted in 46 I.L.M. 10013 (2007); *see also* Osofsky, *supra* note 17; Alessandro Fodella, *International Law and the Diversity of Indigenous Peoples*, 30 Vt. L. Rev. 565 (2006); Resolution of the IACHR on the Problem of Special Protection for Indigenous Populations, Inter-Am. C.H.R., OEA/Ser.L/V/II.29, doc. 38 rev. (1972); Report of the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, Inter-Am. C.H.R., OEA/ser.L/V.II.62, doc. 10, rev. 3 (1983) at 81 § 2-B-15.

<sup>20</sup> Sheila Watt-Cloutier, Petition to the Inter-American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States, Dec. 7, 2005, available at [http://www.earthjustice.org/library/legal\\_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf](http://www.earthjustice.org/library/legal_docs/summary-of-inuit-petition-to-inter-american-council-on-human-rights.pdf).

<sup>21</sup> *See, e.g.*, ICCPR, *supra* note 9, art. 1(1) ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.")

<sup>22</sup> S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 98-104 (1996).

<sup>23</sup> *Id.* at 98.

While in principle the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability. . . . Even as . . . policies [of assimilation] have been abandoned or reversed, indigenous cultures remain threatened as a result of the lingering effects of those historical policies and because, typically, indigenous communities hold a nondominant position in the larger societies in which they live.<sup>24</sup>

I have argued elsewhere<sup>25</sup> that the general concept of cultural integrity suggests two more specific norms: first, one that recognizes the special relationship of indigenous peoples to their lands and the natural resources contained therein; <sup>26</sup> second, an “argument could be made under the Genocide Convention, these peoples have a specific claim to make regarding the destruction of their culture.”<sup>27</sup> With regard to the first potential norm, although it rejected the Inuit Petition, <sup>28</sup> the Inter-American Commission on Human Rights (IACHR) (as well as the UN Human Rights Commission) has recognized the importance of lands and resources to the survival of indigenous cultures.<sup>29</sup> “It follows from indigenous peoples’ articulated ideas of communal stewardship over land and a deeply felt spiritual connection with the earth and its fruits.”<sup>30</sup> Indigenous peoples, furthermore, “typically have looked to a secure land and natural resource base to ensure the economic viability and development of their communities.”<sup>31</sup> In a 1997 Report on the Human Rights Situation in Ecuador, the IACHR stated:

Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival—a right protected in a range of international instruments and conventions.<sup>32</sup>

Several rights based upon this sense of connectedness to the land and the reliance of culture upon that connectedness were argued on behalf of the Inuit Petition.

However, in November 2006, the IACHR rejected the Inuit Petition, stating that it would “not be able to process [the] petition at present. . . . [T]he information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”<sup>33</sup> The Commission

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<sup>24</sup> *Id.* at 102.

<sup>25</sup> Pamela J. Stephens, *Indigenous Peoples, Culturally Specific Rights and Domestic Courts: A Response to Professor Fodella*, 30 VT. L. REV 595 (2006).

<sup>26</sup> *Id.* at 602.

<sup>27</sup> *Id.*; see also Convention on the Prevention and Punishment of the Crime of Genocide arts. 2–3, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>28</sup> See *infra* notes 33–34 and accompanying text.

<sup>29</sup> See ANAYA, *supra* note 22, at 104–105.

<sup>30</sup> S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 35–36 (2004).

<sup>31</sup> James Anaya, *Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT’L & COMP. L. 7, 8 (2005); see also Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, U.N. Doc. CCPR/C/38/D/1671984 (Mar. 26 1990).

<sup>32</sup> Int.-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/ser.L/V/II.96, doc. 10, rev.1-ch. 9 (Apr.24, 1997).

<sup>33</sup> See the posting of Bill Weinberg, Inuit Petition on Climate Change Rejected, <http://ww4report.com/node/2922>.

subsequently agreed to hold a hearing to consider the relationship between climate change and human rights. Testimony before the it specifically raised: the right to use and enjoy property; the right of peoples to enjoy the benefits of culture, in addition to the rights to life, physical integrity and security.<sup>34</sup> No further action has been taken by the Commission.

In addition to the above there is also evidence of state practice in this area.<sup>35</sup> States have included constitutional protections for the environmental rights of indigenous peoples.<sup>36</sup>

In particular, Panama's Constitution 'recognizes and respects the ethnic identity of national indigenous communities. Peru notes indigenous peoples' autonomy with respect to 'abuse of the land.' Guatemala devotes a chapter of its constitution to indigenous affairs. The constitutional provisions in countries with substantial numbers of indigenous peoples indicate a growing state practice of recognition of their special status.<sup>37</sup>

With regard to the Genocide Convention, the focus of the argument on behalf on indigenous peoples would be on the destruction of the environment. The Genocide Convention prohibits "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."<sup>38</sup> However, the Convention requires, in addition, that the acts constituting genocide be "committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such."<sup>39</sup> The argument has been made by at least one commentator that greenhouse gas emissions resulting in rising seas constitute genocide against people living on low lying islands,<sup>40</sup> but this is an argument that is unlikely to prevail. Arguably, with specific environmental harms perpetrated against an indigenous community, for example, by oil and gas extraction companies, it might be possible to infer the requisite intent necessary to establish a form of genocide.<sup>41</sup> Although the Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu* has held that the specific intent element of the Convention could be inferred from the physical acts of the alleged perpetrator and their "massive and/or systematic nature or their atrocity,"<sup>42</sup> the court was referring to a situation in which the acts were clearly directed to a protected group. In the context of global climate change, while various actors, governments and private, may engage in activities which result in the destruction of the environment upon which an indigenous peoples depends, these acts are not specifically directed to that peoples and it is thus much more difficult to infer the requisite specific intent.

Moreover, establishing the "actus reus" of the crime of genocide in this context may prove just as difficult: that an actor, state or nonstate engaged in "deliberately inflicting on the group conditions of life calculated to bring

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<sup>34</sup> See Martin Wagner, Testimony Before the Inter-American Commission on Human Rights (Mar. 1, 2007), available at <http://www.earthjustice.org/library/legaldocs/testimony-before-iachr-on-global-warming-human-rights-by-martin-wagner.pdf>. See also Watt-Cloutier, *Global Warming and Human Rights*, *supra* note 2.

<sup>35</sup> See discussion in Osofsky, *supra* note 17, at 387.

<sup>36</sup> See discussion in Raedza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 166 (1991) (citing the constitutions of Panama, Peru and Guatemala). Osofsky's discussion of the World Conference on Human Rights in Vienna cites various examples of regional groups and nations which reported on constitutional and legislative measures to protect indigenous rights. Osofsky, *supra* note 17, at 387.

<sup>37</sup> Osofsky, *supra* note 17, at 387.

<sup>38</sup> Genocide Convention, *supra* note 27, art. 2(c).

<sup>39</sup> *Id.* art. 2.

<sup>40</sup> See Reed, *supra* note 2.

<sup>41</sup> See Stephens, *supra* note 25, at 606–07.

<sup>42</sup> Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 478 (Sept. 2, 1998).

about its destruction in whole or in part.”<sup>43</sup> Given the drafting history of this provision it is probably fair to read it as reaching conduct that would deprive the group of all means of livelihood.<sup>44</sup> This language of the Convention was meant to cover the imposition of conditions of life similar to the concentration camps of World War II, but an “early draft also acknowledged that a second category of acts might fit within this concept: ‘the deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.’”<sup>45</sup> The (probably insurmountable) difficulty is in showing that the acts of a corporation or state were “calculated to bring about the group’s destruction.”

My last comment regarding the potential of making a “genocide” argument for the effects of global warming has to do with efforts to assert a right to be free from “cultural genocide.”<sup>46</sup> While such a norm might be desirable, its assertion under the Genocide Convention is clearly foreclosed by the drafting history of the Convention,<sup>47</sup> nor has the development of the law of genocide since the Convention recognized such a norm.

### 3. Right to Privacy

The right to privacy is another broadly established, widely accepted norm of international human rights law. I think that it is important to treat this as a separate right and not to subsume it into the right to life discussion, in part because there is case law applying this right in the environmental area. Found in virtually all internationally binding and nonbinding agreements, the formulation varies only slightly.<sup>48</sup> Once again the issue is the extent to which this right can be read to encompass the claims of victims of global climate change. There are a few cases which have addressed the right to privacy in relation to what might be characterized as environmental rights.<sup>49</sup> For example, in 1990 a case was brought before the European Commission of Human Rights by a Spanish national, Mrs. Gregoria Lopez Ostra, who alleged

<sup>43</sup> Genocide Convention, *supra* note 27, art. 2.

<sup>44</sup> See Stephens, *supra* note 25, at 606–07.

<sup>45</sup> *Id.* (citing WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 165 (2000)).

<sup>46</sup> See, e.g., Beanal v. Freeport-McMoran, Inc., 969 F. Supp 362, 372 (E.D. La. 1997).

<sup>47</sup> When the Genocide Convention was being drafted, some national representatives argued for a separate article on cultural genocide:

In this convention, genocide also means any of the following deliberate acts committed with the intention of destroying the language or culture of a national, racial or religious group on grounds of national or racial origin or religious belief:

- (1) prohibiting the use of the language of the group in daily intercourse or in schools, or prohibiting the printing and circulation of publications in the language of the group;
- (2) destroying, or preventing the use of, the libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

SCHABAS, *supra* note 45, at 182 (quoting U.N. ESCOR, Ad Hoc Comm. On Genocide, 6th Session, 14th meeting at 13, UN Doc. E/AC.25/SR. 14 (1948)). Schabas also notes that the drafters ultimately limited the acts of genocide to essentially physical acts to achieve wide spread agreement. *Id.* at 178–85 (describing the debate about whether to include cultural genocide within the definition of genocide and the final vote to exclude cultural genocide from this definition.)

<sup>48</sup> See, e.g., UDHR, *supra* note 9, art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”); European Convention, *supra* note 9, art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”); American Convention, *supra* note 9, art. 11 (“No one may be the object of arbitrary or abusive interference with his private life, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”)

<sup>49</sup> See, e.g., Powell & Rayner v. U.K. 172 Eur. Ct. of H.R. (ser. A) (1990); Case of Skärby v. Sweden, 180-B Eur. Ct. of H.R. (ser. A) (1990); Arrondelle v. U.K., App. No. 7889/77, 23Y.B. Eur. Con on H.R. 166 (1980); Lopez Ostra v. Spain [hereinafter Lopez Ostra], App. No. 16798/90, 20 Eur. Hum. R. Rep. 277 (1995). See generally Richard Desgagne, *Integrating Environmental Values into the European Convention Human Rights*, 89 AM. J. INT’L L. 263 (1995).

that her right to privacy under the European Convention was being violated. The source of the violation was a waste treatment plant located very close to her home, which was emitting noxious fumes and noise. The local government and the State of Spain had failed to address her concerns. The Commission found a violation of Article 8, the privacy provision of the Convention<sup>50</sup> and the European Court of Human Rights confirmed. The Court held:

Whether the question is analysed in terms of a positive duty on the State—to take reasonable and appropriate measures to secure the applicant’s rights under paragraph 1 of Article 8 . . . , as the applicant wishes in her case, or in terms of an “interference by a public authority” to be justified in accordance with paragraph 2 . . . , the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation . . . . Having regard to the foregoing and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being—that of having a waste treatment plant—and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.<sup>51</sup>

These specific interpretations of the right to privacy under the European Convention are interesting and may provide the basis to argue for the development of such a norm more generally, but as of now would appear to be insufficient evidence of a customary international law rule.

#### 4. Other Socio-Economic Rights

There is a set of socio-economic rights that are set out in international and regional documents, including rights to property, to an adequate standard of living, to food and to health, which perhaps might be invoked to protect those impacted by global climate change.<sup>52</sup> While arguments can certainly be made that these are binding norms, in that many of them appear in binding international treaties,<sup>53</sup> the question remains regarding an agreed upon content to the norms and the nature of the obligation to which a State has bound itself in signing these agreements. One need not take the position that a right to health or a right to food are not binding norms to understand that there is not general agreement about the nature of a State’s obligation to ensure that health or a certain level of food. For example, what

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<sup>50</sup> Which provides :

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

European Convention, *supra* note 9, art. 8.

<sup>51</sup> Lopez-Ostra, *supra* note 49, at para. 51, 58.

<sup>52</sup> See, e.g., UDHR, *supra* note 9, art. 17 (Right to Property), art. 25 (Right to adequate Standard of Living); International Covenant on Economic, Social and Cultural Rights art. 11 (Rights to an Adequate Standard of Living and to be Free from Hunger), Dec. 16, 1966. 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967 [hereinafter ICESCR]); African Charter, *supra* note 9, art. 14 (Right to property); art. 16 (Right to Health); art. 22 (Right to Economic, Social and Cultural Development); Convention on the Rights of the Child art. 24 (right of the child to the enjoyment of the highest attainable standard of health and requiring the State to combat disease and malnutrition, “taking into consideration the dangers and risks of environmental pollution”), Nov. 20, 1989, 1577 U.N.T.S. 3, *reprinted in* 28 I.L.M. 1448 (1989) [hereinafter CRC].

<sup>53</sup> It should be noted that the United States is not a party to two of the most significant of these binding treaties, the Convention of the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights.

precisely is meant by the ICESCR's right to be free from hunger (Article 11)? In accordance with the ICESCR's formula of progressive implementation of rights, the treaty sets out the right generally and then sets out steps that should be taken by a State "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized". So, in Article 11, the Covenant states:

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
  - (b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>54</sup>

This does not even begin to approach a formula for determining the precise nature of a state's obligation to protect the food supplies of its citizens. Even those who advocate for implementation of a right to food,<sup>55</sup> concede that the conventional right to food "evokes obligations that are fluid"<sup>56</sup> and that "[f]rom a traditional CIL standpoint focused on state practice, there are grounds for being skeptical about the claim of a customary right to food."<sup>57</sup>

The Convention on the Rights of the Child (CRC) presents one of the few instances of explicit protection for future generations as that term is being used herein.<sup>58</sup> A child is defined in the CRC, Article 1 as "every human being below the age of eighteen years" and thus encompasses the near future generation. The CRC binds parties to several obligations that might arguably be asserted to protect those impacted by Global Climate Change, though as with the ICESCR, those rights are qualified by the language of Article 4: "With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and , where needed, within the framework of international co-operation."<sup>59</sup> Perhaps most interesting for our purposes among the rights posited in the CRC is that found in Article 24:

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health. . . .
2. The State Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: . . . .

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<sup>54</sup> ICESCR, *supra* note 52, art. 11.

<sup>55</sup> See, e.g., Chris Downes, *Must the Losers of Free Trade go Hungry? Reconciling WTO Obligations and the Right to Food*, 47 VA. J. INT'L L. 619 (2007)

<sup>56</sup> *Id.* at 663

<sup>57</sup> *Id.* at 664.

<sup>58</sup> See Burns Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 VT. J. ENVTL L. 375(2008).

<sup>59</sup> CRC, *supra* note 52, art. 4.

- c. To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.<sup>60</sup>

Along with the other subsections of Article 24, this subsection provides broad protections for childrens' health. The difficulty of using it for our purposes is, of course, the fact that the U.S. is not a party to this Convention and therefore not bound by it. One might argue that given the fact that all States except the U.S. and Somalia are parties to this Convention, its provisions have become customary international law. However, given the general nature of the obligations set out in the Convention, the large numbers of reservations from its provisions,<sup>61</sup> and the persistent objections of the U.S. to the Convention, it will probably be very difficult to establish clear, legally binding norms under international law outside the Convention.

Each of the socio-economic rights listed above in the first paragraph of this section are subject to the same critique and therefore are less well established than the rights asserted in the preceding sections.<sup>62</sup> We are left then with only the possibility of arguing, based upon binding and nonbinding international and regional documents, that one or more of these asserted rights might have the sufficiently developed content and sufficient acceptance in the international community outside treaty law so as to form the basis of a human rights claim relative to harms emanating from climate change.<sup>63</sup>

### C. Assertion of International Human Rights Norms in U.S. Courts

In order to bring a claim in the United States federal courts, several hurdles must be cleared. Key among those are meeting requirements of federal subject matter jurisdiction, standing to sue and personal jurisdiction. Generally speaking, to demonstrate subject matter jurisdiction, one must comply with Article III, Section 2 of the U.S. Constitution<sup>64</sup> and must meet the requirements of an implementing federal statute. The two principal statutory grants of subject matter jurisdiction are federal question jurisdiction under 28 U.S.C. §1331, which requires plaintiff to assert a claim which arises "under the Constitution, laws or treaties of the United States"<sup>65</sup> and Diversity Jurisdiction under 28 U.S.C §1332, which requires diversity of citizenship as defined by the statute and an amount in controversy of greater

<sup>60</sup> *Id.* art. 24.

<sup>61</sup> See the Office of High Commissioner for Human Rights website at <http://www.unhchr.ch/html/menu3/b/k2crc.htm> for a link to the Declarations and Reservations to the CRC.

<sup>62</sup> This is not to suggest that there is not emerging law in other arenas. For a discussion of the Right to Water and its development at the domestic level, see Eric Bluemel, *The Implications of Formulating a Human Right to Water*, 31 *ECOLOGY L.Q.* 957 (2005).

<sup>63</sup> The possibility that there is an emerging right to a healthy environment has been widely considered. For an introduction to this argument, see KISS & SHELTON, *GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW*, *supra* note 7, at 237–41. This issue will be more fully addressed in another portion of the Green Paper.

<sup>64</sup> Which provides in relevant part:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another:—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

<sup>65</sup> 28 U.S.C. §1331 (2008).

than \$75,000.<sup>66</sup> It is also possible to proceed under a specific grant of federal subject matter jurisdiction such as the ATS<sup>67</sup> which is considered below. Because the law regarding the general grants of subject matter jurisdiction are relatively underdeveloped in this substantive area (i.e., the bringing of international human rights claims in federal courts) and because what law there is regarding those grants tends to draw upon the jurisprudence developed in the ATS cases, the paper will develop the framework of those ATS cases first and then discuss the general grants.

The procedural hurdles raised above may vary depending upon the nature of the subject matter jurisdiction asserted. In addition, plaintiffs may have to address a set of justiciability concerns (separation of powers issues, political question doctrine, act of state doctrine, and concerns regarding international comity). Finally, courts may consider *forum non conveniens* doctrine. The various immunity doctrines may also come into play to limit the potential defendants in a given suit.

## 1. Alien Tort Statute

### a. A Brief History of the ATS in Federal Courts

Modern use of and the modern debate over the ATS dates from the second circuit's 1980 decision in *Filartiga v. Pena-Irala*.<sup>68</sup> In that decision, the court allowed two Paraguayan plaintiffs to bring an action against a Paraguayan defendant for the torture death of a relative. The court relied upon the ATS, which provides: "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."<sup>69</sup>

In reversing the district court,<sup>70</sup> the court of appeals held that:

deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, section 1350 provides federal jurisdiction.<sup>71</sup>

In reaching its decision, the court focused on the statutory language regarding the "law of nations," which it equated with Customary International Law. Citing the Supreme Court's opinion in *The Paquete Habana*,<sup>72</sup> the Court concluded:

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; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects they treat.<sup>73</sup>

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<sup>66</sup> *Id.* §1332.

<sup>67</sup> *Id.* §1350. Note that cases and commentators have over the years used different titles when referring to this statute, so that one might see it variously referred to as the Alien Tort Claims Act (ATCA), the Alien Tort Act (ATA), as well as the Alien Tort Statute (ATS). As the Supreme Court seems to have settled on the last term, so does this paper.

<sup>68</sup> 630 F.2d 876 (2d. Cir. 1980)

<sup>69</sup> 28 U.S.C. §1380 (2008).

<sup>70</sup> The District Court had dismissed the action for lack of subject matter jurisdiction, relying on dicta in two prior second circuits cases which seemed to exclude a nation's treatment of its own citizens from the definition of "law of nations". *Filartiga*, 630 F.2d at 888.

<sup>71</sup> *Id.* at 878.

<sup>72</sup> 175 U.S. 677, 700 (1900).

<sup>73</sup> *Filartiga*, 630 F.2d at 880–81.

The Court proceeded to examine “evidence” of the international norm prohibiting the official use of torture, including the United Nations Charter<sup>74</sup>, the UDHR,<sup>75</sup> the Declaration on the Protection of All Persons From Being Subject to Torture, the American Convention,<sup>76</sup> the ICCPR,<sup>77</sup> and the European Convention.<sup>78</sup> From this examination of international law, both binding and non-binding, the court found the existence of a norm prohibiting the official use of torture.<sup>79</sup>

Over the more than twenty years since *Filartiga*, the federal courts have allowed an expanding category of private rights of actions based on serious violations of customary international law norms, including: claims of genocide, war crimes, crimes against humanity, summary execution, arbitrary detention and disappearance.<sup>80</sup> Standing has not been an issue in these cases, presumably because both those eligible to bring suit (aliens) and the grounds upon which they may do so are spelled out in the statute. However, the cases have struggled with various other procedural and substantive aspects of applying the ATS. When one views a case brought by an alien against an alien or aliens for conduct taking place in a foreign venue (which has been the typical though not the exclusive format of these cases), one obvious issue that arises is that of *forum non conveniens*.<sup>81</sup> The courts have also addressed concerns surrounding separation of powers, for example, whether the political question doctrine, under which a court may dismiss a case if it finds that the substance of the claim relates to a matter left by the Constitution to the political branches, precludes the exercise of jurisdiction in some or all of these ATS cases.<sup>82</sup> The courts have also considered whether the Act of State Doctrine, “under which courts generally refrain from judging acts of a foreign state within its territory,” precludes application of the ATS in a given case.<sup>83</sup> The lower courts have generally rejected a broad based objection to the ATS based upon separation of powers concerns.<sup>84</sup>

A larger concern in the federal courts considering an ATS case has been whether the statute is constitutional and whether, if so, it provides a cause of action as well as federal subject matter jurisdiction. Related to that latter issue is the question of what constitutes a “tort in violation of the law of nations.” Prior to the Supreme Court’s decision in *Sosa v. Alvarez-Machain*,<sup>85</sup> the lower courts had reached a level of consensus on that latter question, agreeing that it is not every

<sup>74</sup> U.N. Charter, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, June 26, 1945 (entered into force October 24, 1945).

<sup>75</sup> UDHR, *supra* note 9.

<sup>76</sup> G.A. Res. 3452 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975).

<sup>77</sup> American Convention, *supra* note 9.

<sup>78</sup> ICCPR, *supra* note 9.

<sup>79</sup> European Convention, *supra* note 9.

<sup>80</sup> *Filartiga*, 630 F. 2d at 884.

<sup>81</sup> *See, e.g.*, *Forti v. Suarez-Mason*, 672 F. Supp. 1535 (N.D. Cal 1987) (torture, prolonged arbitrary detention, summary execution); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (Summary execution, torture, disappearance and arbitrary detention); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes, torture and summary execution).

<sup>82</sup> *See, e.g.*, *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000). *Forum non conveniens* is a discretionary doctrine that allows a district court which has good jurisdiction and venue over a case to nonetheless dismiss it, if the court determines there is an alternative forum which is more convenient, more fair to the parties. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

<sup>83</sup> *See, e.g.*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (opinions of Judges Bork and Robb) and *infra* notes 148–52 and accompanying text.

<sup>84</sup> *Kadic*, 70 F.3d. at 249; *see infra* notes 153-55 and accompanying text.

<sup>85</sup> *See, e.g.*, *Kadic*, 70 F.3d at 248; *Forti*, 672 F. Supp. at 1544; *Siderman*, 965 F. 2d 699, 707 (9th Cir. 1992).

act alleged to be in violation of international law that would be sufficient under the ATS. Rather, an “international tort” must be one involving an act that violates a norm that is “specific, universal and obligatory.”<sup>86</sup>

### b. *Sosa v. Alvarez-Machain* and its Aftermath

The Supreme Court’s decision in *Sosa* should be placed in the context of a then on-going scholarly debate regarding the relationship of customary international law and federal common law. This debate (and its resolution by the Court in *Sosa*) has relevance not only for ATS cases, but also for other human rights/climate change cases that might be brought in federal court on other subject matter bases.<sup>87</sup> Beginning in 1997, a group of legal scholars, led by Curtis Bradley and Jack Goldsmith, attacked what they referred to as the “modern position.” This position was defined by them as the “proposition that customary international law (“CIL”) is part of this country’s post-*Erie* federal common law.”<sup>88</sup> The result of that characterization they argue, is that “[i]f CIL has the status of federal common law, it presumably preempts inconsistent state law pursuant to the Supremacy Clause and provides a basis for Article III ‘arising under’ jurisdiction.” They argue that the “modern position” rests on “questionable assumptions” and is inconsistent with “fundamental constitutional principles” and should therefore be rejected.<sup>89</sup>

Much of the Bradley/Goldsmith critique has played out in the context of cases brought under the ATS. Together with other revisionist scholars, they had made the illegitimacy of using the ATS to bring cases based upon violations of customary international law pivotal to their arguments.<sup>90</sup> The Supreme Court, in addressing the applicability and scope of the ATS in *Sosa*, fully considered the Bradley/Goldsmith position and rejected it in its entirety.<sup>91</sup>

At the heart of the Supreme Court’s decision in *Sosa* is the question of whether the ATS is a purely jurisdictional statute or whether it also creates a federal cause of action. In order to bring a claim in federal court one must satisfy the requirements of a grant of federal subject matter jurisdiction. This is so because under our Constitution<sup>92</sup> the federal district courts are courts of limited jurisdiction, which means the presumption is that they do not have jurisdiction absent an affirmative constitutional and statutory grant. Virtually all who considered the ATS viewed it as at a minimum providing this statutory grant. In addition to a jurisdictional grant, one must also assert a valid claim under federal law. Perhaps the easiest way to illustrate this is with diversity jurisdiction. A case might come before the federal district court in which the plaintiff was of a different citizenship than the defendant and the amount in controversy was greater than

<sup>86</sup> 542 U.S. 692 (2004).

<sup>87</sup> See, e.g., Forti, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) (finding that such a tort “must be one which is definable, obligatory [rather than honoratory], and universally condemned” and applying that test to dismiss two alleged torts under the ATS.)

<sup>88</sup> For a more complete understanding of the debate and how it is resolved by *Sosa*, see, Pamela J. Stephens, *Spinning Sosa: Federal Common Law, The Alien Tort Statute and Judicial Restraint*, 30 B.U. INT’L L.J. 1 (2007).

<sup>89</sup> Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L.REV. 815 (1997); see also, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L.REV. 1824 (1998); Gerald Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L.REV. 371 (1997); Jordan J. Paust, *Customary International Law and Human Rights Treaties are the Law of the United States*, 20 MICH. J. INT’L L. 301 (1999); Beth Stephens, *The Law of the Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L.REV. 393 (1997).

<sup>90</sup> Bradley & Goldsmith, *supra* note 89, at 817.

<sup>91</sup> See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997).

<sup>92</sup> “By making the self-styled “revisionist” approach to customary international law central to his analysis, and by obtaining the votes of only two additional justices, Justice Scalia effectively demonstrates that the revisionist critique of the ATS was unpersuasive and had finally been laid to rest....” Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2254 (2004).

\$75,000. That would satisfy the subject matter jurisdiction requirements of §1332, the diversity jurisdiction statute. But, plaintiff could not proceed in the absence of a valid substantive claim or cause of action. In a diversity case this would generally be a state law claim (e.g. breach of contract, negligence, etc.). With regard to the ATS, the question was what law created the underlying cause of action, the tort at issue. Some argued that it could not be international law in that international law does not generally create private rights of action.

This question in turn depends upon the broader question of the relationship between customary international law and federal common law.<sup>93</sup> The revisionist position was that once *Erie* established that there was no “general federal common law,” customary international law (which pre-*Erie* was part of the general common law) could no longer be applied as law in the federal courts “in the absence of some domestic authorization to do so, as it was under the regime of general common law.”<sup>94</sup> In their initial article setting out this position, Bradley and Goldsmith left open the possibility that ATS claims might survive their critique, saying that “rejection of the modern position would not necessarily spell the end for *Filartiga*-type litigation for two reasons. First, there might be justifications other than the modern position for the constitutionality of the ATS. And, second, Congress could legislate human rights norms into federal law, which would remedy any Article III problems.”<sup>95</sup> However, their subsequent articles were more hostile to ATS suits,<sup>96</sup> focusing on the fact that the claims in these cases rested upon multilateral treaties, which the Senate had expressly made non-self-executing in the U.S. Courts and nonbinding U.N. General Assembly resolutions. “The modern position claim that CIL is to be applied as federal common law thus ‘compensate[s] for the abstinence of the United States vis-a-vis ratification of international human rights treaties.’ It permits federal courts to accomplish through the back door of CIL what the political branches have prohibited through the front door of treaties.”<sup>97</sup> Other international scholars responded to the Bradley/Goldsmith critique swiftly and negatively.<sup>98</sup>

*Sosa v. Alvarez-Machain*<sup>99</sup> was a lawsuit brought by a Mexican doctor, who alleged he had been kidnapped in Mexico by persons (including the defendant Sosa) who were working with the U.S. Drug Enforcement Agency, and was brought to the United States against his will. He sued the U.S. government under the Federal Tort Claims Act and Sosa under the ATS.<sup>100</sup> The district court had granted the government’s motion to dismiss on the FTCA claim, but granted a summary judgment for plaintiff on the ATS claim. The Ninth Circuit, both originally and *en banc*, affirmed on the ATS claim, but reversed the dismissal of the FTCA claim.<sup>101</sup>

The Court majority addressed the threshold issue of whether the ATS is merely a grant of subject matter jurisdiction or in addition was meant to create a cause of action. The original language of the ATS in the First Judiciary Act of 1789 provided that federal courts “shall also have cognizance, concurrent with the courts of the several States, or

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<sup>93</sup> U.S. Const. art. III, § 2.

<sup>94</sup> See, Stephens, *supra* note 88, at 7–14, for a more complete analysis of the “traditional” view and of post-*Erie* federal common law versus the revisionist critique.

<sup>95</sup> Bradley & Goldsmith, *supra* note 89 at 853.

<sup>96</sup> *Id.* at 872-73; see, e.g., The Torture Victim Protection Act, 28 U.S.C. §1350 (2008).

<sup>97</sup> See, e.g., Bradley & Goldsmith, *supra* note 91; Curtis Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457 (2001); Curtis Bradley, *The Alien Tort Statute and Article III*, 42 VA J. INT’L L. 587 (2002).

<sup>98</sup> Bradley & Goldsmith, *supra* note 91, at 327.

<sup>99</sup> See, e.g., Koh, *supra* note 89; Ryan Goodman & Derek Jenks, *Filartiga’s Firm Footing: International Human Rights and Federal common Law*, 66 FORDHAM L. REV. 463 (1997); Neuman, *supra* note 89 ; Beth Stephens, *supra* note 89. For a detailed discussion of this response, see Pamela Stephens, *supra* note 88, at 12-14.

<sup>100</sup> 542 U.S. 692 (2004).

<sup>101</sup> *Id.* at 697–99.

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.”<sup>102</sup> The Court focused on both the language of the statute and its placement in §9 of the Judiciary Act. It observed that “the ATS gave the district courts ‘cognizance’ of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law”<sup>103</sup> and “the fact that the ATS was placed in §9 of the Judiciary Act, a statute otherwise exclusively concerned with federal court jurisdiction, is itself support for its strictly jurisdictional nature.”<sup>104</sup> Therefore, the court held that “the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.”<sup>105</sup>

However, the Court went on to reject the notion that the ATS was “stillborn” because Congress did not subsequently pass statutes creating causes of actions that implemented the statute. Instead the Court decided that “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors . . . violations of safe conduct . . . and individual actions arising out of prize captures and piracy.”<sup>106</sup> This portion of the opinion was joined by all members of the Court.

A majority (consisting of Justice Souter writing for himself and five other members of the Court), went further, however, and found that while the First Congress may have only had in mind the three offenses above, the ATS allows federal courts to recognize other private causes of action in violation of the law of nations.<sup>107</sup> The Court limited this by saying that the federal 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 18<sup>th</sup> century paradigms we have recognized.”<sup>108</sup> The Court did argue for judicial caution in recognizing new causes of action.<sup>109</sup> In light of its expressed concerns, the Court adopted a test for the recognition of new private causes of action under the ATS that would “not recognize private claims . . . with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.”<sup>110</sup> In other words, the Court requires acts “which violate definable, universal and obligatory norms,”<sup>111</sup> or violations of a norm that is “specific, universal and obligatory.”<sup>112</sup> The Court held on the specific facts of the case before it that Alvarez-Machain had failed to demonstrate that his brief detention violated any such international norm.<sup>113</sup>

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<sup>102</sup> 331 F. 3d at 641. The FTCA claim was rejected by the Supreme Court as falling within an exception to the FTCA waiver of sovereign immunity for claims “arising in a foreign country.” 28 U.S.C. §2680(k) (2008). For the full discussion of the Court’s rationale, see *Sosa*, 542 U.S. 699-712.

<sup>103</sup> Act of Sept 24, ch. 20, §9(b), 1 Stat. 79 (1789).

<sup>104</sup> *Sosa*, 542 U.S. at 713 (citing Alexander Hamilton’s discussion of jurisdiction in *Federalist papers* no. 81, 447, 451).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 714.

<sup>107</sup> *Id.* at 719–20.

<sup>108</sup> *Id.* at 724–25.

<sup>109</sup> *Id.* at 725.

<sup>110</sup> The Court sets out five specific reasons for the exercise of such caution: (1) the prevailing view of the common law has changed since 1789; (2) in addition, there has been a change in the role of the federal courts in making common law; (3) the Court reaffirms its view that the creation of private rights is more properly a legislative function; (4) the Court acknowledges that there are “collateral consequences of making international rules privately actionable; and (5) the Court notes a lack of congressional mandate to seek out and define new violations of the law of nations. In fact, “the Senate has expressly declined to give federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions were not self-executing. *Id.* at 727–728..

<sup>111</sup> *Id.* at 732

<sup>112</sup> *Id.* (citing *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring)).

<sup>113</sup> *Sosa*, 542 U.S. at 781 (citing *In re: Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

In the immediate aftermath of *Sosa*, a couple of things relevant to our topic seem clear. First, the federal courts continue to apply the “specific, universal and obligatory” norm standard much as they did before *Sosa* to find the existence of both subject matter jurisdiction and a private right of action.<sup>114</sup> There are a few cases that do not allow an ATS claim to go forward.<sup>115</sup> *Sosa* does not seem to have impacted the decisions in these cases, although it is cited extensively in these and in the cases which found good causes of action. For the most part it seems these cases would have turned out the same way pre-*Sosa*, turning as most do on the plaintiffs’ failure to establish a definite, obligatory norm of customary international law.<sup>116</sup> The possible exception is the *Enahora* case, which relies heavily on the language of the *Sosa* case to conclude that the Torture Victim Protection Act (TVPA)<sup>117</sup> completely supplants the ATS with regard to claims for torture and extrajudicial killing. This means, according to the *Enahora* Court, that “these claims may only be brought under the TVPA and are subject to its limitations regarding exhaustion and the statute of limitations, as well as the definitions of the substantive claims provided by the TVPA.”<sup>118</sup> No case has rejected a prior, clearly established norm creating a cause of action.<sup>119</sup>

The second observation one might make regarding the post-*Sosa* caselaw is that no new causes of action have been recognized. The language of caution and judicial restraint in *Sosa* appears in several of the cases, suggesting that a certain “chilling effect” may operate with respect to the creation of new norms. This obviously impacts our task, since cases prior to *Sosa* rejected not only causes of action based upon international environmental norms, but also those based upon human rights norms of lesser specificity and lacking “universal” acceptance. Thus far the few cases since *Sosa* have continued to do so. If in fact the federal courts are taking a more jaundiced view of new causes of action, placing a greater emphasis on how clear, definite and universally accepted the international norms are, this will make our task even more difficult.

<sup>114</sup> *Id.* at 738.

<sup>115</sup> *See, e.g.*, *Sarei v. Rio Tinto, PLC*, 487 F.3d 1069 (9th Cir. 2007); *Aldana v. Del Monte*, 416 F.3d 1242 (11th Cir. 2005); *Arce v. Garcia*, 400 F.3d 1340 (11th Cir. 2005); *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882 (DLC), 2005 WL 2082846 (S.D.N.Y. Aug. 30, 2005); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn 2005); *Doe v. Saravia*, 382 F. Supp 2d 1112 (E.D. Cal. 2004); *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005); *JAMA v. U.S. Immigration and Naturalization Service*, 343 F. Supp. 2d 338 (D. NJ 2004).

<sup>116</sup> *See, e.g.*, *Enahoro v. Abubakar*, 402 F.3d 877 (7th Cir. 2005); *Weiss v. The American Jewish Committee*, 335 F. Supp. 2d 469 (S.D.N.Y. 2004); *Arndt v. UBS AG*, 342 F. Supp. 2d 132 (E.D.N.Y. 2004); *In re: South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005).

<sup>117</sup> *See, e.g.*, *Weiss*, 335 F. Supp. 2d at 476–77 (in which the court finds plaintiffs failed to plead a tort in violation of customary international law in seeking to prevent the building of a memorial in a former death camp, which might have itself desecrated the site); *Arndt*, 342 F. Supp. 2d at 139 (German “plaintiffs do not identify any principle of international law that they rely on” in an attempt to sue German corporations, which allegedly profited under the Nazi regime); *In re: South African Apartheid Litigation*, 346 F. Supp. 2d at 548 (finding “that none of the theories pleaded by plaintiffs support jurisdiction under the ATCA” in their attempt to sue corporations which had done business with the former government).

<sup>118</sup> The Torture Victim Protection Act was enacted by Congress as implementing legislation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. in October of 1990. “The Act provides a federal cause of action for damages ‘against any individual who, under actual or apparent authority or under color of law of any foreign nations, subjects any individual to torture or extrajudicial killing.’ The Act requires the claimants to have exhausted remedies ‘in the place in which the conduct giving rise to the claim occurred’ prior to bringing the federal suit and it contains a ten-year statute of limitations. It provides definitions of extrajudicial killings and torture based upon the Torture Convention.” Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L.REV 941, 953 (2001) (quoting Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992)).

<sup>119</sup> Stephens, *supra* note 88, at 34–35; *See Enahora*, 408 F.3d at 884-85; cf. *Aldana*, 416 F. 3d 1242; *Doe*, 382 F. Supp. 1112; *Chavez*, 413 F. Supp. 2d 891; *Mujica*, 381 F. Supp. 2d 1164 (all of which reject that view and found subject matter jurisdiction and private rights of action for torture or extrajudicial killing or both under the ATS).

## 2. New Causes of Action Based on the Impacts of Climate Change in the Federal Courts: Substantive and Procedural Hurdles.

### a. Subject Matter Jurisdiction and Failure to State a Claim Under the ATS

The limitations imposed by subject matter jurisdiction and failure to state a claim under the ATS will be considered jointly, since courts tend to treat them either as one inquiry or two interrelated inquiries. As of now none of the norms discussed in the first part of this paper has been accepted by the U.S. federal courts as those norms relate to environmental claims generally or claims based upon global climate change specifically. In fact in cases prior to *Sosa*, courts expressly rejected such environmentally based claims under the ATS, whether raised under international environmental law norms<sup>120</sup> or under human rights norms.<sup>121</sup> In a very careful and detailed opinion, the Second Circuit in *Flores v. Southern Peru Copper Corp.* addressed directly the question of whether plaintiffs could bring ATS claims based upon allegations that the defendant mining company's Peruvian operations had caused severe lung disease. Interestingly, the court seems in its analysis to be equating the subject matter jurisdiction inquiry under the ATS with the traditional determination of whether a customary international law norm has emerged. After examining the existing customary international law, the court held that the plaintiffs had failed to establish that specific universal and obligatory norms had been violated. Plaintiffs alleged that their rights to life and health had been violated by the defendant's actions, but the court held that "the asserted 'right to health' and 'right to life' are insufficiently definite to constitute rules of customary international law."<sup>122</sup> The court examined nonbinding international law and binding law to which the U.S. is not a party and held that "[f]ar from being 'clear and unambiguous,' the statements relied on by plaintiffs to define the rights to life and health are vague and amorphous."<sup>123</sup> The principles relied upon by the plaintiffs are, according to the court "boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of states that disagree on many of the particulars regarding how actually to achieve them . . . . [T]hey do not meet the requirement of our law that rules of customary international law be clear, definite, and unambiguous."<sup>124</sup> *Sosa* indicated that only when such a clear and universal norm is established should a court go on to consider "even the possibility of a private right of action."<sup>125</sup>

Following *Sosa*, the Ninth Circuit, after rehearing, issued a second opinion in *Sarei v. Rio Tinto, PLC*.<sup>126</sup> Like *Flores*, this case was on appeal from the district court's dismissal of plaintiffs' claims brought under the ATS. The claims were against a mining company by citizens of Bougainville, an island in Papua New Guinea (PNG) and arose out of those mining operations and a 10-year civil conflict following an uprising at the Rio Tinto mine. The district court

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<sup>120</sup> A couple of cases rejected application of what might be valid norms based upon the specific facts of the case (much like *Sosa*). See, e.g., *Aldana*, 416 F.3d at 1246–47.

<sup>121</sup> See, e.g., *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

<sup>122</sup> See, e.g., *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003)

<sup>123</sup> *Id.* at 160.

<sup>124</sup> *Id.* "For example, the statements that plaintiffs rely on to define the rights to life and health include the following: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family . . . ' UDHR, Art. 25, G.A. Res 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 at 71 (1949); 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' International Covenant on Economic, Social and Cultural Rights, Art. 12; 'Human beings are . . . entitled to a healthy and productive life in harmony with nature.' Rio Declaration on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, Principle 1, 31 I.L.M. 874." *Id.* at 160–61.

<sup>125</sup> *Id.* at 161. The court also rejected plaintiffs' purely environmental claims because they failed to establish that CIL prohibits intranational pollution. See *Flores*, 343 F.3d at 161–68.

<sup>126</sup> *Sosa*, 542 U.S. at 738, n. 30.

had “found the plaintiffs had stated cognizable ATCA claims for racial discrimination, crimes against humanity, and violations of the laws of war, but that of the environmental claims asserted, only the violation of the United Nations Convention on the Law of the Sea (UNCLOS) was cognizable under the ATCA.”<sup>127</sup> The district court, however, dismissed all of plaintiffs’ claims as presenting nonjusticiable political questions and alternatively dismissed the racial discrimination claims under the Act of State Doctrine.<sup>128</sup>

Although the Ninth Circuit went on to reverse the district court on almost all issues, it did so largely based on its view of the above cited justiciability issues and did not take the opportunity to address directly the environmental claims raised here. Even the UNCLOS claim was not addressed on its merits.. The court discussed *Sosa* and that case’s relevance and concluded that the Supreme Court essentially adopted the test of the Ninth Circuit’s prior caselaw.<sup>129</sup> The Ninth Circuit adopts a fairly liberal view regarding the burden the plaintiffs must meet in order to withstand a motion to dismiss for lack of subject matter jurisdiction. “In order to satisfy ourselves of jurisdiction, we thus need not engage in a full blown review of plaintiffs’ claims on the merits, but rather must determine only whether the claims do not ‘appear[] to be immaterial and made solely for the purpose of obtaining jurisdiction,’ and are not ‘wholly insubstantial and frivolous’ . . . Whether the cause of action turns out to be ‘well-founded in law and fact’ . . . is beyond the scope of our threshold jurisdictional review.”<sup>130</sup>

It appears at this point that U.S. federal courts are unlikely to find a sufficiently definite, universal and obligatory norm that will satisfy the ATS and thereby serve our purpose of using international human rights law to bring a lawsuit in federal court. Note that the cases to date have been against corporations, so issues regarding government liability for failure to meet obligations under CIL have not been tested, but do not necessarily seem to provide a more promising basis for litigation. This is so not only because the same issues of indefiniteness and lack of universal acceptance of norms will persist, but also because of immunity defenses, both domestic and foreign.<sup>131</sup>

### **b. Other Bases for Federal Subject Matter Jurisdiction**

The discussion above relates only to cases brought by aliens in U.S. courts. In order for U.S. citizens to use the federal courts to bring climate change litigation based upon human rights norms, other bases of subject matter jurisdiction must be asserted. As discussed earlier, there are other possible bases for federal subject matter jurisdiction: federal question jurisdiction,<sup>132</sup> diversity jurisdiction,<sup>133</sup> and federal supplemental jurisdiction.<sup>134</sup> The issue of whether

<sup>127</sup> 487 F.3d 1193 (9th Cir. 2007).

<sup>128</sup> *Id.* at 1199.

<sup>129</sup> See *infra* notes 148–61 and accompanying text for discussion of these doctrines.

<sup>130</sup> *Sarei*, 487 F.3d at 1202 (noting that the Supreme Court “adopted a view of ATCA jurisdiction that is ‘generally consistent with the Ninth Circuit law applied by the district court in this case. . .’”).

<sup>131</sup> *Id.* at 1201.

<sup>132</sup> See, e.g., *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (holding that the Foreign Sovereign Immunity Act provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts and that the Alien Tort Statute did not provide a human rights exception to allow jurisdiction.) However, the most important exception to foreign sovereign immunity is the commercial activity exception: A suit may be brought against a foreign state in three circumstances: the suit must be “based upon a commercial activity carried on in the United States by the foreign state,” based upon “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere,” or based upon “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C. §1605(a)(2) (2008). One can imagine a situation in which a foreign state might meet one of these standards through state owned utilities or industries which contributed to Global Climate Change.

<sup>133</sup> 28 U.S.C. §1331.

international human rights claims could be asserted under the general federal question jurisdiction was raised in *Sosa*. Once the Court found that customary international law was a part of federal common law and formed the basis of a private right of action under the ATS, the issue then became whether a similar cause of action might be implied under the general federal question jurisdiction statute. In his concurring opinion, Justice Scalia argues that the position taken by the majority “necessarily means that [a claim based on] a post-*Erie* federal common law rule would ‘arise under’ the laws of the United States for purposes of general federal question jurisdiction (essentially rendering moot Section 1350).”<sup>135</sup> The Court, however, dismisses Scalia’s conclusion. “Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as §1350) . . . Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.”<sup>136</sup>

However, the ninth circuit reads *Sosa* as requiring the same jurisdictional showing under §1331 as under §1350. “Making the jurisdictional showing under §1350 the same as under §1331 is also consistent with *Sosa v. Alvarez-Machain* . . . , which suggests that where a federal court has recognized an international law tort under the ATCA, the suit arises under federal common law and thus federal jurisdiction may alternatively be premised upon §1331.”<sup>137</sup>

The dilemma for “arising under” jurisdiction, as well as for potential claims under the diversity jurisdiction statute,<sup>138</sup> is that each of those grants of jurisdiction will require the plaintiffs to establish a cause of action under customary international law, so we are right back to where we were with the ATS. Because international law does not generally provide for private rights of action, it is necessary to imply such rights from customary international law and there is no reason to suppose this would be an easier task under these jurisdictional grants than under the ATS. This is also true regarding supplemental jurisdiction claims under 28 U.S.C. §1367. That statute allows a claim over which the federal courts would otherwise not have original jurisdiction to be heard in federal court if brought with a related claim over which the federal courts do have jurisdiction.<sup>139</sup> Though this doctrine is generally asserted to allow state law claims into federal court, the court in *Rio Tinto* state that “because plaintiffs are plainly aliens whose claims sound exclusively in tort, we need only inquire into whether they have alleged at least one non frivolous violation of the law of nations. If they have, the district court may exercise supplemental jurisdiction over the remaining claims in the complaint.”<sup>140</sup> Presumably the court means this to extend to the environmental claims dismissed by the district court. However, once the court has asserted proper subject matter jurisdiction via §1367, the environmental claims, or the human rights

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<sup>134</sup> *Id.* §1332.

<sup>135</sup> *Id.* §1367. Supplemental jurisdiction allows claims which could not get into federal court on their own (i.e., no federal question or diversity jurisdiction), to “piggy back” onto a federally sufficient claim to which it is related. The statute provides the standard for relatedness, that the two claims must form “one constitutional case” and limits significantly the extent to which supplemental jurisdiction is available in a diversity jurisdiction case.

<sup>136</sup> See Stephens, *supra* note 88, at 20 (citing 542 U.S. at 745, note \*).

<sup>137</sup> *Sosa*, 542 U.S. at 731 n.19.

<sup>138</sup> *Id.* at 732. See also *Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972) (concluding that “§1331 will support claims founded upon federal common law”). Note that this is the theory the plaintiffs are arguing supports federal subject matter jurisdiction in the case of *Native Village of Kivalina v. ExxonMobil, et al.*, No. CV 08-1138 (N.D. Cal., filed Feb. 26, 2008).

<sup>139</sup> Diversity jurisdiction would theoretically be available in suits involving U.S. citizens suing foreign corporations or foreign officials for claims based upon the harms inflicted by global climate change.

<sup>140</sup> The test for relatedness is whether the claims form one constitutional case, which is ascertained by whether they share a common nucleus of operative fact. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

claims based upon environmental harms would likely be dismissed for failure to state a claim upon which relief would be granted, for the reasons discussed above.<sup>141</sup>

### c. Standing

Standing doctrine developed as an attempt to analogize actions against governmental agencies or entities to those against private parties and therefore early cases focused on confining the actionable cases to those in which the injury involved was analogous to common law injuries.<sup>142</sup> That earlier characterization has evolved and more recently, the Supreme Court has described its jurisprudence in the area as follows:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally-protected interest which is (a) concrete and particularized [by particularized, we mean that the injury must affect the plaintiff in a personal and individual way] and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical’.” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . traceable to the challenged action of the defendant, and not. . . the result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”<sup>143</sup>

The party asserting standing bears the burden of establishing these elements.

The issues in the preceding sections are likely to sink global climate change litigation brought under a theory of human rights and therefore standing will not be that much of an issue. In the existing case law regarding the ATS, standing issues have seldom been invoked because the statute by its nature requires proof of an injury (tort) based upon the law of nations and suffered by an alien. Absent any one of those elements and the case fails for lack of subject matter jurisdiction. With them, given the limited category of rights to which the statute has been applied, one has a good argument for standing—injury in fact (that is concrete and particularized), an injury that is traceable to the actions of the defendant and a harm that is redressable by a favorable decision.<sup>144</sup> As we move away from this traditional model for ATS claims, to one which would assert a broader, less definite injury against defendants including governmental agencies and one which is less traceable to the specific actions of the defendant, less particularized, with less clear causation and which presents more difficult problems regarding redressability, standing will become more of an issue.<sup>145</sup> The same difficulties concerning making claims on behalf of future generations that arise with regard to the other theories, would

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<sup>141</sup> *Sarei*, 487 F.3d at 1201.

<sup>142</sup> An additional jurisdictional requirement for bringing a case in federal court is the requirement that the defendant in the case be subject to personal jurisdiction, that is, the court must have the power to adjudicate with respect to the rights and obligations of such a party. In most of the ATS cases, personal jurisdiction has not been an issue. With respect to individual defendants, personal jurisdiction has generally been asserted by in hand service of process within the U.S. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). With respect to corporate defendants, the court has been required to determine whether the corporation has sufficient minimum contacts with the U.S. to support personal jurisdiction. This may be satisfied by a high quantity and quality of defendant’s business activity in the U.S. or by U.S. corporate citizenship. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000).

<sup>143</sup> *See generally* HOWARD P. FINK, ET AL., *FEDERAL COURTS IN THE 21st CENTURY: CASES AND MATERIALS* (3rd ed. 2007).

<sup>144</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>145</sup> *See, e.g.*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Friends of the Earth, Inc. v. Laidlaw Environmental Serv. (TOC), Inc.*, 528 U.S. 167 (2000).

arise regarding claims based upon international human rights norms, though it is more likely these cases will be dismissed based on lack of subject matter jurisdiction before it is necessary to address standing.

#### d. Justiciability

The federal courts have addressed several discretionary doctrines which allow them to dismiss ATS cases. Assuming a case asserting human rights impacts of global climate change is found to meet subject matter jurisdiction and standing requirements, the court might still dismiss it on the basis of political question or Act of State Doctrines or on the doctrine of international comity.<sup>146</sup> As the court in *Rio Tinto* has acknowledged, “all in effect provide different ways of asking one central question: are the United States courts the appropriate forum for resolving the plaintiffs’ claims?”<sup>147</sup>

#### i. The Political Question Doctrine

The political question doctrine requires courts to consider the analysis of the Supreme Court in *Baker v. Carr*,<sup>148</sup> which seeks to balance separation of powers concerns. The Court in *Baker* sets out six factors that require dismissal of the case if any one of them is “‘inextricable’ from the case at bar.”<sup>149</sup>

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>150</sup>

In *Sosa*, by virtue of reaching the merits of the case, the Supreme Court rejects the notion that ATS cases generally run afoul of the political question doctrine. It does, however, raise the possibility that a “policy of case-specific deference to the political branches might limit the availability of relief in the federal courts for violations of customary international law.”<sup>151</sup> The Supreme Court has elsewhere made it clear that not every question that conflicts with a political branch requires dismissal under this doctrine.<sup>152</sup>

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<sup>146</sup> Bradford C. Mank, *Standing and Global Warming: Is Injury to all Injury to None*, 35 ENVTL L. 1 (2005).

<sup>147</sup> Under which a federal court may decline to exercise jurisdiction over a case or to apply U.S. law to a case in which a foreign state has a greater interest. See, e.g., RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES, §403(2).

<sup>148</sup> *Sarei*, 487 F.3d at 1197.

<sup>149</sup> 369 U.S. 186 (1962).

<sup>150</sup> *Id.* at 217.

<sup>151</sup> *Id.*

<sup>152</sup> *Sosa*, 542 U.S. at 733 n.21.

## ii. Act of State Doctrine

Under the act of state doctrine, federal “courts generally refrain from judging acts of a foreign state within its territory.”<sup>153</sup> The doctrine has seldom been argued and has not generally been applied in ATS cases. The act of state doctrine is also based upon considerations of separation of powers and requires that the court be considering the validity of the governmental act.<sup>154</sup> In ATS cases, because of the generally egregious nature of the acts alleged (frequently violations of *jus cogens* norms), defendants have seldom argued their behavior was an official act of the state, nor are they likely to find the courts receptive to such an argument.<sup>155</sup> As attempts are made to challenge less clearly defined and generally condemned acts of a state, this could be more of an issue.

## iii. International Comity Doctrine

“Under the international comity doctrine, courts sometimes defer to the laws or interests of a foreign country and decline to exercise jurisdiction that is otherwise properly asserted.”<sup>156</sup> In the *Rio Tinto* case, the district court found two of the claims asserted, claims based upon racial discrimination and UNCLOS, to be cognizable ATS claims, but dismissed them under the Act of State Doctrine and international comity.<sup>157</sup> The decision to do so was largely based on a Statement of Interest filed by the U.S. State Department.<sup>158</sup> The Ninth Circuit concluded that the district court had given too much weight to that SOI and remanded for reconsideration of those claims.<sup>159</sup>

In conclusion, ATS cases and other federal cases stand very little chance of being successful at this point, absent clearer customary law in the area. A search for state law cases has found very few relevant cases in which international human rights norms are asserted. There is at least one environmental case asserting claims based on international

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<sup>153</sup> Stephens, *supra* note 118, at 965 n.201.

<sup>154</sup> See *Underhill v. Hernandez*, 168 U.S. 250 (1897) (“Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.”).

<sup>155</sup> *Banco Nacional de Cuba v. Sabbatino*, Receiver, 376 U.S. 398 (1964) (“The act of state doctrine does, however, have ‘constitutional’ underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.”)

<sup>156</sup> *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

<sup>157</sup> *Sarei*, 487 F.3d at 1211 (citing *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n.27 (1987) (“Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interest of other states.”)

<sup>158</sup> See *id.* at 1199.

<sup>159</sup> The SOI stated that in the opinion of the State Department “continued adjudication of the claims . . . would risk a potentially serious adverse impact on the peace process [in Papua New Guinea], and hence on the conduct of our foreign relations.” It “concludes with the observation that “[t]he Government of Papua New Guinea . . . has stated its objection to these proceedings in the strongest terms,” and that PNG “perceives the potential impact of this litigation on the U.S.-PNG relations, and wider regional interests, to be ‘very grave.’” *Id.* at 1205–06.

norms.<sup>160</sup> One of the major obstacles to bringing such cases in state courts against foreign defendants is that they will invariably be removed, when possible, to federal courts.<sup>161</sup>

#### D. Is There an Alternative International Forum

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are potential fora for raising these issues. As noted earlier in this paper, the IAHR system has been receptive to arguments for broad protections for rights to life, health and property, particularly regarding indigenous peoples under both the binding American Convention and the non-binding American Declaration of the Rights and Duties of Man. Moreover, the Court has used language suggesting that the protection of future generations is a viable goal.<sup>162</sup> However, several things caution against being overly reliant on this system at this time. First, the failure of the United States and Canada to fully participate in the OAS, including the failure of those states to ratify the American Convention and thereby accept the jurisdiction of the Court, weakens the system and leaves it without any effective remedy against them. States have not complied with the broad decisions in the environmental area and the Court has no power to enforce its judgments.<sup>163</sup> And finally, the system's reluctance to take the Inuit case is troubling in that it seems to suggest that the Commission is unlikely to take on the United States or, alternatively, that even with its relatively broad view of the right asserted, it does not believe the petitioners can adequately establish a connection between the acts of the U.S. and the harms to the Inuit way of life.

As far as other international fora might be concerned, there are none available for proceeding against non-state actors and the United States has insulated itself from such actions in the ICCPR Human Rights Committee by refusing to become a party to Optional Protocol 1, which provides for individual petitions. It is true that the U.S. has accepted the possibility of state-to-state petitions under the ICCPR, but this is as of yet an unused option. Finally, the U.S. is not a party to other international treaties that might obligate it at least to report to the treaty bodies associated with those.

#### E. Conclusion

While there are many international human rights norms that seem not only relevant, but also legally applicable to addressing the harms caused by global climate change, many difficulties remain in turning a “moral imperative into a legal imperative.”<sup>164</sup> The emerging law linking human rights and climate change must be developed further and we must use the legal/political process to develop that international law. Litigation has a role to play in that process and might, over the long run, develop the law and the remedies that will deal with the problems. But do we have the time to develop the law that way? Because of the necessarily slow nature of developing law incrementally through litigation and the urgent situation in which we find ourselves, in this context litigation may serve more as a prod to the policy process<sup>165</sup> than as a solution to the problem of global climate change—but it may be a necessary prod.

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<sup>160</sup> *Id.* at 1213 (“The district court acted within its discretion in determining that it should decline to hear these claims on comity grounds. However, as with the district court’s act of state dismissal of the UNCLOS claim, because we have rejected the district court’s reliance on the SOI in the context to the political question doctrine, we again consider it prudent to allow the district court to revisit its reliance on the SOI in the comity context”).

<sup>161</sup> *See* *Alomang v. Freeport-McMoran, Inc.*, 718 So. 2d 971 (La. Ct. App. 1998).

<sup>162</sup> *See* 28 U.S.C. §1441 (2008).

<sup>163</sup> *See, e.g.*, *The Bamaca Vélasquez Case*, *supra* note 1.

<sup>164</sup> *See* American Convention, *supra* note 9, art. 52–69.

<sup>165</sup> The description of the Climate Legacy Initiative task. *See* the CLI website at [www.vermontlaw.edu/cli](http://www.vermontlaw.edu/cli).