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**GLOBAL WARMING LITIGATION UNDER THE ALIEN TORT CLAIMS
ACT: WHAT SOSA V. ALVAREZ MACHAIN AND ITS PROGENY
MEAN FOR INDIGENOUS ARCTIC COMMUNITIES**

Mini Kaur

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Mini Kaur*

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I. Introduction

"These are things that all of our old oral history has never mentioned," said Enosik Nashalik, 87, [an elder in the Inuit village of Pangnirtung, Canada]. "We cannot pass on our traditional knowledge, because it is no longer reliable. Before, I could look at cloud patterns or the wind, or even what stars are twinkling, and predict the weather. Now, everything is changed."¹

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¹ Doug Struck, *Inuit See Signs in Arctic Thaw; String of Warm Winters Alarms 'Sentries for the Rest of the World,'* WASH. POST, Mar. 22, 2006, at A01.

Just how much has changed for inhabitants of the Arctic remains largely unpublicized. Global warming, resulting from the accumulation of greenhouse gases in the Earth's atmosphere, is taking its toll on the region.² What role, if any, can law play in dealing with climate change? This Note explores the possibility of global warming litigation under the Alien Tort Claims Act (ATCA). Part II begins with an overview of the global warming crisis as it affects indigenous Arctic communities and a discussion of past and current global warming cases. Part III introduces the ATCA and the jurisprudence interpreting the statute before the landmark Supreme Court case *Sosa v. Alvarez-Machain*, which is the only instance the Court has considered the jurisdictional scope of the Act.³ Part IV describes the Supreme Court's opinion in *Sosa* and what the case means for ATCA litigants. Part V considers ATCA cases decided after *Sosa* and describes the way *Sosa* has played out in lower courts. Part VI lays out a potential claim for indigenous Arctic communities under the ATCA and considers whether such a claim would be viable. Finally, Part VII discusses the role that litigation can play in the global warming debate and whether judicializing the issue would actually benefit the Arctic communities at risk for catastrophic climate change.

II. The Global Warming Crisis in the Arctic

Among those communities whose lifestyles have been dramatically altered by global warming are indigenous Arctic communities and inhabitants of low-lying island nations. Inuit communities in the Arctic have recently garnered media attention after the 2005-06 winter season, the warmest winter on record in Canada and in parts of the United States.⁴ The

² See generally ARCTIC CLIMATE IMPACT ASSESSMENT, ARCTIC COUNCIL, IMPACTS OF A WARMING ARCTIC (2004) (detailing the current and future effects of climate change on the Arctic region) [hereinafter ACIA], available at <http://amap.no/acia/> (cited in Mini Kaur, Global Warming and Environmental Justice 10 (Jan. 5, 2006) (unpublished manuscript, on file with author)).

³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). In *Sosa*, Humberto Alvarez-Machain alleged that the United States Drug Enforcement Agency (DEA) arranged for his abduction from Mexico, and that this constituted a violation of the law of nations under the ATCA. *Id.* at 698. The Court rejected Alvarez-Machain's argument, finding that he was not entitled to a remedy under the ATCA. *Id.* at 697. The Court stated that while the ATCA does allow for private rights of action, Congress intended for the ATCA to allow jurisdiction for only a "modest set of actions." *Id.* at 720. The Court also found that the applicable customary international law is the current law, not the customary international law that was in place when Congress first enacted the ATCA. *Id.* at 725. The Court also stated that any alleged violation of customary international law must also be "defined with a specificity" comparable to that of the few offenses that were specifically recognized as violations of customary international law at the time of the ATCA's enactment. *Id.* Under this framework, the *Sosa* Court found that Alvarez-Machain's claim fell outside the purview of the ATCA. *Id.* at 712.

⁴ *Balmy Winter Fuels Warming Fears*, TORONTO SUN, Mar. 14, 2006, at 4 ("[B]etween December and February, the country was 3.9C above normal -- the warmest winter season since

global warming debate used to be about whether warming exists or will exist in the future, but recent history has made that debate somewhat moot. The debate has now shifted to whether society should be adopting policies to reduce global warming and whether climate change has the potential to become catastrophic.⁵

In the last few decades, average temperatures in the Arctic rose at almost twice the rate of the rest of the world.⁶ Observed and predicted effects of rising temperatures include receding of permafrost boundaries, tree lines, and summer sea-ice extent.⁷ Indigenous Arctic communities are experiencing both economic and cultural impacts as a result of rising temperatures.⁸

In many indigenous communities, hunting is not solely for the purpose of acquiring food or supporting one's family economically—it is also central to the cultural and social identity of the people.⁹ When the loss or migration of any particular species is threatened, the loss of indigenous peoples' food security as well as their culture is also threatened.¹⁰ For the Inuit people, global warming means a disruption to their hunting and food-sharing culture because melting sea ice causes the animals that Inuit hunt to "decline, become less accessible, and possibly become extinct."¹¹ Some animals at risk of extinction or severe decline include the polar bear, different species of ice-dependent seals, migratory birds, and caribou/reindeer.¹²

Arctic animal populations are already changing.¹³ Caribou, a staple of the Inuit diet, are falling through sea ice that was once solid.¹⁴ Polar bears and seals are moving northward because they need the shelter provided by

temperatures were first recorded in 1948."); Jackie Crosby, *St. Paul Mayor Signs Pact to Cut Pollution, Make City Greener; The Plan Would Cut Car and Power Plant Emissions to 1990 Levels by 2012*, STAR TRIBUNE, Feb. 2, 2006, at 1A ("Minnesota's warmest winter since 1895 has melted ice sculptures, canceled ice-fishing tournaments and prompted plenty of griping from outdoor enthusiasts unable to skate or ski cross-country.").

⁵ See Juliet Eilperin, *Debate on Climate Shifts to Issue of Irreparable Change; Some Experts on Global Warming Foresee 'Tipping Point' When it is Too Late to Act*, WASH. POST, Jan. 29, 2006, at A01 (discussing the near-consensus among scientists that anthropogenic climate change is occurring and the shifting of the central debate to whether climate change is occurring rapidly enough that the Earth will reach a point of no return).

⁶ ACIA, *supra* note 2 at 1.

⁷ *Id.* at inside cover.

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 6.

¹³ Lisa Krause, *Global Warming Melts Inuit's Arctic Lifestyle*, NATIONAL GEOGRAPHIC NEWS, July 12, 2000, available at <http://news.nationalgeographic.com/news/2000/12/122900inuits.html>.

¹⁴ *Id.*

pack ice to give birth.¹⁵ As species move north, new species move into their habitat.¹⁶ In the Arctic this means that areas traditionally home to polar bears are now home to grizzly bears, and fishermen farther north than ever before are finding salmon in their nets.¹⁷ These changes complicate indigenous peoples' established hunting and fishing practices.¹⁸ Those who depend on hunting and fishing for their subsistence, and particularly those who depend on only a few species, will experience severe impacts from changes to the species' population or distribution.¹⁹

Coastal erosion and thawing permafrost are also changing lives in many indigenous communities.²⁰ Some coastal villages are already being forced to relocate entirely.²¹ Others are facing the risks and costs associated with living in a community that is "eroding into the ocean right in front of [their] eyes."²²

Climate change also presents public health concerns for many indigenous communities.²³ Effects on human health will vary based on communities' differences in health status and adaptive abilities.²⁴ Those that are most vulnerable to adverse health impacts are "rural arctic residents in small, isolated communities with a fragile system of support, little infrastructure, and marginal or nonexistent public health systems."²⁵ Global warming-induced shifts in animal populations can also increase the transport of contaminants to the Arctic and "[facilitate]...the spread of infectious diseases in animals that can be transmitted to humans...."²⁶ These health risks add to the disproportionate health hazards that Arctic communities already face. Arctic natives are already exposed to high levels of polychlorinated biphenyls (PCBs) because of global atmospheric patterns that deposit the PCBs in the north.²⁷ PCBs are "persistent bioaccumulative and toxic pollutants [that] pose a special threat to native subsistence fishers and wildlife consumers."²⁸

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ ACIA, *supra* note 2.

²⁰ *Id.* at 8.

²¹ *Id.*

²² *Id.* (quoting Duane Smith, Inuit Circumpolar Conference, Canada).

²³ *Id.* at 13.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Robert D. Bullard et al., *Addressing Global Poverty, Pollution, and Human Rights*, in *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* 291 (Robert D. Bullard ed., Sierra Club Books 2005) (*cited in* Mini Kaur, *Global Warming and Environmental Justice* 10 (Jan. 5, 2006) (unpublished manuscript, on file with author)).

²⁸ *Id.*

Indigenous peoples also face travel hazards due to changing ice and weather conditions resulting from warming.²⁹ The time periods when ice roads and tundra are frozen will get shorter and shorter as the warming continues.³⁰ The unavailability of these critical infrastructure resources will compromise transportation and industry on land.³¹

The predicted decline in arctic sea-ice extent will also have effects that some would find beneficial: while industry on land will be compromised, retreating sea ice will open up new shipping routes and prolong the time period when shipping is possible.³² Historically closed passages may open up for industry use.³³ Greater access to shipping routes, however, will raise new questions of security and safety.³⁴ For example, the projected increase in shipping access may require "new and revised national and international regulations . . . [governing] marine safety and environmental protection."³⁵ A greater industry presence in the Arctic will increase the risk of "environmental degradation" such as that caused by oil spills or other industrial accidents.³⁶ These types of incidents generally have longer-lasting effects and confer greater harm when they occur in poor, indigenous communities with low populations. According to the Arctic Climate Impact Assessment, "[a] recent study suggests that the effects of oil spills in a high-latitude, cold ocean environment last much longer and are far worse than first suspected."³⁷ Arguments that global warming will improve the Arctic economy fail to consider the negative impacts of warming on every other facet of indigenous communities' lifestyles.

Arctic victims of global warming have few means to address greenhouse gas emitters.³⁸ The United States comprises less than five percent of the world's population, yet it produces twenty-five percent of carbon dioxide emissions.³⁹ Because carbon dioxide in the atmosphere will

²⁹ ACIA, *supra* note 2 at 8.

³⁰ *Id.* at 9.

³¹ *Id.*

³² *See id.* at 12 (noting the likely increase in marine transport and access to arctic shipping routes that will occur as sea-ice extent declines).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ The phrase "victims of global warming" is a novel one. A Westlaw search of all cases, texts, and periodicals revealed only six articles using the phrases "victim of global warming" or "victims of global warming" as of March 14, 2006. I use this language throughout this Note because identifiable victims of global warming already exist. *See generally* ACIA, *supra* note 2; *see also* ACF News Source, *Climate Change – Tuvalu*, <http://www.acfnewsources.org/environment/Tuvalu.html> (discussing the "shrinking size" of Tuvalu, a low-lying island nation in the Pacific). Arctic communities are already feeling drastic effects of global warming and are undeniably victims of greenhouse gas emissions.

³⁹ Jeffrey Kluger et al., *Polar Ice Caps Are Melting Faster Than Ever*, TIME, Apr. 3, 2006, at 28.

remain elevated for centuries as a result of past human activities, some future warming is unavoidable.⁴⁰ Consequently, even if greenhouse gas emissions halt immediately, global warming would continue and the lives of indigenous people in the Arctic would continue to be altered.⁴¹

Residents of the Arctic region are properly situated to be plaintiffs in a global warming case: they are already experiencing concrete and severe effects of global warming, to the extent that some communities are being forced to relocate. Future victims of global warming will include communities all over the world, including many who will have extreme difficulty coping with catastrophic climate changes to their environments.⁴² Those individuals in the worst position to prevent future warming or respond to climate change will also suffer the worst consequences.

Few cases have addressed global warming, and none have approached the topic using the ATCA. Cases seeking to address greenhouse gas emissions have generally been unsuccessful.⁴³ In December of 2005, eight U.S. states, New York City, and three NGOs appealed a district court's dismissal of their nuisance claim against the five biggest power companies in the United States.⁴⁴ The plaintiffs argued that the defendants' power plants contribute to climate change substantially and therefore constitute a public nuisance.⁴⁵ The district court dismissed the claim on the grounds that it lacked jurisdiction because the case presented non-justiciable political questions that are relegated to the political branches, not to the judiciary.⁴⁶

The Inuit Circumpolar Conference (ICC) recently filed a petition with the Inter-American Commission on Human Rights claiming that the United States' continued greenhouse gas emissions are hurting the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² While the ATCA, discussed in Part II, *infra*, only addresses torts that have already occurred, the hope is that a finding of liability under the ATCA for past harms would deter future harms by raising the cost of producing greenhouse gas emissions.

⁴³ For a list of cases addressing global warming that are already underway, see Climate Justice Programme, *Cases already underway*, <http://www.climatelaw.org/cases> (cited in Mini Kaur, Global Warming and Environmental Justice 10 (Jan. 5, 2006) (unpublished manuscript, on file with author)).

⁴⁴ Climate Justice Programme, *U.S. Nuisance Appeal*, <http://www.climatelaw.org/media/U.S.%20nuisance%20appeal> [hereinafter *Nuisance Appeal*]. The United States District Court for the Southern District of New York dismissed the states' complaint in *Connecticut v. American Electric Power Company*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) [hereinafter *AEP*] (cited in Mini Kaur, Global Warming and Environmental Justice 10 (Jan. 5, 2006) (unpublished manuscript, on file with author)).

⁴⁵ *Nuisance Appeal*, *supra* note 44.

⁴⁶ *AEP*, 406 F. Supp. 2d at 274. The court noted that President Bush expressly opposes the Kyoto Protocol and that a non-justiciable political question exists where "[it is impossible for a court to reach a decision] without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 270, 272. The court concluded by reiterating the appropriate balance of power that it saw appropriate in the global warming context: "[C]limate change raises important foreign policy issues, and it is the President's prerogative to address them." *Id.* at 273. For a discussion of how the political question doctrine may apply to global warming litigation in the ATCA context, see Part V, *infra*.

livelihoods of Arctic communities.⁴⁷ The petition demands that the United States reduce emissions, pointing out the severe impacts of climate change that Inuit communities are already experiencing.⁴⁸ Even if the ICC is successful and the Commission issues a decision requiring the U.S. to adopt mandatory emissions limits, the victory would only be a symbolic one.⁴⁹ This is because the Commission operates within the framework of the American Convention of Human Rights, which the U.S. has not ratified.⁵⁰ However, the ICC believes that if the Commission finds the U.S. violated human rights, it will not be taken lightly.⁵¹ Some speculate that a favorable ruling could mean that the ICC could then rely on the Alien Tort Claims Act (ATCA), which is discussed in detail below, using the Commission's judgment in national litigation involving the ATCA.⁵²

III. The Alien Tort Claims Act

The First Congress enacted the Alien Tort Claims Act (ATCA) as part of the Judiciary Act of 1789.⁵³ The Act provides federal courts in the United States with jurisdiction to hear cases brought by aliens alleging violations of international law. The statute reads: "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."⁵⁴ While the text of the statute does not specify the duration of the statute of limitations, courts have adopted a ten year statute of limitations from the Torture Victims Prevention Act (TVPA).⁵⁵

⁴⁷ Richard Black, *Inuit Sue US Over Climate Policy*, BBC News, Dec. 8, 2005, <http://news.bbc.co.uk/1/hi/sci/tech/4511556.stm> (cited in Mini Kaur, *Global Warming and Environmental Justice 10* (Jan. 5, 2006) (unpublished manuscript, on file with author)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* This approach would likely be unsuccessful because a ruling by the ICC is not customary international law that is cognizable under the ATCA. See Part IV, *infra*, for a discussion of what the Supreme Court requires for a norm to be actionable under ATCA.

⁵³ Judiciary Act of 1789, codified as amended at 28 U.S.C. § 1350 (2000). ATCA is alternatively referred to as the Alien Tort Statute.

⁵⁴ *Id.*

⁵⁵ *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002) (borrowing TVPA's statute of limitations for the ATCA because the two statutes share similar goals and similar mechanisms for achieving those goals); *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1180-81 (N.D. Cal. 2001) (concluding that the TVPA is the closest federal statute to the ATCA and consequently borrowing the TVPA's limitations period). Congress enacted the TVPA in 1991 as a statutory note to the ATCA. Torture Victim Prevention Act of 1991, 28 U.S.C. § 1350, note 2 (2000).

ATCA was rarely applied before the Second Circuit Court of Appeals decided *Filartiga v. Pena-Irala* in 1980.⁵⁶ *Filartiga* revived the ATCA by holding that the Act grants jurisdiction to aliens seeking redress in United States district courts for human rights violations that occurred overseas.⁵⁷ *Filartiga* opened the door for future human rights litigation under the ATCA and created the potential for substantive rights under what was previously viewed as a purely jurisdictional statute.⁵⁸

There are three elements of a claim under the ATCA: (1) the plaintiff must be an alien suing (2) for a tort (3) that violates the law of nations. The third element is the most relevant to this discussion because it presents the greatest obstacle for climate change litigants. The ability to litigate a global warming complaint successfully under the ATCA mandates some finding of a violation of the "law of nations," which necessitates some positive human right that protects against environmental degradation, habitat loss, or detriment to human health.

Laws of nations, or customary international laws, are generally described as those that are universally accepted by States "out of a sense of legal obligation and mutual concern."⁵⁹ Customary international law only addresses wrongs that are of "mutual" concern to the States, those wrongs that affect the relationship between states or between an individual and a foreign state.⁶⁰ It does not address wrongs that are of "several" concern to

⁵⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the court considered whether a grant of subject matter jurisdiction under the ATCA was appropriate where a Paraguayan citizen brought suit in the United States against another Paraguayan citizen, alleging violations of customary international law that took place in Paraguay. *Id.* at 879-80. The plaintiffs argued the defendant tortured and killed a member of their family in retaliation for political activities of the victim's father. *Id.* at 878. The court discussed various sources of customary international law that demonstrate the law of nations clearly and unambiguously prohibits torture. *Id.* at 880-85. Because the ATCA opened the "federal courts for adjudication of the rights already recognized by international law," a grant of jurisdiction under the ATCA was proper. *Id.* at 887. To see a discussion of cases where ATCA claims were unsuccessfully raised before *Filartiga*, see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002).

⁵⁷ See *Filartiga*, 630 F.2d at 887 (explaining that "[a]lthough the Alien Tort Statute has rarely been the basis for jurisdiction during its long history . . . there can be little doubt that this action is properly brought in federal court").

⁵⁸ See Igor Fuks, Note, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 113 (2006) ("Filartiga was revolutionary...[it] created an opening for analogous actions in the future, such as for plaintiffs seeking redress for incidents of torture, extrajudicial killings, and state-sponsored violence against defendants either residing or traveling in the United States.").

⁵⁹ *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003). The Restatement of Foreign Relations Law defines customary international law as resulting "from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

⁶⁰ *Flores*, 414 F.3d at 249.

the States, that are matters in which States are "separately and independently interested."⁶¹ The States must also intend to be legally bound by the laws.⁶²

ATCA liability is not limited to state actors; it can also extend to private individuals acting under the color of the state.⁶³ While directly violating customary international law will certainly give rise to ATCA jurisdiction (provided that the plaintiff is an alien alleging a tort), at least one court has held that aiding or abetting in the violation of customary international law also gives rise to a claim under the statute.⁶⁴

To date, only a handful of cases have approached ATCA from an environmental perspective, and none have approached it from an environmental human rights perspective to deal with the problem of climate change.

In *Flores v. Southern Peru Copper Corp.*, a group of Peruvian plaintiffs brought personal injury claims under the ATCA against the Southern Peru Copper Corporation (SPCC), a United States company.⁶⁵ The plaintiffs, which included residents of Peru and the representatives of deceased residents, alleged that SPCC's copper mining, refining, and smelting operations created pollution that caused plaintiffs' and the decedents' lung diseases.⁶⁶ Plaintiffs argued that SPCC deprived them of their rights to life, health, and sustainable development.⁶⁷ Plaintiffs proposed that a standard of "shockingly egregious" be applied to determine whether their claims were recognizable under international law.⁶⁸

The court conceded that customary international law "does not stem from any single, definitive, readily-identifiable source" and is therefore "subject to creative interpretation."⁶⁹ For a norm to qualify as customary international law, States must universally accept it and accede to it out of legal obligation, and it must be a matter in which States are mutually interested.⁷⁰

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995) (cited in Laura A. Cisneros, Note, *Sosa v. Alvarez-Machain – Restricting Access to U.S. Courts Under the Federal Tort Claims Act and the Alien Tort Statute: Reversing the Trend*, 6 LOY. J. PUB. INT. L. 81, 89 (2004)).

⁶⁴ See *Presbyterian Church of Sudan v. Talisman Energy*, 374 F. Supp. 2d. 331, 337-41 (S.D.N.Y. 2005) (rejecting defendant's argument that there was insufficient evidence to support the imposition of aiding and abetting liability under international law).

⁶⁵ *Flores*, 414 F.3d at 236.

⁶⁶ *Id.* at 237.

⁶⁷ *Id.*

⁶⁸ *Id.* at 253.

⁶⁹ *Id.* at 248.

⁷⁰ *Id.* at 248-49. The mutuality requirement essentially means that a customary international law must "[affect] the relationship between states or between an individual and a foreign state, and [be] used by those states for their common good and/or in dealings *inter se*." *Id.* at 249 (emphasis in original) (internal citation omitted in original) (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

Looking to the charter of the International Court of Justice, the court listed various sources of customary international law:

[T]he proper *primary* evidence consists only of those "conventions" (that is, treaties) that set forth "rules expressly recognized by the contesting states," ... "international custom" insofar as it provides "evidence of a general practice *accepted as law*," ... and "the general principles of *law* recognized by civilized nations," ... [A]cceptable *secondary* (or "subsidiary") sources summarizing customary international law include "judicial decisions," and the works of "the most highly qualified publicists," as that term would have been understood at the time of the Statute's drafting.⁷¹

The court pointed out that customs based on social or moral norms are not appropriate sources of customary international law.⁷² The plaintiffs' "egregiousness" standard was rejected because it did not mandate the universality and mutuality that customary international law requires.⁷³ The court also rejected plaintiffs claims that customary international law recognized a "right to life" or a "right to health."⁷⁴ These claims were far too indefinite and vague to comprise customary international law.⁷⁵

The court declined to find that customary international law prohibits *intranational* pollution.⁷⁶ While the plaintiffs supplied the court with, *inter alia*, treaties, covenants, decisions of multinational tribunals, and non-binding declarations of the United Nations General Assembly, the court found none of these convincing.⁷⁷ None of the evidence plaintiffs provided met the requirements of universality, obligation, and mutuality.

In *Beanal v. Freeport-Morain*, Indonesian plaintiffs sued two Delaware corporations that engaged in mining operations in Irian Jaya, Indonesia.⁷⁸ Plaintiffs alleged that the defendants engaged in environmental abuses, human rights violations, and cultural genocide during the course of their mining activities in plaintiffs' habitat.⁷⁹ Arguing that Freeport's mining

Mutuality connotes that the law, if violated, may be "capable of impairing international peace and security." *Id.*

⁷¹ *Id.* at 251 (emphasis in original) (internal citations omitted).

⁷² *Id.* at 252.

⁷³ *Id.* at 253-54.

⁷⁴ *Id.* at 255.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 256.

⁷⁸ *Beanal v. Freeport-McMoran*, 197 F.3d 161, 163 (5th Cir. 1999).

⁷⁹ *Id.*

operations caused harm and injury to their habitat, and that this destruction of their habitat and religious symbols forced them to relocate, plaintiffs brought suit under the Alien Tort Claims Act.⁸⁰ The District Court dismissed the plaintiffs' complaint for failure to state a claim upon which relief could be granted, and the case arrived on appeal to the Fifth Circuit.⁸¹

The Fifth Circuit examined the sources on which Beanal relied for the proposition that environmental abuse was a violation of customary international law and found that these sources were not adequate.⁸² The ATCA only applies to "shockingly egregious violations of universally recognized principles of international law."⁸³ The agreements and treaties that Beanal relied upon were not universally accepted in the international community.⁸⁴ The court found that the various sources of international law that plaintiffs set forth demonstrated a "general sense of environmental responsibility and [stated] abstract rights and liberties devoid of articulable or discernable standards ... to identify practices that constitute international environmental abuses or torts."⁸⁵ The court urged that federal courts should exercise extreme caution when facing environmental claims under international law.⁸⁶ It urged other courts to ensure that "environmental policies of the United States do not displace environmental policies of other governments."⁸⁷

The court then turned to the cultural genocide claim. Plaintiffs asserted that Freeport "purposely engaged in activity to destroy [their] cultural and social framework," and that this constituted cultural genocide in violation of the law of nations.⁸⁸ The court found that plaintiffs' complaint was filled with "conclusory allegations devoid of any underlying facts" to support the claim of genocide.⁸⁹ Plaintiffs also failed to demonstrate that cultural genocide constitutes a violation of the law of nations.⁹⁰ It was simply too "amorphous a cause of action" to be cognizable as a violation of customary international law.⁹¹ Consequently, the court dismissed Beanal's genocide claims as well.

⁸⁰ *Id.* Plaintiffs also argued that Freeport's private security forces acted with the Republic of Indonesia in violating international human rights, but only the environmental claims are examined here. *Id.*

⁸¹ *Id.* (citing *Beanal v. Freeport-McMoran*, 969 F. Supp. 362 (E.D. La. 1997)).

⁸² *Id.* at 167.

⁸³ *Id.* (citing *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam)) (internal quotation omitted).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 168.

⁹⁰ *Id.*

⁹¹ *Id.*

Another court faced environmental claims in *In re Agent Orange Product Liability Litigation*.⁹² In *Agent Orange*, Vietnamese nationals filed suit against chemical companies that manufactured the herbicide Agent Orange (dioxin) for the Vietnam War.⁹³ The plaintiffs alleged a host of domestic and international law violations, including violation of the ATCA.⁹⁴ Plaintiffs relied on the 1925 Geneva Protocol's prohibition of lethal gas weapons as evidence of customary international law.⁹⁵ The court rejected this argument because at the time of the Vietnam War, the United States was not a party to the protocol and it was therefore simply a rule based on reciprocity, not on customary international law.⁹⁶ Moreover, the Geneva Protocol did not even encompass military use of herbicides.⁹⁷ Plaintiffs also attempted to rely on international environmental law norms, but the court found no "international convention or instrument that solely and specifically addresses environmental law relevant to the legality of herbicide use during war up to 1975."⁹⁸ The court ultimately rejected and dismissed all of plaintiffs' claims.⁹⁹

IV. *Sosa v. Alvarez-Machain*

In 2004, the United States Supreme Court addressed the Alien Tort Claims Act in *Sosa v. Alvarez-Machain*.¹⁰⁰ *Sosa* was not the first instance that the Court was presented with an ATCA claim, but it was the first time that the Court substantively considered such a claim.¹⁰¹ *Sosa* involved a dispute between two Mexican nationals, Humberto Alvarez-Machain and Jose Francisco Sosa, but the underlying conflict was between Alvarez-Machain and the United States Drug Enforcement Agency (DEA). In 1985, a Drug Enforcement Association (DEA) official on assignment in Mexico was captured, tortured and murdered.¹⁰² DEA officials in the United States suspected Alvarez-Machain, a physician, of being present during the torture and prolonging the DEA agent's life to allow the torture to continue.¹⁰³ In

⁹² *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

⁹³ *Id.* at 15.

⁹⁴ *Id.*

⁹⁵ *Id.* at 120.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 127.

⁹⁹ *Id.* at 145.

¹⁰⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹⁰¹ *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (dismissing ATCA claim because defendant was a foreign sovereign protected by the Foreign Sovereign Immunities Act).

¹⁰² *Sosa*, 542 U.S. at 697.

¹⁰³ *Id.*

1990, a federal grand jury indicted Alvarez for the torture and murder of the DEA agent, and the district court issued a warrant for his arrest.¹⁰⁴ The Mexican government was unhelpful to the DEA in getting Alvarez to the United States so that he could be arrested.¹⁰⁵ The DEA thus approved a plan to hire a group of Mexican nationals, including Sosa, to abduct Alvarez and bring him to the United States.¹⁰⁶

The plan was executed and Sosa and others brought Alvarez-Machain to the United States, where he was arrested by federal officers.¹⁰⁷ Alvarez-Machain was tried and acquitted in 1992.¹⁰⁸ Upon returning to Mexico, Alvarez-Machain initiated a civil action alleging that the DEA arranged for his abduction from Mexico, and that this constituted false arrest under the Federal Tort Claims Act (FTCA) and a violation of the law of nations under the ATCA.¹⁰⁹

Reversing the Ninth Circuit's judgment in favor of Alvarez-Machain, the Supreme Court held that Alvarez-Machain was not entitled to a remedy under either statute.¹¹⁰ In a unanimous decision, the Court found that Alvarez-Machain's claim did not fall within the purview of the ATCA.¹¹¹ While the *Sosa* decision itself was unanimous, the different opinions set forth in the case reflect diverse views of the ATCA and the role federal courts should play in interpreting the statute.

In deciding *Sosa*, the Court established several important principles. First, while the ATCA is a jurisdictional statute, it allows for private rights of action.¹¹² Examining the history of the ATCA, the Court concluded that the First Congress did not intend for the ATCA to be a "jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners."¹¹³ Instead, they recognized certain offenses to be

¹⁰⁴ *Id.* at 697-98.

¹⁰⁵ *Id.* at 698.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Prior to the trial on the merits, Alvarez-Machain moved to dismiss the indictment, arguing that his seizure was illegal in violation of the extradition treaty between the United States and Mexico. *Id.* The district court granted the motion to dismiss the indictment and the Ninth Circuit affirmed. *Id.* The Supreme Court reversed, finding that a forced seizure does not affect the jurisdiction of a federal court. *Id.* Sosa's case then proceeded to trial. *Id.* The Supreme Court's opinion on the jurisdictional issue is located at *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

¹⁰⁸ *Sosa*, 542 U.S. at 698.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 697. This Note will solely discuss the ATCA claim.

¹¹¹ *Id.* at 712.

¹¹² *Id.*

¹¹³ *Id.* at 719.

criminal under the law of nations, and they wanted the statute to have practical effect in being able to address those offenses.¹¹⁴

Second, the Court found that Congress intended for the ATCA to allow jurisdiction for "a relatively modest set of actions alleging violations of the law of nations."¹¹⁵ Thus the range of rights protected by the ATCA is limited to rights recognized by customary international law. The Court relied on Blackstone's Commentaries for the proposition that "'offences against this law [of nations] are principally incident to whole states or nations,' and not individuals seeking relief in court."¹¹⁶

Finally, the applicable customary international law is the *current* law, not the customary international law that was in place when the First Congress promulgated the ATCA in 1789.¹¹⁷ Any alleged violation of customary international law must also be "defined with a specificity" comparable to that of the few offenses that were specifically recognized as violations of the law of nations when the ATCA was enacted.¹¹⁸ The right should also be clearly defined and universally accepted among civilized nations.¹¹⁹

The Court cited various cases for the proposition that any proper claim under the ATCA would assert a right that is truly specific in definition, universal in nature, and obligatory upon all civilized nations.¹²⁰ The Court relied on the Second Circuit's opinion in *Filartiga* for the proposition that "[f]or purposes of civil liability, the torturer has become--like the pirate and slave trader before him--hostis humani generis, an enemy of all mankind."¹²¹ The Court turned to the D.C. Circuit for the principle that "the 'limits of section 1350's reach' [should] be defined by 'a handful of heinous actions--each of which violates definable, universal and obligatory norms.'"¹²² The Court referred to the Ninth Circuit for the phrase "specific, universal, and obligatory" to describe actionable violations of international law.¹²³ These are not environmental cases, but an environmental case under the ATCA would have to meet similar requirements. Applying these principles to Sosa's case, the Court concluded that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 720.

¹¹⁶ *Id.* at 720 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES 68).

¹¹⁷ *Id.* at 725.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 732.

¹²⁰ *Id.*

¹²¹ *Id.* (quoting *Filartiga*, 630 F.2d at 890).

¹²² *Id.* (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)).

¹²³ *Id.* (quoting *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."¹²⁴

The Court acknowledged that there is some element of judgment involved on the part of courts deciding whether to grant a cause of action under ATCA in any particular case.¹²⁵ In addition to the requirements described above, those courts should also consider the practical implications of allowing jurisdiction under the ATCA.¹²⁶ The Court advised judicial restraint, asserting that courts should read the class of rights protected by ATCA narrowly.¹²⁷ Lower courts should not readily expand interpretations of customary international law according to the dictates of common law.¹²⁸

Justice Scalia, in a concurrence joined by Chief Justice Rehnquist and Justice Thomas, argued that while the Court's analysis of the ATCA as purely jurisdictional was correct, the Court should not have recognized any discretionary right of the federal courts to allow claims that violate international norms under ATCA.¹²⁹ Any recognition of international law at the time of ATCA's enactment was that of a "general common law."¹³⁰ But the application of a general common law was explicitly rejected by the Court in *Erie Railroad Company v. Tompkins*, which held that "all law was grounded in a particular sovereign, either the federal or state government."¹³¹ Justice Scalia highlighted what he perceived to be a critical distinction between pre-*Erie* general common law and post-*Erie* federal common law.¹³² Post-*Erie* federal common law is made by federal courts that have been given the authority to shape it, and that authority does not automatically flow from a simple grant of jurisdiction.¹³³ Because such authority does not exist in the area of international human rights law, Justice Scalia concluded that

¹²⁴ *Id.* at 738.

¹²⁵ *See id.* at 732-33 (recognizing that the Court must determine whether the norm violated is definite enough to support a cause of action under the ATCA).

¹²⁶ *See id.* ("[Determining] whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.").

¹²⁷ *See id.* at 725-29 (discussing various reasons for courts to use judicial caution when considering the kinds of individual claims that may fall under the ATCA).

¹²⁸ *Id.*

¹²⁹ *Id.* at 739 (Scalia, J., concurring).

¹³⁰ *Id.*

¹³¹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also* Beth Stephens, Comment, *Sosa v. Alvarez-Machain "The Door Is Still Ajar" For Human Rights Litigation in U.S. Courts*, 70 *BROOK. L. REV.* 533, 547-48 (2005) (examining Justice Scalia's absolutist argument that no general common law can be recognizable post-*Erie*). In *Erie*, the Court considered whether federal or state substantive law applied to a diversity case involving a negligence action by an individual against a railroad company. *Id.* at 69-71. The Court found that because there is no such thing as a federal general common law, the law to be applied by federal courts in diversity cases is the law of the state where the court is situated. *Id.* at 78.

¹³² *Sosa*, 542 U.S. at 745.

¹³³ *Id.* at 741-42.

the Court should not have recognized discretionary authority to create federal common law using the ATCA.¹³⁴

Justice Breyer, in his concurrence, set forth one additional consideration for courts that are deciding whether to allow a claim under the ATCA: the principle of international comity.¹³⁵ In Justice Breyer's view, courts should inquire into whether the exercise of jurisdiction under the ATCA is "consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."¹³⁶ ATCA litigation should not "undermine the very harmony [between the nations of the world] that it was intended to promote."¹³⁷ Comity concerns should also be stronger where the conduct at issue did not take place in the country providing the right of action, or the individuals bringing the action are not nationals of the country.¹³⁸

Sosa is both a blessing and a curse for environmental rights advocates. On the one hand, the case makes clear that the ATCA does allow for a private right of action. This is important for potential plaintiffs since potential defendants that are state actors can escape liability due to sovereign immunity under the Federal Sovereign Immunities Act. The Court also, by holding that the applicable law is the current customary international law instead of the law in 1789, left open the possibility that *any* customary international law could develop over time, provided that the States do in fact agree and the law is definable and specific enough. *Sosa* made clear that the law of nations is not static. It is based on concrete evidence of the behavior of international sovereignties, which changes over time. *Sosa* has been criticized for holding that the ATCA is a jurisdictional statute whose jurisdictional reach is constantly shifting.

On the other hand, the *Sosa* court emphasized that customary international law was to be construed extremely narrowly.¹³⁹ Courts should look to "legislative guidance before exercising innovative authority over substantive law."¹⁴⁰ The Court rejected Alvarez' proposed rule as being an

¹³⁴ *Id.* at 750 ("[T]he Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then--repeating the same formula--invites them to try again.").

¹³⁵ *Id.* at 761 (Breyer, J., concurring).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* ("These comity concerns normally do not arise (or at least are mitigated) if the conduct in question takes place in the country that provides the cause of action or if that conduct involves that country's own national . . . [t]hey do arise, however, when foreign persons injured abroad bring suit in the United States under the [ATCA], asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm.").

¹³⁹ *Sosa*, 542 U.S. at 725-29 (discussing various reasons courts should exercise judicial caution when considering whether claims may fall under the ATCA).

¹⁴⁰ *Id.* at 726.

"aspiration" that in the "present, imperfect" world would not rise to the level of an customary international law.¹⁴¹

V. *Post-Sosa Cases involving the Alien Tort Claims Act*

In deciding *Sosa*, the Supreme Court left many questions regarding the interpretation of ATCA unanswered.¹⁴² Subsequent lower court decisions have not filled the gaps that *Sosa* left in the ATCA analytical framework. In particular, two post-*Sosa* district court cases, *In re: South African Apartheid Litigation* and *Presbyterian Church of Sudan v. Talisman Energy*, both suggest that *Sosa* did not clarify the scope of claims that properly allow for jurisdiction under the ATCA.¹⁴³

A. *In re: South African Apartheid Litigation*

In the *Apartheid Litigation* case, former victims of apartheid sued various multinational corporations alleging that the corporations violated the ATCA by engaging in business with South Africa's apartheid government.¹⁴⁴ The defendant corporations moved to dismiss, arguing that plaintiffs lacked subject matter jurisdiction and failed to state a claim upon which relief can be granted.¹⁴⁵ Although the court found that "[p]laintiffs . . . alleged a veritable cornucopia of international law violations, including forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination," it ultimately granted the defendants' motion to dismiss for lack of subject matter jurisdiction.¹⁴⁶ The court reasoned that it had to apply the law instead of its own moral ideals to the facts of the case.¹⁴⁷ Examining the plaintiffs' ATCA claims, the court found

¹⁴¹ *Id.* at 738.

¹⁴² See Charles H. Whitebread, *The Rule of Law, Judicial Self-Restraint, and Unanswered Questions: Decisions of the United States Supreme Court's 2003-2004 Term*, 26 WHITTIER L. REV. 101, 103 (2004) ("[T]he Court left open important questions by issuing only a narrow holding."); see also Beth Stephens, Comment, *Sosa v. Alvarez-Machain "The Door Is Still Ajar" For Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 535 (2005) ("[T]he Supreme Court reconciled the intent of the late-eighteenth-century drafters of the statute with the jurisprudential demands of our modern judicial system . . . [but] *Sosa* left several contentious issues unresolved.").

¹⁴³ *In re: South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Presbyterian Church of Sudan v. Talisman Energy*, 2005 U.S. Dist. LEXIS 18399 (S.D.N.Y. 2005).

¹⁴⁴ *Apartheid Litigation*, 346 F. Supp 2d at 542.

¹⁴⁵ *Id.* at 543.

¹⁴⁶ *Id.* at 548, 554.

¹⁴⁷ *Id.* at 548.

that defendants did not act under the color of state action simply by doing business with the South African Government.¹⁴⁸

The *Apartheid Litigation* plaintiffs also argued that even if defendants did not act under color of state action, their aiding or abetting international law violations or simply doing business in apartheid South Africa constituted violations of the law of nations.¹⁴⁹ Addressing the aiding and abetting argument first, the court found that plaintiffs presented little evidence that aiding and abetting international law violations is a universally accepted international law violation in itself.¹⁵⁰ The court stated that ATCA refers to international law for the causes of action over which it grants jurisdiction to potential plaintiffs, but it does not authorize aider and abettor liability.¹⁵¹ Keeping *Sosa's* mandate of judicial deference in mind, the court refused to write aider and abettor liability into the statute through plaintiffs' suggested interpretation.¹⁵² The court relied heavily on *Sosa* for the proposition that "deference to Congress and a restrained understanding of new international norms was required of the lower federal courts."¹⁵³

Turning to the question of whether doing business with the South African government constituted a violation of the law of nations, the court examined various international treaties plaintiffs presented as evidence of this claim.¹⁵⁴ The court found that neither the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")¹⁵⁵ nor the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture")¹⁵⁶ apply to private actors.¹⁵⁷ Although both of those conventions punish complicity in acts that violate international law, they are both concerned with criminal actions and neither convention is self-executing.¹⁵⁸ Since there is no private liability under these treaties in the United States, any alleged violation of the treaties cannot provide a ground for jurisdiction under the ATCA.¹⁵⁹ The court relied on *Sosa* again to reject plaintiffs' arguments concerning international

¹⁴⁸ *Id.* at 549 ("At most, by engaging in business with the South African regime, defendants benefited from the unlawful state action of the apartheid government.").

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 550.

¹⁵² *Id.*

¹⁵³ *Id.* at 550 n.12. Justice Scalia's concurrence, discussed above, envisioned minimal discretionary authority in the Federal Judiciary.

¹⁵⁴ *Id.* at 551.

¹⁵⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. EXEC. DOC. O, 81-1, 78 U.N.T.S. 277.

¹⁵⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85.

¹⁵⁷ *Apartheid Litigation*, 346 F. Supp. 2d at 552.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

conventions and United Nations' General Assembly's non-binding resolutions, reasoning that these did not rise to the level of customary international law mandated by *Sosa*.¹⁶⁰

The *Apartheid Litigation* court also placed emphasis on another of *Sosa's* admonitions: that courts beware of the possible repercussions of finding a new international law violation that supports ATCA jurisdiction.¹⁶¹ The court described various potential collateral consequences of allowing the apartheid victims' claim to go forward under the ATCA.¹⁶² Since the South African government issued a statement stating it did not support the litigation, allowing the plaintiffs to proceed under the ATCA could preempt the South African government's ability to handle domestic matters.¹⁶³ The United States government also issued a statement arguing that the adjudication of the apartheid victims' suit under the ATCA would create tension between the United States and South Africa and would frustrate the policy of "encouraging positive change in developing countries via economic investment."¹⁶⁴ As a result, another consequence of allowing the plaintiffs' claim to go forward would be to discourage investment in the South African economy.¹⁶⁵ In the end, the potentially "significant, if not disastrous" effects on international commerce that could result from the court's granting ATCA jurisdiction were simply too great for the court to ignore, especially given *Sosa's* clear statement that courts should give weight to foreign relations consequences in such cases.¹⁶⁶

¹⁶⁰ See *id.* at 553 ("Even if this Court were swayed by the non-binding General Assembly resolutions calling for an end to defendants' business activities in South Africa, it is clear from history and from the factors announced by the Court in *Sosa* ... that the opinions expressed by these resolutions never matured into customary international law actionable under the ATCA.").

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 553-54. The footnote that the *Apartheid Litigation* case relied on for this part of its ATCA analysis, footnote 21 of the *Sosa* opinion, has proven to be contentious. The footnote contains the cryptic statement that in cases such as *Apartheid Litigation*, which the *Sosa* court explicitly referred to in the footnote, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 U.S. at 733, n.21. But the *Sosa* court failed to elucidate what aspects of *Apartheid Litigation* called for this sort of "case-specific deference to the political branches." *Id.* This footnote is particularly relevant in the global warming context since the current administration would likely oppose any global warming litigation in U.S. courts. For a more detailed discussion of the possible repercussions of this "obtuse" footnote, see Stephens, *supra* note 131, at 560-67.

B. Presbyterian Church of Sudan v. Talisman Energy

In *Talisman*, a group of current and former residents of the Sudan brought an action under the ATCA against Talisman Energy and the Republic of Sudan.¹⁶⁷ The plaintiffs alleged that they were victims of genocide, crimes against humanity, and other violations of international law perpetrated by the defendants.¹⁶⁸ They argued that Talisman Energy, a Canadian energy company, knowingly assisted the Sudan in carrying out a campaign of genocide and other crimes against humanity.¹⁶⁹ Talisman moved for judgment on the pleadings under the international comity and the political question doctrines, urging the court to avoid interfering with the executive and legislative branches' managing of foreign affairs.¹⁷⁰

Talisman sought to liken the plaintiffs' claims to those in *Apartheid Litigation*, arguing that allowing a claim under the ATCA would lead to similar foreign relations problems as those the *Apartheid Litigation* court sought to avoid.¹⁷¹ The Canadian government issued a statement in *Talisman* discouraging jurisdiction under the ATCA.¹⁷² The statement from the Embassy of Canada asserted that exercising jurisdiction would infringe upon the Government of Canada's conduct of foreign relations and interfere with its efforts to use trade as "both a stick and a carrot in support of peace" in the Sudan.¹⁷³ The United States also issued a statement in support of the Canadian position, arguing that "when the government in question protests that the U.S. proceeding interferes with the conduct of its foreign policy in pursuit of goals that the United States shares, . . . considerations of international comity and judicial abstention may properly come into play."¹⁷⁴

The *Talisman* court rejected the analogy to *Apartheid Litigation*, finding the cases to be qualitatively different.¹⁷⁵ Whereas the plaintiffs in

¹⁶⁷ *Presbyterian Church of Sudan v. Talisman Energy*, No. 01 Civ. 9882, 2005 U.S. Dist. LEXIS 18399, 1-2 (S.D.N.Y. 2005).

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *Id.* at 18.

¹⁷⁰ *Id.* at 2. A nonjusticiable political question traditionally involves one or more of the following: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

¹⁷¹ *Talisman*, 2005 U.S. Dist. LEXIS 18399, at 16-17.

¹⁷² *Id.* at 5.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 8.

¹⁷⁵ *Id.* at 18-19.

Apartheid Litigation simply alleged that defendant multinational corporations engaged in business in and with South Africa, the *Talisman* plaintiffs alleged that Talisman Energy *knowingly* assisted Sudan in perpetrating violations of customary international law.¹⁷⁶ The court found the recommended amount of deference to the Government of Canada's foreign policy unviable where the importance of the relevant foreign policy to Canada did not outweigh the public's interest in "vindicating the values advanced by the lawsuit."¹⁷⁷ The court pointed out that the case did not involve trade, but instead involved a Canadian company operating in the Sudan.¹⁷⁸ The plaintiffs' allegations did not concern trading activity, but instead concerned genocide and crimes against humanity.¹⁷⁹ The Government of Canada's argument that granting jurisdiction would interfere with Canada's use of trade incentives for Sudan to strive towards peace was thus rejected as insufficiently related to the claims being addressed in the litigation.¹⁸⁰ The court also declined to grant international comity because while Canadian courts could hear cases on the same subject matter as *Talisman*, such cases would be treated as alleging violations of Canadian rather than international law.¹⁸¹

The court left open the possibility of declining to hear some cases that interfere with a State's foreign policy.¹⁸² Specifically, the court adopted a two prong test to determine when a case that hinders a peace-oriented foreign policy should be adjudicated. First, the nexus between the lawsuit and the foreign policy must be clear.¹⁸³ Second, the foreign policy must be "important" enough to outweigh the public interest in vindicating fundamental rights.¹⁸⁴ Applying this test to the facts of *Talisman*, the court concluded that the rights plaintiffs sought to protect were vital enough to justify ATCA jurisdiction.¹⁸⁵ This remained true even though the court gave "substantial deference" to the Government of Canada's position.¹⁸⁶

Talisman Energy also argued that footnote 21 of *Sosa* required the court to avoid interfering with executive and legislative discretion to manage

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 25.

¹⁷⁸ *Id.* at 21.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at 21-22 ("[D]eference is appropriate to the extent that a sovereign's opinion has been stated with particularity . . . [w]hile there is no requirement that a government's letter must support its position with detailed argument, where the contents of the letter suggest a lack of understanding about the nature of the claims in the ATS litigation, a court may take that into account in assessing the concerns expressed in the letter." (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004))).

¹⁸¹ *Id.* at 26.

¹⁸² *Id.* at 25.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

foreign policy towards Sudan and Canada.¹⁸⁷ The court referred to the footnote as dicta discussing the "policy of case-specific deference to the political branches' in the context of pending ATS case addressing the South African apartheid regime."¹⁸⁸ In the South African cases, the United States and South African governments issued statements asserting that U.S. lawsuits against corporations that conducted business in apartheid South Africa interfere with the policies of South Africa's Truth and Reconciliation Commission.¹⁸⁹ The Commission had categorically approached apartheid crimes under principles of "reconciliation, reconstruction, reparation, and goodwill."¹⁹⁰ The Supreme Court recognized that deference to the Executive Branch was appropriate for such a case.¹⁹¹ The *Talisman* court pointed out that neither the Canadian nor the United States Governments contended that the *Talisman* case would affect United States foreign policy towards either Sudan or Canada.¹⁹² Moreover, *Talisman* Energy never argued that the United States made a political decision to address human rights violations in Sudan by employing an approach such as the South African Truth and Reconciliation Commission's.¹⁹³ *Talisman* could not pinpoint any United States foreign policies towards Sudan with which the litigation conflicted, and was forced to "speculate...generally about its effects on efforts to promote peace in Sudan."¹⁹⁴ Ultimately, all of *Talisman*'s arguments failed and the court rejected its motion for judgment on the pleadings.¹⁹⁵

C. Reconciling Apartheid Litigation and *Talisman*

Although *Apartheid Litigation* and *Talisman* were issued by the same district court and addressed similar alleged offenses, the court reached opposite decisions on the issue of ATCA jurisdiction. Was the difference simply that the Supreme Court explicitly referred to *Apartheid Litigation* in the context of the political question doctrine, as an example of a case where discretion could be granted to the executive? The defendants in *Apartheid Litigation* were doing business with the South African apartheid regime, whereas the defendant in *Talisman* knowingly assisted the Sudan in committing violations of customary international law. If this is the best way to distinguish the two cases, that is a good sign for potential global warming

¹⁸⁷ *Id.* at 28-29 (citing *Sosa*, 542 U.S. at 733 n.21).

¹⁸⁸ *Id.* at 29.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (quoting *Sosa*, 542 U.S. at 733 n.21).

¹⁹¹ *Id.*

¹⁹² *Id.* at 29-30.

¹⁹³ *Id.* at 30.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

litigants. Corporations producing greenhouse gas emissions know of the externalities generated by their operations, and they are aware of the role of these emissions in contributing to climate change.

The *Talisman* court recognized a distinction between *past*, egregious activities that the lawsuit sought to address and *future* foreign policy. The defendants wanted the court to decline to exercise jurisdiction for past events because that exercise of jurisdiction could potentially conflict with future foreign policy. The court was unwilling to do this in cases involving allegations of serious violations of customary international law. *Apartheid Litigation*, on the other hand, involved the South African Truth and Reconciliation Commission, which was already operating at the time of the lawsuit. So instead of conflicting with future, potential foreign policy, the court's involvement could interfere with current, ongoing policy decisions.

Applying this foreign policy discussion to the global warming context, the United States does not have a strong policy framework in place to deal with global warming. However, it can be argued that the failure to establish a strong global warming policy is a policy choice in itself. A court's involvement in the global warming context could therefore potentially be seen as the same type of interference with current and ongoing policy decisions that the *Apartheid Litigation* court wanted to avoid.

VI. Arctic Residents' Potential Claim Under ATCA

Arctic residents wishing to bring a global warming-related lawsuit against American corporations under the ATCA would have to meet the requirements laid out in *Sosa*. A potential claim would have to show that global warming-related harm infringes on some right that is protected by customary international law. The right at issue would have to be sufficiently well-defined, universal and obligatory in nature, and arise out of mutual relations between States.

Many Arctic victims of global warming reside in the United States and would not qualify as aliens within the purview of ATCA. For indigenous communities like the Inuit, with homelands in Alaska, Canada, Greenland and northern Russia,¹⁹⁶ only those communities comprised of aliens could bring an action under the statute. Potential defendants in the lawsuit would be United States or foreign corporations, who are major contributors to greenhouse gas emissions. Defendants could also include corporations who would be vicariously liable under theories of secondary liability such as conspiracy and aiding and abetting.¹⁹⁷

¹⁹⁶ Struck, *supra* note 1.

¹⁹⁷ *Talisman*, 374 F. Supp. 2d. at 333.

In order to show a violation of customary international law, potential plaintiffs would have to point to a norm that is "definable, universal and obligatory."¹⁹⁸ One approach is to argue that international law recognizes the right to an inhabitable environment as a fundamental human right. In order for such a right to be cognizable under the ATCA, plaintiffs would have to rely on sources of customary international law such as those mentioned by the *Flores* court: conventions setting forth rules recognized by the states involved in the dispute, international custom, and to a lesser extent judicial decisions and academic works.¹⁹⁹

Plaintiffs could in fact point to several of the types of sources mentioned in *Flores*. The United Nations Universal Declaration of Human Rights has several references to the right to a healthy environment.²⁰⁰ This includes sections "applicable to the right to a healthy environment" and sections "focusing on the right to standard of living, housing, food, and free development of peoples."²⁰¹ The International Covenant on Economic, Social and Cultural Rights also recognizes rights to "an adequate standard of living, . . . to health, . . . [and] to dispose of one's natural resources."²⁰²

International law also recognizes indigenous communities' right to have their environment free from harm caused by others.²⁰³ The Stockholm Declaration, which was adopted by the Stockholm Convention in 1972, stated that nations have "the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction."²⁰⁴ The 1992 Rio Declaration, which was adopted by 176 nations, including the United States, contains similar principles.²⁰⁵ The Rio Declaration adopted the portion of the Stockholm

¹⁹⁸ *Sosa*, 542 U.S. at 732 (quoting *Tel-Oren*, 726 F.2d at 781).

¹⁹⁹ *Flores*, 414 F.3d at 251.

²⁰⁰ See Rosemary Reed, Comment: *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL'Y 399, 413-14 (2002) (discussing, pre-*Sosa*, a potential ATCA claim for inhabitants of low-lying island nations).

²⁰¹ *Id.* at 413 (citing United Nations Universal Declaration of Human Rights, G.A. Res. 217A, arts. 3, 22, 25, 28, U.N. Doc. A/810 (1948)).

²⁰² *Id.* (citing International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, arts. 1, 7, 11, 12, 15, U.N. Doc. A/6546 (1966)). While this covenant was signed by President Jimmy Carter in 1977, Congress has not yet ratified it and so the United States is not a party to it.

²⁰³ *Id.* at 414 (arguing that international law recognizes a "general duty not to damage the environment, particularly the environment of others").

²⁰⁴ *Id.* at 414-15 (citing Declaration of the United Nations Conference on the Human Environment, Jun. 16, 1972, 11 I.L.M. 289).

²⁰⁵ *Id.* at 415 (citing United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, 47th Sess., U.N. Doc. A/CONF. 151/5/REV.1 (1992)).

Declaration quoted above, adding that that states have the affirmative right to develop *their own* environmental and development policies.²⁰⁶

One hundred and forty-one nations, not including the United States, have ratified the Kyoto treaty, which sets caps for each nation on greenhouse gas emissions based on a five percent reduction of 1990 levels of those emissions.²⁰⁷ The Montreal Protocol, first enacted in 1987 and revisited several times since, seeks to reduce the production of ozone-depleting substances such as chlorofluorocarbons (CFCs).²⁰⁸ Its ultimate goal is to protect the ozone layer by phasing out the use of these substances entirely.²⁰⁹ To that end, it seeks to employ "scientific knowledge, taking into account technical and economic considerations and bearing in mind the developmental needs of developing countries."²¹⁰ Arctic plaintiffs trying to establish a right to a healthy environment could try to use the almost-universal approval of these agreements among civilized nations and the universal approval of greenhouse gas reduction policies (even by the Bush Administration) to argue an international recognition of global warming as a harm. There is some support for the argument that U.S. actions and statements regarding the Rio Convention and the Kyoto Treaty could give rise to ATCA liability in the future.²¹¹ For example, a plaintiff could potentially argue under the ATCA that the United States government has "'acknowledged' the basis for their claims."²¹²

Turning to judicial opinions, plaintiffs would not have difficulty locating opinions alluding to a right to a healthy environment. Judicial opinions recognizing such a right have come out of courts in the Philippines, Colombia, Chile, Ecuador, Peru,²¹³ and India. The complexity of the environmental legal and regulatory framework in the United States evidences a governmental recognition of the importance of a clean and healthy

²⁰⁶ *Id.*

²⁰⁷ Kluger, *supra* note 39; United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 [hereinafter Kyoto].

²⁰⁸ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 3, available at <http://hq.unep.org/ozone/Montreal-Protocol/Montreal-Protocol2000.shtml>.

²⁰⁹ *Id.* at preamble.

²¹⁰ *Id.* The relationship between ozone depletion and global warming does not garner but attention, but the two are functionally related. CFCs, the ozone-depleting substances that the Montreal Protocol seeks to reduce, trap heat and are estimated to be responsible for less than a tenth of total warming. Union of Concerned Scientists, *Global Warming FAQ*, available at http://www.ucsusa.org/global_warming/science/global-warming-faq.html#8. While eliminating CFCs alone cannot solve the climate change problem, it can certainly play a part. *Id.*

²¹¹ Christopher C. Horner, *The Perils of "Soft" and Unratified Treaty Commitments: The Emerging Campaign to "Enforce" U.S. Acknowledgements Made In and Under the Rio Treaty and Kyoto Protocol Using the Vienna Convention, WTO, Alien Tort Statute, and NEPA 7* (Competitive Enterprise Institute, Working Paper, 2003), available at <http://www.cei.org/pdf/3297.pdf>.

²¹² *Id.* at 26.

²¹³ Reed, *supra* note 200 at 416.

environment. Arctic victims of global warming could bring a lawsuit alleging a right to a healthy environment based on these international and domestic sources. Whether courts would easily recognize such a claim as sufficiently universal, specific, and mutual in nature to satisfy the requirements of ATCA is another matter.

Potentially plaintiffs in an ATCA suit would have to overcome the political question doctrine. In *Connecticut v. American Electric Power Company*, discussed in Part II, the court dismissed a global warming nuisance claim brought by eight states against the five largest power companies in the United States.²¹⁴ The court found that the case presented non-justiciable political questions and, although *AEP* was not an ATCA case, its holding has implications for future ATCA cases relating to global warming.²¹⁵ After *AEP*, it will be difficult for potential plaintiffs to overcome the political question doctrine.²¹⁶ If other courts respond similarly, the Bush Administration's pro-industry policies will be given deference over the claims of the plaintiffs. Unlike the claims asserted in *Talisman*, claims asserted in global warming litigation would not be likely to involve rights courts view as "serious." A reviewing court would thus be more likely to grant deference to the executive branch's decision to face global warming with policy and research initiatives that lack teeth.

Global warming litigation in particular presents problems that other claims raised under the ATCA do not present. The difficulty of proving standing or pinpointing causation to particular defendants may be insurmountable for plaintiffs with scarce resources. Defendants are likely to challenge the plaintiffs' standing to sue in any global warming litigation.²¹⁷ Article III's standing requirements must be met in any federal case, and this includes cases brought pursuant to the ATCA. Courts have interpreted the 'injury in fact' element of standing to mean a particularized, concrete harm. This creates problems in the global warming context because harm can often be impending and not yet have completely materialized. Since many individuals or groups that will be affected by global warming will only be affected in the "indefinite future," defendants argue that these potential plaintiffs lack standing.²¹⁸ One court described standing in a global warming

²¹⁴ *AEP*, 406 F. Supp. 2d at 274.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ For a discussion of Article III standing requirements put forth by the Supreme Court and how they may be applied to global warming cases, see Bradford Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL L. 1 (2005).

²¹⁸ See Robert Meltz, Congressional Research Service Report for Congress, *Global Warming: The Litigation Heats Up* 18 (Jan. 10, 2005) (discussing various types of problems that arise with regards to standing in global warming litigation) (cited in Mini Kaur, *Global Warming and Environmental Justice* 10 (Jan. 5, 2006) (unpublished manuscript, on file with author)).

lawsuit as "too general, too unsubstantiated, too unlikely to be caused by defendant's conduct, and/or too unlikely to be redressed by the relief sought."²¹⁹

According to the World Health Organization, climate change already causes 150,000 deaths a year.²²⁰ But these deaths, although concrete instances of harm, are difficult to causally relate to global warming in litigation, and so the causation element of standing also becomes an obstacle to effective litigation. The link between any individual source of greenhouse gas emissions and the harm caused by those emissions is difficult to establish. Since greenhouse gases are a global problem, any single source, or even a group of what may seem to be major sources, most likely represents only a tiny part of the overall gases emitted into the atmosphere. There are also many confounding factors present, such as feedback from greenhouse gases that are already in the atmosphere.

Multiple commentators have compared climate change litigation with tobacco litigation.²²¹ In both types of litigation, plaintiffs face defendants with vastly greater financial resources.²²² This leaves defendants with the ability "to challenge everything, including issues like general causation that appear to be well-established."²²³ With defendants challenging everything from harm to causation to standing to sue, plaintiffs are placed at a severe disadvantage. Global warming plaintiffs would in fact have to overcome many obstacles, but as commentator put it, "plaintiffs in tobacco cases surmounted similar hurdles about a decade ago."²²⁴

Sosa made clear that courts should not recognize violations of customary international law routinely, but rather reserve this right for those egregious acts that violate fundamental and universal norms. Where nations have been slow to respond to and acknowledge global warming, it will be difficult, especially post-*Sosa*, for plaintiffs to show that customary international law protects the right to a healthy environment. Arctic residents' claims to a healthy environment would probably not be recognized under the ATCA today, since some of the key players in the global warming crisis refuse to enter any binding, obligatory agreements regarding emissions

²¹⁹ *Id.* (quoting *Center for Biological Diversity v. Abraham*, 218 F. Supp. 2d 1143 (N.D. Cal. 2002)).

²²⁰ Lei Du, *Climate change 'to hit health in poor nations hardest'*, Science and Development Network, Nov. 17, 2005, <http://www.scidev.net/News/index.cfm?fuseaction=readNews&itemid=2482&language=1>.

²²¹ David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 6 (2003); J. Kevin Healy and Jeffrey M. Tapick, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel - it's a Legal Problem*, 29 COLUM. J. ENVTL. L. 89, 102 (2004).

²²² Grossman, *supra* note 221 at 6.

²²³ *Id.*

²²⁴ Healy and Tapick, *supra* note 221 at 102.

reductions.²²⁵ On the other hand, most of the world's civilized nations have now acknowledged the presence of anthropogenic climate change. Even if Arctic plaintiffs' ATCA claim is dismissed because customary international law does not *yet* recognize the right to a healthy environment, such a right *will* develop in the long run, as more and more nations form treaties and issue legal decisions addressing global warming. Potential plaintiffs must keep in mind that the law in the area of climate change is continually evolving and will *always* be evolving. Additionally, as discussed below, litigation can be an effective tool even when unsuccessful.

VII. *The Potential and Limits of the ATCA in Global Warming Litigation*

There remains debate on whether taking legal action is an appropriate way to approach harms resulting from global warming.²²⁶ The general expansion of ATCA jurisdiction in *Filartiga* and later decisions is also not without its share of critics, who see global warming as an issue warranting a political instead of a legal response.²²⁷

Critics argue that broadening the reach of ATCA could have several negative consequences.²²⁸ First, ATCA decisions can conflict with decisions of other sovereignties, especially where both parties to a lawsuit are citizens of the same foreign state.²²⁹ Second, ATCA cases may endanger relations between the United States and foreign governments, particularly where "foreign-based [multinational corporations] are subjected to large, American-style damage awards."²³⁰ Third, because ATCA cases are civil actions, critics believe they will evolve into "attorney-driven enrichment machines" not unlike mass tort actions.²³¹ Finally, critics argue that ATCA cases do

²²⁵ See Eilperin, *supra* note 5 (discussing different policy approaches towards global warming). John Marburger III, President Bush's chief science adviser, described the Bush administration's approach to global warming: "[T]hrough everyone agrees carbon dioxide emissions should decline, the United States prefers to promote cleaner technology rather than impose mandatory greenhouse gas limits... 'The U.S. is the world leader in doing something on climate change because of its actions on changing technology.'" *Id.* See also Kluger et al., *supra* note 39 (describing the Bush Administration's research initiatives and voluntary emissions controls as "not exactly the laws with teeth scientists are calling for").

²²⁶ See, e.g., Grossman, *supra* note 221 at 6 (2003) ("Although a tort approach to climate change might be possible, ... some would dispute its desirability, seeing global warming as something requiring a political rather than a legal solution."); see also Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 319 (2005) (discussing arguments that the international nature of the global warming crisis requires a diplomatic solution rather than a legal one, and litigation in this area could undermine "efforts by the federal government to forge a diplomatic solution to global warming").

²²⁷ See generally Gary C. Hufbauer & Nicholas K. Mitrokostas, Institute for International Economics, *Awakening Monster: The Alien Tort Statute of 1789* (2003).

²²⁸ *Id.* at 46.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

away with well-established separation of powers principles that demand that the executive manage foreign relations.²³²

Critics of climate change litigation assert that court intervention in the global warming arena may hinder or deter legislative action, and court rulings favoring environmentalists may be seen as attempts by activist judges to step into the shoes of legislators. These critics also emphasize the many alternatives to litigation. Some argue that environmentalists would be better served by lobbying legislatures, who have the power to set concrete standards on allowable levels of warming. Others would endorse an approach where environmentalists focus their efforts on swaying public opinion in their favor, which in turn would reflect in the public voting for environmentally-friendly legislators or pushing for legislative reform.

Critics also point to the problem of redressability. No remedy can reverse the damage already caused by warming or stop the inevitable warming yet to occur as a result of greenhouse gases already emitted into the atmosphere. Remedies may also be difficult to enforce. For example, certain types of specific performance, such as injunctions ordering polluters to cease, are expensive to enforce because their effective enforcement requires constant monitoring of emissions. But these complications do not retract from the underlying symbolic value of a judicially-sanctioned remedy in the global warming context. The problems posed by standing and causation discussed above may also make it more difficult to succeed in climate change litigation, but that does not mean that inaction is the answer.

It is true that even successful litigation might not help the victims of global warming. Enforcement of a favorable ruling could be difficult and expensive, also discussed above, due to the complications involved in measuring precise amounts of emissions. A favorable ruling for indigenous Arctic communities would not be able to rewind the clock and reinstate their habitat to its natural state. But there is value in filing a claim outside of simply the potential for winning the case. A major potential benefit of litigation is the publicity factor – even a failed lawsuit would garner a significant amount of attention to the plight of indigenous Arctic peoples from the media and from the public as a whole. By allowing violations of modern-day customary international law to be filed under the ATCA, *Sosa* paved the way for the public education and expressive functions of the legal process to take place. Lawsuits that seek to break new ground, such as the one this Note proposes, can promote political change and educate the public even if they are unsuccessful in the courtroom. The value of litigation to stimulate legislative activity should not be underestimated.

²³² *Id.*

As nations of the world globalize, both socially and economically, it makes more and more sense for the United States to make extraterritorial harms accountable under the ATCA. This has been argued to be especially true in the terrorism context, where multinational corporations can potentially "act as fronts for terrorist organizations" or "engage in activities that can...be classified as some permutation of terrorist activity."²³³ Because of the transnational nature of global warming, it is different from any other type of environmental hazard. No single nation will cause the entirety of the harm, and no single nation will feel the brunt of the harm. *Sosa* made clear that ATCA specifically addresses transnational harm.²³⁴ This could prove to be a strong motivator for ATCA jurisdiction in climate change cases in the future. Those who suffer most severely from the effects of global warming must be allowed to bring transnational claims in order to gain redress because attempts to control greenhouse gas emissions intranationally have proved to be fruitless.

The challenges facing indigenous communities in pursuing climate change litigation are many, but litigation is nonetheless a valuable tool in this context, and far superior to inaction altogether. Ultimately, the most effective solution would likely involve a combination of these approaches depending on the receptiveness of the legislature and the public.

²³³ Fuks, *supra* note 58 at 139-40.

²³⁴ *Sosa*, 542 U.S. at 715.