THE NEW NORMAL: CLIMATE CHANGE VICTIMS IN POST-*KIOBEL* UNITED STATES FEDERAL COURTS

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I. INTRODUCTION

There can be little dispute that the United States has been relatively slow in addressing its contribution to climate change. This past June, President Barack Obama signaled that the United States might finally join the rest of the international community in its fight against climate change:

> So the question is not whether we need to act. The overwhelming judgment of science—of chemistry and physics and millions of measurements—has put all that to rest. . . . [T]he question now is whether we will have the courage to act before it's too late. And how we answer will have a profound impact on the world that we leave behind not just to you, but to your children and to your grandchildren.[1]

Unfortunately, even if the United States and other major emitting nations were to adopt stringent measures today, the effects of climate change, including warming temperatures and rising seas, would continue well into the next century.[2]

In April 2013, the United States Supreme Court held in *Kiobel v. Royal Dutch Petroleum Company* that the Alien Tort Statute ("ATS" or "Act") confers jurisdiction to U.S. federal courts to hear claims for violations of international norms only where the offending conduct occurs in the United States' sovereign territory.[3] Although the United States has not ratified the seminal treaty addressing climate change,[4] its accession to other

1. President Barack Obama, Address at Georgetown University: We Need to Act, (June 25, 2013) (transcript available at http://www.bloomberg.com/news/2013-06-25/-we-need-to-act-transcript-of-obama-s-climate-change-speech.html).

2. *Future Climate Change,* U.S. ENVTL. PROT. AGENCY,http://www.epa.gov/climatechange/science/future.html (last visited Aug. 8, 2013).

3. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ___, 133 S. Ct. 1659 (2013). *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

4. *Status of Ratification of the Convention*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php. The Kyoto Protocol to the United Nations Framework Convention on Climate Change is the treaty that specifically addresses limits on greenhouse gases. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, 37 I.L.M. 32, *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf [hereinafter Kyoto Protocol]. To date, the U.S. has not ratified the Kyoto Protocol. *Status of Ratification of the Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON

related treaties, as well as the emerging customary international norm that nations and major emitters must take steps to reduce greenhouse gas emissions,[5] seems to oblige it to do something, and perhaps creates liability for its failure to act. This paper argues that the United States, and major emitters operating in the United States, may be in violation of an international norm by failing to address or by significantly contributing to climate change, and explores whether tort plaintiffs post-*Kiobel* may bring a claim for such failures under the ATS.

Part I of this paper provides a brief overview of domestic and international climate change litigation to date, highlighting successes and failures. Part II of this paper discusses the relevant international law on climate change and transboundary harm. Part III describes the jurisdictional elements of the Alien Tort Statute and how U.S. courts have interpreted the law of nations in the context of the Act. Part IV of the paper provides a roadmap for plaintiffs bringing climate change claims under the Alien Tort Statute.

To date, ATS plaintiffs have not been successful in proving claims for violations of customary international norms of an environmental nature.[6] However, this paper argues that there is an emerging international norm of limiting contributions to climate change, and that a plaintiff bringing an ATS claim regarding climate change may succeed on the merits of the case. The scope of this paper is limited to the use of the ATS as a vehicle for addressing climate change; it does not discuss climate change science, issues of subject matter jurisdiction, such as

CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.

5. For the purpose of this paper, "greenhouse gases" or "GHG" refers to the six greenhouse gases addressed in the Kyoto Protocol: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *See generally* Kyoto Protocol, *supra* note 4.

6. *See, e.g.*, Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 543–44 (S.D.N.Y. 2002); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 384 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

standing or political question doctrine,[7] or whether the ATS should not be used for policy reasons.[8]

II. A NEW APPROACH TO CLIMATE CHANGE LITIGATION

Since the 2007 landmark Supreme Court case, *Massachusetts v. EPA*, which established that the Environmental Protection Agency has the authority to regulate carbon dioxide as an air pollutant, climate change plaintiffs have failed to make further significant progress in U.S. courts.[9] Meanwhile, the United States continues to delay significant regulation of greenhouse gases; oil, gas, and utilities companies continue to enjoy a regulatory system devoid of meaningful climate change measures.[10] Therefore, a new legal approach is needed to help compensate those who are most vulnerable to the impacts of climate change. A successful lawsuit would not necessarily seek to compel national reform; the intention would be to make whole the injured plaintiff. However, such litigation may have the effect

7. For a background on standing in climate change suits, see David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. LAND USE & ENVTL. L. 451 (2000); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1 (2005); Joseph M. Stancati, Note, *Victims of Climate Change and Their Standing to Sue: Why the Northern District of California Got it Right*, 38 CASE W. RES. J. INT'L L. 687 (2007). For information regarding the assessment of climate change, see INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http://www.ipcc.ch/.

8. Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925 (2007).

9. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

10. Congress has not passed climate change legislation and most efforts by the United States EPA to regulate emissions sources under the Clean Air Act have yet to be realized. *See* John M. Broder, *After Delayed Vote, E.P.A. Gains a Tough Leader to Tackle Climate Change*, N.Y. TIMES (July 28, 2013), http://www.nytimes.com/2013/07/29/us/politics/after-delayed-vote-epa-gains-a-tough-leader-to-tackle-climate-change.html?pagewanted=all&_r=0; Jane Mayer, *Koch Pledge Tied to Congressional Climate Inaction*, NEW YORKER (July 1, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/07/the-kochs-and-the-action-on-global-warming.html. *See also* Union of Concerned Scientists, *Steps the EPA Must Take to Reduce Global Warming Emissions*, http://www.ucsusa.org/global_warming/solutions/big_picture_solutions/steps-the-epa-must-take-to-reduce-global-warming-emissions.html (last modified Sept. 26, 2013).

of encouraging major emitters to proactively seek to reduce emissions, or send a loud message to the legislative and executive branches to take more seriously their climate change obligations.

A. An Overview of Domestic Climate Change Litigation

Hundreds of climate change related cases have been filed in United States federal and state courts.[11] The vast majority sought compliance with federal laws, such as the Clean Air Act and National Environmental Policy Act, and have achieved varying degrees of success. However, claims brought under federal environmental statutes are generally not designed to compensate victims of climate change. Outside of federal environmental statutes, the most frequently litigated climate change claims fall under either the public nuisance or the public trust doctrine.

The public nuisance doctrine provides state actors with a cause of action against unreasonable and substantial interference with a public right, while the public trust doctrine reflects the notion that certain shared resources should be protected for current and future use, and that the state acts as trustee of those resources.[12] However, several cases have established that these claims are not available for climate change plaintiffs. Most notably, in 2011, the United States Supreme Court in *Connecticut v. American Electric Power Co.* held that the Clean Air Act displaced federal common law regarding the regulation of greenhouse gas emissions where states brought a public nuisance claim against six large power companies for their contributions to climate change.[13]

11. For a comprehensive, up-to-date list of climate change related litigation, see Arnold & Porter, LLP's Climate Change Case Chart, http://www.climatecasechart.com/ (last visited Aug. 8, 2013).

12. For an explanation of the role of the public trust doctrine in climate change litigation, see Julia B. Wyman, *In States We Trust: The Importance of the Preservation of the Public Trust Doctrine in the Wake of Climate Change*, 35 VT. L. REV. 507 (2010–2011). *See also* Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 U.C. DAVIS L. REV. 1075 (2012).

13. Am. Elec. Power Co. v. Connecticut, 564 U.S. ___, 131 S. Ct. 2527 (2011); *see also* Alec L. v. Perciasepe, No. 11-cv-2235(RLW), 2013 WL 2248001, at *1 (D.D.C. May 22, 2013) (holding that the public trust doctrine is a matter of state, not federal law and regardless, it is preempted by the Clean Air Act).

In another high-profile climate change case, *Native Village of Kivalina v. ExxonMobil Corp.*, the Native Village of Kivalina sued oil, energy, and utilities companies under federal common law nuisance for their "excessive emission of carbon dioxide and other greenhouse gases."[14] The United States District Court for the Northern District of California dismissed plaintiffs' claims holding that the political question doctrine barred the court's review and that the plaintiffs were unable to establish standing.[15] The Ninth Circuit Court of Appeals affirmed the lower court's decision and added that the plaintiffs could not sue under the public trust doctrine because the Clean Air Act displaced it.[16] The United States Supreme Court denied the plaintiff's petition for writ of certiorari.[17]

Several state courts have also determined that the public trust doctrine is not available to address climate change.[18] In 2011, Our Children's Trust filed administrative petitions in several states requesting that environmental agencies adopt rules to reduce greenhouse gases pursuant to the public trust doctrine.[19] These petitions have lead to litigation in state courts,

14. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

15. *Id*. at 882.

16. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

17. Petition for Writ of Certiorari, *Kivalina*, 696 F.3d 849 (No. 12-1072). While the plaintiffs in *Kivalina* were unsuccessful, ExxonMobil's insurer in *AES Corp. v. Steadfast Insurance Co.* was successful in seeking a declaratory judgment that it would not be liable for climate change damages that companies it insures may be obliged to pay to climate change plaintiffs. *See* Steadfast Ins. Co. v. AES Corp., CLO8000858-00 , 2010 WL 1484811 (Va. Cir. Ct. Feb. 5, 2010), *aff'd*, 715 S.E.2d 28 (Va. 2011) *superseded by*, 725 S.E.2d 532 (Va. 2012) (holding insurance company had no duty to defend ExxonMobil because the policies only covered against accidents and GHG emissions and ExxonMobil's contribution to climate change do not qualify as accidents under the policies).

18. *See infra* notes 19–27 and accompanying text.

19. *See, e.g.*, Petition for Declaratory Judgment, for Writ of Mandamus and Application for Injunctive Relief, Farb v. Kansas, No. 12-C-1133 (Kan. Dist. Ct. Oct. 18, 2012), *available at* http://www.ourchildrenstrust.org/sites/default/files/KansasFiledPetition.pdf.; Response to Petition for Original Jurisdiction, Barhaugh v. State, No. OP 11-0258 (Mont. Sup. Ct. June 6, 2011), *available at* http://www.ourchildrenstrust.org/sites/default/files/Montana%20Complaint%20.pdf.

and have largely been unsuccessful.[20] For example, the Iowa Court of Appeals found that the scope of the public trust doctrine is narrow and does not cover the air.[21] In Texas, the Travis County District Court found that the Texas Commission on Environmental Quality properly exercised its discretion in denying a petition given that there was ongoing litigation between the state and the Environmental Protection Agency.[22] The Minnesota Court of Appeals upheld the lower court's determination that the public trust doctrine only applies to navigable waters and not the atmosphere.[23] Only a few of the Our Children's Trust cases remain active, and none have yet been met with success.[24]

In addition to Our Children's Trust litigation there have been other unsuccessful attempts to have state courts recognize a public trust claim to address climate change.[25] In *Kanuk v. SOA*, Alaskan minors sought a declaration that the atmosphere is a public trust, and that the state as trustee, had failed in its duty

20. *See infra* notes 21–23 and accompanying text.

21. Filippone v. Iowa Dep't of Natural Res., No. 2-1005/ 12-0444 (Iowa Ct. App. filed Mar. 13, 2013), *available at* http://www.iowacourts.gov/court_of_appeals/Recent_Opinions/2013031312-1005.pdf.

22. Bonser-Lain v. Texas Comm. on Envtl. Quality, No. D-1-GN-11-002194 (W.D. Tex. filed Aug. 2, 2012), *available at* http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-159572.pdf.

23. Aronow v. Minnesota, No. 62-CV-11-3952 (Minn. Ct. App. Oct. 1, 2012), *available at* http://mn.gov/lawlib//archive/ctapun/1210/opa120585-100112.pdf.

24. Our Children's Trust has active lawsuits in Alaska, Iowa, Kansas, New Mexico, Oregon, Texas, and Washington. *States with Active Lawsuits*, OUR CHILDREN'S TRUST, http://ourchildrenstrust.org/US/LawsuitStates (last visited Sept. 6, 2013).

25. *See* Butler v. Brewer, No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. Ct. App. Mar. 14, 2013) (affirming decision in Peshlakai v. Brewer, No. CV2011-010106 (Ariz. Super. Ct. Feb. 2012)); *see also* Korsinsky v. EPA, No. 05 Civ. 859 (NRB), 2005 U.S. Dist. LEXIS 21778, at *2 (S.D.N.Y. Sept. 28, 2005) (dismissing plaintiff's public nuisance claim against the EPA, New York Department of Environmental Conservation, and the New York City Department of Environmental Protection; holding plaintiff's mental illness born from concerns about the danger's of pollution did not confer standing); Sanders-Reed v. Martinez, No. D-101-CV-2011-01514 (N.M. Dist. Ct. July 14, 2012) (dismissing part of complaint alleging New Mexico's failure to act with respect to the atmosphere).

to protect the trust.[26] The Superior Court for the State of Alaska dismissed the complaint finding that the claims raised a political question.[27] Likewise, in *Chernaik v. Kitzhaber*, Oregon minors filed a complaint seeking a declaration that the atmosphere, water resources, and wildlife are a public trust and that the state had failed in its duty to protect them by inadequately regulating and reducing carbon dioxide emissions.[28] Plaintiffs sought an order requiring the state to prepare an annual accounting of Oregon's carbon dioxide emissions.[29] The court found that the relief the plaintiffs requested exceeded the court's authority and violated the separation of powers doctrine, and that the claims were barred by sovereign immunity and the political question doctrine.[30]

Beyond the public trust and public nuisance doctrines, very little has been attempted under common law in the United States.[31]

B. International Climate Change Actions

Several cases in other nations have successfully compelled States to take into account climate change impacts or to compel

26. Kanuk v. Alaska Dep't of Natural Res., No. 3AN-11-07474CI, at *2 (D. Alaska Mar. 16, 2012).

27. *Id*. at *11.

28. Chernaik v. Kitzhaber, No. 16-11-09273 (Or. Cir. Ct. Apr. 5, 2012).

29. *Id*.

30. *Id*.

31. *See* Unopposed Motion to Dismiss Appeal, California *ex rel* Brown v. Gen. Motors Corp., No. 07-16908 (9th Cir. 2009) (holding that California's claims against automobile companies for their contribution to climate change were non-justiciable under the political question doctrine). *See also* Pietrangelo v. S&E Customize It Auto Corp., 39 Misc. 3d 1239(A) (N.Y. Civ. Ct. May 22, 2013) (holding it is not negligent to fail to cover insurance in a case involving a car owner whose car sustained flood damage while in an auto repair shop during Hurricane Sandy); *In re* Comer, 131 S. Ct. 902 (2011) (denying petition for writ of mandamus); Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010) (holding that Hurricane Katrina victims did not have standing to sue fossil fuel producing companies for their GHG emissions and that political question doctrine barred review of whether emission contributed to climate change which exacerbated the storm and damage to plaintiffs' property); Comer v. Murphy Oil USA, 598 F.3d 208 (5th Cir. 2010); Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009).

greenhouse gas reducing measures.[32] However, to date there have been no successful challenges in any country's court system finding governments or companies culpable for injuries sustained by victims of climate change. Victims of climate change have also yet to receive justice in international courts.

So far, no international court or tribunal has weighed in on the climate change debate though several cases have been submitted. In December 2005, the Inuit Circumpolar Conference ("ICC") submitted a petition to the Inter-American Commission on Human Rights ("Commission").[33] The Commission is the enforcement arm of the Organization of the American States ("OAS") and has the authority to recommend measures to protect human rights, to request that States adopt specific precautionary measures to avoid harm, and if necessary to submit cases to the Inter-American Court of Human Rights.[34] The ICC alleged violations under the American Declaration of the Rights and Duties of Man, International Covenant on Civil and Political Rights, International Covenant on Economic, Social, and Cultural Rights, Article 28 of the United Nations Draft Declaration on the Rights of Indigenous People, as well as obligations under the United Nations Framework Convention on Climate Change (UNFCCC).[35] On behalf of its 150,000 Inuit members, the ICC argued the Inuits' fundamental rights to use and enjoy their land had been violated by both the actions and

32. Case C-107/05, Comm'n v. Finland, 2006 E.C.R. I-00010; C-122/05, Comm'n v. Italy, 2006 E.C.R. I-00065, (regarding Directive 2003/87/EC); *see also* Environment-People-Law v. Ministry of Envtl. Prot., Commercial Ct. of Lviv (2008) (holding the Ukrainian Ministry of Environmental Protection must enact regulations to reduce national GHG emissions and meet its obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol).

33. 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://inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf. [hereinafter Watt-Cloutier, *Petition to the Inter-Am. Comm'n H.R.*].

34. Organization of American States, *available at* http://www.oas.org/en/iachr/mandate/what.asp.

35. *See* Watt-Cloutier, *Petition to the Inter-Am. Comm'n H.R.*, *supra* note 33, at 7.

inactions of the United States.[36] The Commission dismissed the petition,[37] but ultimately convened a hearing where the petitioner was asked to give testimony.[38]

On April 23, 2013, the Arctic Athabaskan Peoples submitted a separate, similar petition to the Commission.[39] The petition sought relief for violations against their rights incurred by Arctic warming, in part caused by Canada.[40] Petitioners asked the Commission to investigate and declare that Canada is failing to meet its international obligations to reduce black carbon emissions.[41] The Commission has not yet acted on the petition.[42]

A finding by the Commission that the United States is violating applicable international law may encourage it to adopt measures to mitigate its damages as it is a member party of the OAS. Perhaps more important, a finding by the Commission would reinforce the emerging norm that nations have an obligation pursuant to customary international law to implement national plans to reduce emissions.

In September 2011, the President of Palau announced that Palau and other small island nations would seek an International Court of Justice ("I.C.J.") advisory opinion regarding whether countries have a legal responsibility to ensure greenhouse gas emitting activities in their countries do not harm other States.[43] He argued that "[t]he ICJ has already confirmed

36. *See id*. at 5.

37. *See* Andrew C. Revkin, *Inuit Climate Change Petition Rejected*, N.Y. TIMES (Dec. 16, 2006), http://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html.

38. Letter from Ariel E. Dulitzky, Assistant Exec. Sec'y, Organization of Am. States, on Global Warming & Human Rights Hearing to Shelia Watt-Cloutier (Feb. 1, 2007), *available at* http://earthjustice.org/sites/default/files/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf.

39. Verónica de la Rosa Jaimes, *The Petition of the Arctic Athabaskan Peoples to the Inter American Commission on Human Rights* (July 22, 2013), http://ablawg.ca/wp-content/uploads/2013/07/Blog_VRJ_Petition_Inter_American_Commission_on_HR_Arctic_Athabaskan_July2013.pdf.

40. *Id*.

41. *Id*.

42. *Id*.

43. U.N. NEWS CENTRE, Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases, (Sept. 22, 2011), http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1#.Uex2ZdLU9sE.

that customary international law obliges States to ensure that activities within their jurisdiction and control respect the environment of other States."[44] He also claimed:

> Article 194(2) of the United Nations Convention on the Law of the Sea provides that States shall take all measures necessary to ensure that activities under their jurisdiction or control do not spread and do not cause damage by pollution to other States. It is time we determine what the international rule of law means in the context of climate change.[45]

The I.C.J. is capable of deciding what is international law and could render a decision regarding climate change.[46] An I.C.J. opinion that there is a customary international law obliging nations to address greenhouse gas emissions would not be binding, but would be instructive in determining the status of international law on the subject.[47] As of February 2012, the General Assembly was still discussing the nature of the precise question it would present to the I.C.J.[48]

III. CLIMATE CHANGE IS THE NORM

Modern sources of international law demonstrate that most nations recognize the connection between anthropogenic sources of GHG emissions and climate change.[49] Many of these nations have also committed to a goal of limiting and reducing these

44. *Id*.

45. *Id*.

46. The I.C.J. has already determined that there is a norm prohibiting transboundary harm. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241–43 (July 8).

47. Aaron Korman & Giselle Barcia, *Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion*, 37 YALE J. INT'L L. ONLINE 35, 36 (2012), http://www.yjil.org/docs/pub/o-37-korman-barcia-rethinking-climate-change.pdf.

48. Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change, Dep't Pub. Info., U.N. (Feb. 3, 2012), http://www.un.org/News/briefings/docs/2012/120203_ICJ.doc.htm.

49. United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [hereinafter UNFCCC].

emissions.[50] Some scholars even argue that an environmental norm regarding carbon dioxide emissions may have already reached the status of customary international law.[51]

A. Sources and Development of International Law

International law is based on the development and enforcement of the norms that emerge from treaty and custom. Customary international law can exist absent codification, and sometimes concepts contained in binding agreements can become customary international law.[52] Customary international law exists where there is *opinion juris*—the belief that a certain practice is obligatory as a matter of law—that occurs for some duration of time with uniformity, consistency, as well as generality.[53] A state practice need not be universally followed; there simply needs to be wide acceptance.[54]

The most concrete source of international law is that which is codified in international agreements and conventions. Therefore, international law norms are commonly codified in international agreements. The Vienna Convention on the Law of Treaties (Vienna Convention) dictates how treaties come into force and how States can ratify a treaty with reservations.[55] It is the

50. *See* Kyoto Protocol, *supra* note 4, at art. 2, para. 1.

51. Mark W. Wilson, Comment, *Why Private Remedies for Environmental Torts Under the Alien Tort Statute Should Not Be Constrained By the Judicially Created Doctrines of* Jus Cogens *and Exhaustion*, 39 ENVTL. L. 451, 453 (2009).

52. *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011) (finding that "conventions that not all nations ratify can still be evidence of customary international law. Otherwise every nation . . . would have veto power over customary international law") (citations omitted).

53. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 302 (2000).

54. Lee, *supra* note 53, at 303. Key factors include how widespread the participation is and the size of the majority.

55. Vienna Convention on the Law of Treaties, art. 2, ¶ 1(d), May 23, 1969, 1115 U.N.T.S. 331 [hereinafter Vienna Convention] (Reservations allow a nation to unilaterally exclude or modify the legal effect of a certain provision of a treaty). Note, the United States has signed, but not ratified the Vienna Convention. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 286 (1988).

Vienna Convention that guides States in negotiating and enacting other treaties, and codifies the practice of *pacta sunt servanda* – "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[56]

The I.C.J. also has the authority to determine whether a rule of international law exists.[57] The I.C.J.'s enabling statute lays out where international law can be found: (1) international conventions, (2) international custom, (3) general principles of law, and (4) judicial decisions and teachings.[58] Suits can be brought before the I.C.J. to settle international disputes; however, the effectiveness of that endeavor depends on the willingness of a State to submit to I.C.J.'s jurisdiction. Even though there is virtually no way to enforce an I.C.J. decision, a decision could carry considerable weight in influencing a U.S. court to accept a customary international norm as such.[59]

In certain circumstances, a nation may escape the application of customary international law to its actions by objecting to the norm, as it is being developed, through persistent objection.[60] However, even if a state is a persistent objector to a customary international law, jus cogens establishes a peremptory norm, permitting no derogation.[61] Jus cogens occurs when an international norm is so important that it binds the objecting nation to compliance because of its global significance.[62] It establishes that there are some universal norms from which no derogation is possible, such as human rights violations or certain injuries to nations.[63] There is disagreement among legal scholars as to when jus cogens norms become such.[64] However, the United

56. Vienna Convention, *supra* note 55, at art. 26.

57. The Statute of the International Court of Justice, art. 36, June 26, 1945, 1 U.N.T.S. 151 [hereinafter I.C.J.].

58. *Id*. at art. 38.

59. Denis Culley, *Global Warming, Sea Level Rise and Tort*, 8 OCEAN & COASTAL L.J. 91, 115 (2003).

60. Vienna Convention, *supra* note 55, at art. 34–38.

61. *Id*. at art. 53.

62. M. Cherif Bassiouni, *International Crimes*: Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 69 (1996).

63. Vienna Convention, *supra* note 55, at art. 53.

64. *See* Eva M. Kornicker Uhlmann, *State Community Interests,* Jus Cogens *and Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 GEO. INT'L ENVTL. L. REV. 101 (1999); Bassiouni, *supra*

States Court of Appeals for the Ninth Circuit Court has described jus cogens as "a norm accepted and recognized, by the international community of states as a whole, [sic] as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[65]

Only a governmental defendant or defendant that is claiming to be a state actor may use the defense of persistent objection.[66] Where there is a violation of customary international law, a non-state actor would not be exempt from liability just because jus cogens had not been established.[67] Rather, jus cogens would only be available to those raising a defense of sovereign immunity.[68]

Therefore, even if the United States refuses to ratify treaties on climate change, if failing to address climate change becomes prohibited by a jus cogens norm, then despite United States' persistent objections to mandatory reductions (assuming that could be argued), it may be liable for violations of that peremptory norm.

B. Emerging International Law on Climate Change and Transboundary Harm.

A number of international treaties address nations' obligations regarding climate change and transboundary harm.[69]

note 62, at 67, 69.

65. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention, *supra* note 55, at art. 53).

66. *See id*. at 715.

67. *See* Doe v. Unocal Corp., 395 F.3d 932, 964 (9th Cir. 2002) (Reinhardt, J., concurring); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003);

68. A potential loophole for proving the norm in jus cogens is using human rights violations (already recognized as a jus cogens norm) as a proxy for environmental harm, but that is beyond the scope of this paper. *See* Kevin Scott Prussia, *NAFTA & the Alien Tort Claims Act: Making a Case for Actionable Offenses Based on Environmental Harms and Injuries to the Public Health*, 32 AM. J. L. & MED. 381, 399–403 (2006); *see also* Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 1 (2003).

69. *See infra* Part II.B.1.

While the United States has not signed and ratified all of the treaties described below, there appears to be an emerging international norm to address greenhouse gas emissions.[70] This norm may be something as general as the norm against transboundary harm,[71] or may rise to something more specific, such as the obligation to do something about, or at least not exacerbate climate change.

1. United Nations Framework Convention on Climate Change and the Kyoto Protocol to the UNFCCC

The UNFCCC and the Kyoto Protocol to the UNFCCC (Kyoto Protocol) are the main sources of international law dealing with climate change. The UNFCCC laid out the framework for addressing climate change and the Kyoto Protocol established specific emissions targets as well as penalties. Notably, the United States was the fourth State to ratify the UNFCCC,[72] but never ratified the Kyoto Protocol.[73] In 2001, President Bush announced the United States would not implement the Kyoto Protocol.[74] The United States had been the only industrialized country not participating in the Kyoto Protocol, when Canada in 2011 withdrew from the Kyoto Protocol citing the fact that the treaty was doing nothing to address the emissions of the world's

70. Andrew Long, *International Consensus and U.S. Climate Change Litigation*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 177, 200–01 (2009).

71. United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 [hereinafter United Nations Conference Human Environment]; United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. 1), Annex 1 (Aug. 12, 1992).

72. U.N. Framework Convention on Climate Change: Status of Ratification, http://unfcc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited Aug. 30, 2013).

73. *See* Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997).

74. Letter from President George W. Bush to Senators Hagel, Helms, Craig, and Roberts (March 13, 2001), *available at* http://www.whitehouse.gov/news/releases, 2001/03/20010314.html; *Bush firm over Kyoto stance*, CNN.COM (Mar. 29, 2001, 3:44 PM), http://edition.cnn.com/2001/US/03/29/schroeder.bush/.

two largest emitters, China and the United States.[75]

Notwithstanding the United States' non-implementation of the Kyoto Protocol, the UNFCCC binds the United States to publish national inventories of anthropogenic emissions, create programs to mitigate such emissions, and cooperate in preparing for adaptation to the impacts of climate change.[76] While the United States does participate in a number of voluntary GHG emissions-reductions programs and GHG inventory programs,[77] it has not implemented a mandatory national system for mitigating or limiting GHG emissions. The United States appears to still be committed to the purpose of the UNFCCC but has failed to live up to its obligation to implement a national emissions-reduction strategy or cooperate with member parties of the UNFCCC.[78] The UNFCCC does not allow for reservations, and the United States signed and ratified the UNFCCC without qualifications.[79] Therefore, the United States appears to be, at least in part, in violation of the UNFCCC by failing to adopt national policies aimed at mitigating climate change.

The Kyoto Protocol established emissions limitations on developed nation member parties. For example, had the United States ratified Kyoto, it would have committed to an emissions limitation of 7% below 1990 emissions.[80] Although the UNFCCC and Kyoto Protocol are the backbone of the international climate change regime, other treaties and arrangements have demonstrated the emerging international norm of affirmatively addressing climate change. One alternative plan for addressing

75. Rob Gillies, *Canada Formally Pulls Out of Kyoto Protocol on Climate Change*, STARTRIBUNE (Dec. 12, 2011, 6:47 PM), http://www.startribune.com/world/135469408.html.

76. UNFCCC, *supra* note 49, at art. 5, ¶¶ 1(a), (b), (e).

77. TOM KERR, VOLUNTARY CLIMATE CHANGE EFFORTS, IN GLOBAL CLIMATE CHANGE AND U.S. LAW 591, 602–21 (Michael B. Gerrard ed., 2007); *see also* ASIA-PACIFIC PARTNERSHIP ON CLEAN DEVELOPMENT & CLIMATE, www.asiapacificpartnership.org/, (last visited Sept. 6, 2013) [hereinafter Asia-Pacific Partnership].

78. Press Release, President Bush Discusses Global Climate Change, Office of Press Sec'y (June 11, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/06/20010611-2.html.

79. UNFCCC, *supra* note 49, at art. 24.

80. Kyoto Protocol, *supra* note 4, at Annex B.

climate change was the Asia-Pacific Partnership on Clean Development and Climate. The United States founded this initiative, and its member States included the United States, South Korea, India, China, Australia, Canada and New Zealand.[81] The Partnership created a non-binding commitment to create a voluntary framework to facilitate the development and transfer of clean technologies,[82] but the Partnership terminated in 2011. Even though the purpose of the Partnership was consistent with the principles of the UNFCCC, the Partnership was completely voluntary and not intended to set mandatory emissions limitations.[83]

While the United States seems willing to invest in scientific research and clean technology, it appears equally dedicated to not creating a legally binding framework for nationally reducing emissions.[84] Because the United States is a party to the UNFCCC, an ATS plaintiff may be able to bring suit against parties of the UNFCCC for specific violations of that treaty, or argue that its existence gives rise to an international norm.

2. Principle 21

International law is bound by the concept of state sovereignty, and as such the main international environmental concern is the effect of one state's activities on the sovereign territory of another state, or transboundary harm.[85] Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) states that nations have a right to use their resources, but the

81. Asia-Pacific Partnership, *supra* note 77.

82. *Id*. ¶ 2.1.1.

83. *Id*. at pmbl.

84. MIRANDA A. SCHREURS, THE CLIMATE CHANGE DIVIDE: THE EUROPEAN UNION, THE UNITED STATES, AND THE FUTURE OF THE KYOTO PROTOCOL, IN GREEN GIANTS? 207, 208 (Norman J. Vig & Michael G. Faure eds., 2004); Kristin L. Marburg, *Combating the Impacts of Global Warming: A Novel Legal Strategy*, 2013 COLO. J. INT'L ENVTL. L. & POL'Y 171, 171 (2002).

85. Alexandre Kiss, *The International Protection of the Environment*, *in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 394 (Charlotte Ku and Paul F. Diehl eds., 1998).

"responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[86] While the Stockholm Declaration is not binding, Principle 21 has been included in other subsequent international bodies, such as the Charter of Economic Rights and Duties of States,[87] the Rio Declaration on Environment and Development,[88] and generally in Agenda 21.[89]

Most significantly, this language is captured in the preamble of the Convention on Long-Range Transboundary Air Pollution (Convention on Air Pollution), which the United States ratified with qualifications in 1981.[90] The purpose of the Convention on Air Pollution is to "protect man and his environment against air pollution and . . . reduce and prevent air pollution including long-range transboundary air pollution."[91] The Convention on Air Pollution defines air pollution as the "introduction by man . . . of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment . . . ."[92] It defines long-range transboundary air pollution as "air pollution whose physical origin is. . .within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State . . . ."[93] In considering Principle 21, the Convention on Air

86. United Nations Conference Human Environment, *supra* note 71, at pt. 1, ch. II, princ. 21.

87. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. Doc. A/9946 (Dec. 12, 1974).

88. Rio Declaration on Environment and Development Principle 2, June 14, 1992, 31 I.L.M. 874.

89. Agenda 21, U.N. Conference on Env't & Dev. (June 3–14, 1992), *available at* http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

90. Convention on Long-Range Transboundary Air Pollution, 18 I.L.M. 1442 (Nov. 13, 1979), *available at* http://www.unece.org/fileadmin/DAM/env/lrtap/full%20text/1979.CLRTAP.e.pdf [hereinafter Convention on Air Pollution].

91. *Id*. at art. 2.

92. *Id*. at art. 1(a).

93. *Id*. at art. 1(b).

Pollution acknowledges the "common conviction that States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment . . . ."[94] While the preamble is not binding on the parties, it is notable that the parties thought Principle 21 of such significance when considering transboundary pollution as to include it by reference as a "common conviction that States have."[95]

The concept that Principle 21 stands for is central to many treaties, and is especially relevant to the numerous treaties on transboundary harm. The United States has ratified several of these binding treaties, including: the Vienna Convention for the Protection of the Ozone Layer[96] and the Convention for the Protection of the World Cultural and Natural Heritage.[97] Also notable is that this concept was central in both the *Trail Smelter* arbitration and the *Lake Lanoux* case, and to date no nation has practiced against it.[98] Therefore, a court could find that Principle 21, especially with regard to transboundary air pollution and climate change, is a customary international norm.

While these treaties are not directly about climate change, they link the United States to an international acknowledgment that nations have an obligation to not harm one another or the common good. The Vienna Convention for the Protection of the Ozone Layer obligates member parties to take action to prevent any activities that are likely to modify the ozone layer.[99] The United States' accession to this treaty indicates its willingness to acknowledge that there are some global commons that each nation has a responsibility to protect.[100] The Convention for the Protection of the World Cultural and Natural Heritage obligates

94. Convention on Air Pollution, *supra* note 90, at pmbl.

95. *Id*.

96. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1516 [hereinafter Vienna Convention Ozone Layer].

97. Convention for the Protection of World Cultural and Natural Heritage, Nov. 16, 1972, 11 I.L.M. 1358 [hereinafter Protection of the World Cultural].

98. Kiss, *supra* note 85, at 1074–75; Trail Smelter Case (Can. v. U.S.), 3 REP. INT'L ARB. AWARDS 1905, 1938 (1950); Lake Lanoux (Fr. v. Spain), 12 REP. INT'L ARB. AWARDS 281 (1957).

99. Vienna Convention Ozone Layer, *supra* note 96, at art. 2, ¶ 1.

100. *See id*. at pmbl.

parties to not deliberately take measures which may directly or indirectly damage the cultural or natural heritage of any other nation.[101] These agreements acknowledge, to varying degrees, the responsibility of nations to conduct their activities so as not to damage other nations or the collective environment.

The purpose of identifying these treaties is to illustrate that the United States has signed and ratified a number of international treaties that acknowledge the transboundary impact that nations can individually have on a common good and the common commitment to not harm that common good. The fact that the treaties do not mention climate change specifically may be irrelevant. Moreover, the Convention on Air Pollution's definition of long-range air pollution—"air pollution . . . which has adverse effects in the area under the jurisdiction of another State . . ."—conceivably includes the GHG emissions that contribute to climate change.[102] GHG emissions are air pollutants, the consequences of which affect all States in the form of climate change.[103] Taken together, these treaties and principles may give rise to an international norm against transboundary harm in the form of climate change impacts.

3. Climate Change as a Violation of Human Rights

A number of international law scholars argue that contributions to climate change, or at least environmental harm, may amount to human rights violations.[104] However, to date, no

101. Protection of the World Cultural, *supra* note 97, at art. 6.

102. Convention on Air Pollution, *supra* note 90, at art. 1(b).

103. *See* Hodas, *supra* note 7, at 455–59 (discussing how "climate change from greenhouse gas is but one data point along the analytical spectrum of all types of air pollution"). *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

104. *See e.g.*, Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 26 STAN. ENVTL. L.J. 3 (2007); Daniel Bodansky, *Introduction: Climate Change and Human Rights: Unpacking the Issues*, 38 GA. J. INT'L & COMP. L. 511 (2010); Lee, *supra* note 53; Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?*, 35 DENV. J. INT'L L. & POL'Y 129 (2007); Pamela Stephens, *Applying Human Rights Norms to Climate Change: The Elusive Remedy*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 49 (2010); Svitlana Kravchenko, *Procedural Rights as a Crucial Tool to Combat Climate Change*, 38 GA. J. INT'L

court has championed this position. In March 2008, the United Nations Human Rights Council adopted a Resolution to Study Impact of Climate Change on Human Rights.[105] The resolution stated the Council was "[c]oncerned that climate change poses an immediate and far-reaching threat to people and communities around the world . . . ."[106] The report found that climate change has a range of impacts on human rights.[107] Specifically, it found that:

> The physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specific States. Yet, addressing that harm remains a critical human rights concern and obligation under international law. Hence, legal protection remains relevant as a safeguard against climate change-related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change. [108]

In March 2009, the United Nations Human Rights Council adopted a resolution to hold panel discussion on climate change and human rights.[109] The panel also found that climate change directly affects a range of human rights.[110] In September 2011,

& COMP. L. 613 (2010).

105. Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, General Assembly A/HRC/7/L.21/Rev.1 Mar. 26, 2008, *available at* http://www.arnoldporter.com/resources/documents/UN-HRCouncilResToStudy ImpactOfClimateChangeOnHR_0308.pdf.

106. Human Rights Council Res. 7/23, Res. of the Human Rights Council, Mar. 28, 2008, A/HRC/RES/7/23 (Mar. 28, 2008).

107. U.N. High Comm'r for Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, ¶ 92 U.N. DOC. A/HRC/10/61, (Jan. 15, 2009).

108. *Id*. at ¶ 96.

109. Human Rights Council Res. 10/4, Res. Of the Human Rights Council, 10th Sess., Mar. 25, 2009, A/HRC/RES/10/4 (Mar. 25, 2009).

110. Rep. of the U.N. High Comm'r for Human Rights, *Human Rights Council Panel Discussion on the Relationship Between Climate Change and Human Rights – Summary of Discussions*, (June 15, 2009), *available at* http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Panel.aspx.

the United Nations Human Rights Council adopted a third resolution.[111] The resolution found:

> [C]limate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and the right to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence . . . . [112]

It requested that the Office of the United Nations High Commissioner for Human Rights convene a seminar to address climate change impacts.[113] The seminar was convened February 2012.[114] In her closing remarks, Mary Robinson, former High Commissioner for Human Rights, stated: "My sense is that there is now an acceptance that the subject is so serious that it must be the focus of sustained attention by both the human rights and environmental communities." [115]

As of August 2013, the United Nations Human Rights Council has taken no further action.[116] The United Nations Human Rights Council's work on climate change suggests that there is growing consensus in the international community that climate change is resulting in significant human rights violations, and that nations have an obligation to adopt national policies that seriously address their contributions to climate change.[117]

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111. Human Rights Council Res. 18/22, Rep. of Human Rights Council, 18th Sess., Human Rights and Climate Change A/HRC/RES/18/22 (Oct. 17, 2011).

112. Human Rights Council Res. 18/22, Human Rights and Climate Change, 18th Sess., Sept. 30, 2011, A/HRC/RES/18/22 (Oct. 17, 2011).

113. *Id.*

114. *Human Rights Council Seminar on Human Rights and Climate Change*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS *(23–24 Feb. 2012)*, http://www.ohehr.org/en/Issues/HRAndClimateChange/Pages/HRCseminaronHRandclimatechange.aspx (last visited Sept. 7, 2013) [hereinafter *Human Rights Council Seminar*].

115. Mary Robinson, Closing Remarks, http://www.ohchr.org/Documents/Issues/ClimateChange/Seminar2012/ClosingRemarks_MaryRobinson24Feb2012.pdf (last visited Sept. 7, 2013).

116. *Human Rights Council Seminar*, *supra* note 114.

117. *Id.*

IV. JURISDICTION UNDER THE ALIEN TORT STATUTE

In referring to the ATS, Judge Posner of the United States Seventh Circuit Court of Appeals noted that "only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law."[118] However, while plaintiffs can get into U.S. courts under the ATS, they have struggled to maintain claims for violations of international law resulting in environmental harm.[119] Perhaps one of the limiting factors in interpreting the ATS is the lack of legislative precedent. In fact, the late Judge Henry Friendly of the United States Second Circuit Court of Appeals called the ATS a "legal Lohengrin."[120] Nevertheless, the jurisprudence suggests that a plaintiff may be successful under the ATS where the claim against the defendant arises from violation of a United States treaty or customary law, and the actions have significant connections to the United States.[121]

A. Evolution of the ATS' Jurisdictional Requirements

Only a handful of cases have addressed the jurisdictional requirements of the Alien Tort Statute. In 2004, the Supreme Court in *Sosa v. Alvarz-Machain* refined what claims can be brought under the ATS and how U.S. courts are to interpret customary international norms.[122] In April 2013, the Supreme

118. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011).

119. *See, e.g.*, Flores v. S. Peru Copper, 253 F. Supp. 2d 510, 543–44 (S.D.N.Y. 2002); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 384 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999); Aguinda v. Texaco, Inc., No. 93 CV 7527 (VLB), 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994); Amlon Metals, Inc., v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991).

120. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (referring to Richard Wagner's opera, the *Lohengrin*, where the character Lohengrin, magically appears from nowhere).

121. *See infra* Part III.A.

122. Sosa v. Alvarez-Machain, 542 U.S. 692, 725–28 (2004). The decision in Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (holding that plaintiffs can sue non-state actors under the ATS), was not disturbed by the decision in *Sosa*.

Court in *Kiobel v. Royal Dutch Petroleum Co.* further narrowed the scope of the ATS in deciding that courts cannot recognize a cause of action for violations of the law of nations that occur outside the territory of the United States.[123]

The plaintiff in *Sosa v. Alvarez-Machain* brought action under the ATS for an alleged illegal detention.[124] The Court found that Congress did not intend for the ATS to be used to create a new cause of action for torts in violation of international law.[125] Instead, it found that in enacting the ATS, Congress was likely relying on common law to provide a cause of action for international law violations.[126] The Court held that in ATS suits, courts should require claims to "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized"[127]—referring to violations of safe conduct, infringement on the right of ambassadors, and piracy.[128]

In holding that illegal detention does not rise to such a norm, the Court stated that "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[129] While the Court determined that illegal detention did not rise to a violation of an international norm,[130] the majority's commentary suggests that courts should entertain claims of violations of norms adopted post-*Erie*, and that international customary law exists and could be the basis of an ATS suit.[131] Relevant to the inquiry of whether a private actor could be culpable under the ATS, Justice Souter remarked in a footnote that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to

123. 569 U.S. ___, ___, 133 S. Ct. 1659, 1665 (2013).
124. *Sosa*, 542 U.S. at 698.
125. *Id*. at 713.
126. *Id*. at 724.
127. *Id*. at 725.
128. *Id*. at 724–25.
129. *Id*. at 729.
130. *Id*. at 738.
131. *Id*. at 726; *contra id*. at 744 (Scalia, J., concurring) (arguing that post-*Erie* there was no international common law).

the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[132]

In April 2013, the Supreme Court further narrowed the scope of the ATS in deciding that courts cannot recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.[133] Nigerian citizens had filed a class action claim under the ATS against Royal Dutch Petroleum Company and Shell, alleging that Shell worked with the Nigerian government to torture and detain Nigerian protestors.[134] The United States Second Circuit Court of Appeals held that corporations could not be sued under the ATS because international law, not national law, governs the scope of liability, and that only individuals can be liable for human rights violations under international law.[135]

The Supreme Court originally asked the parties to brief whether the ATS can be used for violations of international law that occur outside the United States and whether suit can be brought against corporations.[136] The Court later refined its inquiry to: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[137]

The opinion of the Court, delivered by Chief Justice Roberts, held "the presumption against extraterritoriality applies to claims under the ATS, and . . . nothing in the statute rebuts that presumption."[138] Like the Court in *Sosa*, the Court in *Kiobel* focused on the fact that at the time the ATS came into force,

132. *Id*. at 732 n.20.

133. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ___, 133 S. Ct. 1659 (2013).

134. *Id*. at 111.

135. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010), *aff'd*, 596 U.S. ___, 133 S. Ct. 1659 (2013).

136. Chimène I. Keitner, *The Reargument Order in* Kiobel v. Dutch Petroleum *and its Potential Implications for Transnational Human Rights Cases*, AM. SOC. OF INT'L L. (Mar. 21, 2012), http://www.asil.org/pdfs/insights/insight120321.pdf; *see also Kiobel*,v. Dutch Petroleum Co., 569 U.S. ___, 132 S. Ct. 1738 (2012) (ordering rehearing on additional question).

137. *Kiobel*, 569 U.S. ___, ___, 132 S. Ct. 1738.

138. *Kiobel*, 569 U.S. ___, ___, 133 S. Ct. 1659, 1669.

there were only three major offenses: violation of safe conduct, crimes against ambassadors, and piracy.[139] Finding that the case had no connection to the United States, the Court held that the claims could not be brought under the ATS.[140] Justice Roberts also noted that even where actions have a connection to the United States, the connection must be of a "sufficient force to displace the presumption against extraterritorial application."[141] Justices Alito and Kennedy endorsed the opinion and found separately that the decision "leaves much unanswered" regarding the ATS.[142]

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, disagreed with Roberts' reasoning that the presumption against extraterritoriality should not be applied to the ATS, because it was created with foreign matters in mind, but that the issue should be instead guided by "principles and practices of foreign relations law."[143] Justice Breyer argued that claims could be brought under the ATS where:

> The alleged tort occurs on American soil, [or] the defendant is an American national, [or] the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind. [144]

With respect to the corporate defendants in the case, Justice Breyer held that "it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest."[145]

The Court did not reach whether plaintiffs could bring claims under the ATS against corporations.[146] In fact, with respect to

139. *Id*. at ___, 133 S. Ct. at 1666.
140. *Id*. at ___, 133 S. Ct. at 1669.
141. *Id*. at ___, 133 S. Ct. at 1669.
142. *Id*. (Alito, J., concurring).
143. *Id*. at ___, 133 S. Ct. at 1671 (Breyer, J., concurring).
144. *Id*.
145. *Id*. at ___, 133 S. Ct. at 1678.
146. *See* Tony Kupersmith, *Cutting to the Chase: Corporate Liability for Environmental Harm Under the Alien Tort Statute,* Kiobel*, and Congress*, 37

corporate defendants, the Court appears to leave that door ajar, finding in dictum that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[147] This indicates that if there were additional contacts with the United States, a plaintiff could maintain a suit against a corporate defendant.

Several United States Circuit Courts of Appeals, including the Second Circuit Court of Appeals prior to its *Kiobel* holding, have held that corporations can be liable under the ATS.[148] Notably, the Seventh Circuit Court of Appeals held:

> The United States has enacted legislation making violations of customary international law actionable in U.S. courts: it is the Alien Tort Statute. And so the fact that Congress may not have enacted legislation implementing a particular treaty or convention (maybe because the treaty or convention hadn't been ratified) does not make a principle of customary international law evidenced by the treaty or convention unenforceable in U.S. courts. [149]

As the Supreme Court did not resolve this issue, it appears that corporations can still be held liable under the ATS, at least in circuits outside the Second Circuit Court of Appeals. Therefore, post-*Kiobel*, a plaintiff must satisfy two elements: (1) that there is a violation of a treaty (to which the United States is

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WM. & MARY ENVTL. L. & POL'Y REV. 885, 897 (2013). *See generally* Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285 (2001).

147. *Kiobel*, 569 U.S. at ___, 133 S. Ct. at 1669 (2013).

148. Flomo v. Firestone Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011) (holding that "corporate liability is possible under the Alien Tort Statute"); Kadic v. Karadzic, 70 F.3d 232, 239–46 (2d Cir. 1995) (holding that certain forms of conduct, such as torture, piracy, and violations of international humanitarian law "violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals); *see also* Doe v. ExxonMobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (holding aiding and abetting liability is available under ATS and corporations can be held liable under the ATS); Romero v. Drummond Co. Inc., 552 F.3d 1303, 1315 (11th Cir. 2008) (finding the ATS does not except corporate liability); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 91–92 (2d Cir. 2000) (holding federal courts can exercise personal subject matter jurisdiction over corporate defendants).

149. *Flomo*, 643 F.3d at 1022.

a party) or an international norm, and (2) that the offending conduct took place in the United States.

B. Evolution of the Law of Nations Through the ATS

In addition to describing the basic jurisdictional elements of the Alien Tort Statute, courts have had to contend with interpreting international law and whether the alleged violation is contrary to treaty or customary law. So far, no plaintiff has been successful in establishing that the environmental harm alleged rose to a violation of an international environmental norm.[150] Plaintiffs' suits typically fail because the harm alleged is not sufficiently international in character—the harm is found to be domestic rather than transboundary—or the violation claimed is too broad or vague to be considered a violation of an international norm. While the following cases were decided prior to *Sosa* and *Kiobel*, they are instructive in demonstrating how courts analyze international environmental norms, particularly transboundary harm.

The decisive case analyzing international law under the ATS is the 1980 United States Court of Appeals for the Second Circuit case *Filartiga v. Pena-Irala*.[151] At issue in *Filartiga* was whether the law of nations prohibited torture.[152] The plaintiffs in *Filartiga* brought an ATS claim against a former Paraguayan police inspector general for the torture and murder of their relative.[153] In holding that torture was indeed prohibited by customary international law, the court examined how an

150. *See* Wilson, *supra* note 51, at 453–54; Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After* Sarei *and* Sosa, 41 COLUM. HUM. RTS. L. REV. 275, 276 (2010); Cyril Kormos, Brett Grosko & Russell A. Mittermeier, *U.S. Participation in International Environmental Law and Policy*, 13 GEO. INT'L ENVTL. L. REV. 661, 674 (2001); Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?*, 2007 UTAH L. REV. 1085, 1100-45 (2007) [hereinafter Mank, *Multinational Environmental Treaties*]; Kupersmith, *supra* note 146, at 906.

151. 630 F.2d 876 (2d Cir. 1980).

152. *Id*. at 878.

153. *Id*.

international norm emerges.[154] It looked to both the Supreme Court's enumeration of appropriate sources of law as well as the I.C.J.'s ability to apply international law described in its enabling statute.[155] The court found that, "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[156] It found that although there was no universal agreement on the extent to which the U.N. Charter protected human rights, torture was universally renounced, as evidenced by both customary international law and consensus in treaties and accords, and that therefore the action could be brought under the ATS.[157]

It further held that for emerging international norms to be enforceable under the ATS, they must be universal, definable, and obligatory under the law of nations.[158] In coming to this conclusion, the Court relied on previous United States Supreme Court cases.[159] It relied on *The Paquete Habana* for the proposition that "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 . . . ."[160] It also cited to the holding in *Romero v. International Terminal Operating Co.*, reasoning that the law of nations is dynamic and should be considered as part of an evolutionary process.[161] The Court found that the ATS provides a substantive cause of action and remanded the case to the United States District Court for the Eastern District of New York which eventually awarded the plaintiffs $10.4 million in compensatory and punitive damages.[162]

Courts have interpreted *Filartiga* to mean that an ATS plaintiff must prove three elements to show that a norm is the law of nations: (1) that there is a universal norm against the act

154. *Id*. at 880.
155. *Id*. at 880–81.
156. *Id*. at 881.
157. *Id*. at 884.
158. *See id*. at 881.
159. *Id*. at 880–81.
160. *Id*. at 880–81 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).
161. *Id*. at 887 (citing Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 360 (1959)).
162. Filartiga v. Pena-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

at issue; (2) that there is a definable criteria to determine whether a State has violated the norm; and (3) that the norm is consistently applied to all actors.[163]

Relevant to the inquiry as to whether there is a customary international law regarding transboundary harm, in 1991, the Southern District of New York adjudicated in the first suit directly addressing the application of international environmental law under the ATS.[164] The plaintiffs in *Amlon Metals, Inc. v. FMC Corp* brought claims under the Resources Conservation and Recovery Act and the ATS against a corporate defendant for allegedly misrepresenting the composition and characteristics of copper residue.[165] They alleged that the misrepresentation led to the imminent and substantial danger to human health and the environment.[166] The plaintiffs based their ATS claim on Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment and the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 602(2)(1987).[167]

The court dismissed the suit holding that Principle 21 did not set forth any specific actions, only that nations should, in general, not cause harm beyond their borders.[168] In holding that endangering people with a hazardous substance does not rise to a violation of an international norm, the court cited *Filartiga*: "It is only where the nations of the world have demonstrated that the wrong is of mutual[,] and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."[169] The court's concern in *Amlon* was that the plurality of nations did not recognize the harm caused by the defendant to be a violation of an international norm.[170] It

163. BRADFORD C. MANK, CIVIL REMEDIES, IN GLOBAL CLIMATE CHANGE & U.S. LAW 183, 226 (Michael B. Gerrard ed., 2007).

164. Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991).

165. *Id*. at 670.

166. *Id*.

167. *Id*. at 671.

168. *Id*.

169. *Id*. (citing Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980)).

170. *Id*.

reasoned that the lack of treaties on the specific issue was evidence of an absence of universality.[171]

Ten years later, in *Aguinda v. Texaco, Inc.*, the same court revisited the holding in *Amlon* in analyzing Ecuadoran citizens' claims that Texaco had inadequately treated waste and contributed to the destruction of tropical rain forests in Ecuador.[172] The court initially relied on both the Rio Declaration as well as U.S. law to find that the ATS would be appropriate if the plaintiff could establish that Texaco misused hazardous waste to such a sufficient magnitude as to violate international law.[173] The court considered U.S. laws governing hazardous waste as "relevant as confirming United States adherence to international commitments to control such wastes" even though the court found that there was not a particular international statute directly addressing hazardous waste.[174] Despite the initial findings, the court eventually dismissed the case for *forum non-conveniens*.[175] The analysis in *Aguinda* suggests that where there are a number of treaties or an adherence to international commitments, such as addressing climate change and transboundary air pollution, a court may find that the issue is of a "mutual and not merely several, concern . . . ."[176]

The following year, the same court in *Flores v. Southern Peru Copper* determined that plaintiffs claiming pollution from a copper mine violated their human rights and international environmental law could not seek relief under the ATS.[177] The plaintiffs alleged the air pollution from the mine caused lung damage, in violation of the their right to life, health, and sustainable development under the Universal Declaration of

171. *Id*.

172. 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

173. *See* Aguinda v. Texaco, Inc., No. 93 CV 7527 (VLB), 1994 WL 142006, at *6–7 (S.D.N.Y. Apr. 11, 1994).

174. *Id*. at *7.

175. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

176. *Id*. at 671 (citing Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980)).

177. Flores v. S. Peru Copper, 253 F. Supp. 2d 510, 525 (S.D.N.Y. 2002), *aff'd*, 414 F.3d 233 (2d Cir. 2003).

Human Rights; the International Covenant on Economic, Social, and Cultural Rights; and the Rio Declaration on Environment and Development.[178] The plaintiffs argued that these international works stood for the customary international norm of a right to life and health.[179] The court found that the plaintiffs had failed to establish subject matter jurisdiction or state a claim under the ATS because they had failed to demonstrate that "[h]igh levels of environmental pollution [within a nation's borders], causing harm to human life, health, and sustainable development . . . violate any well-established rules of customary international law."[180] The United States Court of Appeals for the Second Circuit affirmed the District Court's holding and found that the plaintiffs' claims failed because they were too broad and vague.[181] Notably, Judge Cabranes suggested that transboundary pollution would be a more appropriate subject of customary international law, although courts would still need to determine what the bounds of those rights are.[182]

Taken together, and in light of *Filartiga's* standard that the norm must be universal, definable, and obligatory, it appears there may be an international norm under the ATS for climate change plaintiffs.[183]

V. CONCLUSION: A ROADMAP FOR BRINGING A CLIMATE CHANGE CLAIM UNDER THE ALIEN TORT STATUTE

As of yet, no ATS claims for violations of customary international norms of an environmental nature have been recognized by U.S. courts.[184] For climate change plaintiffs, the biggest hurdle will be establishing that there is an international

178. *Id*. at 518.

179. *See id*.

180. *Id*. at 519.

181. *See* Flores v. S. Peru Copper, 414 F.3d 233, 266 (2d Cir. 2003) (holding that the plaintiff's claims are not supported by sufficient evidence).

182. *Id*. at 255.

183. Mank, *Multinational Environmental Treaties, supra* note 150, at 226.

184. *See, e.g.*, *Flores*, 253 F. Supp. 2d at 543–44; Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 384 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

norm with respect to climate change. The Supreme Court has articulated where it will find customary international law, holding that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law."[185] U.S. courts will likely not rely on general principles of international law—rather, an ATS plaintiff will have to establish that the matter at issue is rooted in a specific customary international law that nations limit their GHG emissions.[186]

An analysis of existing ATS case law regarding the application of ATS to environmental claims reveals that the most successful ATS plaintiff will be the one that can cite a specific violation or provision in a treaty. A lack of specific violations as well as an absence of transboundary harm was a key criticism in several of the ATS suits. It appears that a climate change claim may succeed where other environment claims have failed because climate change necessarily involves transboundary harm and there are a few major treaties on transboundary harm, including UNFCCC and the Kyoto Protocol.

Between treaties and custom, a customary international norm that nations must address climate change has evolved. One could argue that this duty is subject to jus cogens, and that therefore, a plaintiff could bring an ATS suit alleging injury under the established customary international law of curbing climate change against any nation or corporation not actively addressing its GHG emissions. While both regional and state initiatives in the United States have attempted to address climate change,[187] the United States has failed to implement and enforce a national program aimed at addressing climate change. In fact, existing federal policy to some extent preempts local and

185. United States v. Smith, 18 U.S. 153, 160–61 (1820).

186. Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 17 (1996).

187. *See* REGIONAL GREENHOUSE GAS INITIATIVE, www.rggi.org (last visited Sept. 7, 2013); *see also* WESTERN CLIMATE INITIATIVE, www.westernclimateinitiative.org (last visited Sept. 7, 2013); PEW CENTER ON GLOBAL CLIMATE CHANGE, www.pewclimate.org/states-regions (last visited Sept. 7, 2013).

regional efforts to curb GHG emissions.[188] Therefore, an ATS plaintiff could likely prove that the United States has failed to meaningfully address climate change. The difficulty for an ATS plaintiff will be in proving that the failure results in a violation of a U.S. treaty or customary international law.

Sosa established that the ATS does not confer a new cause of action, but instead relies on common law.[189] The Court in *Sosa* held that such a norm must be accepted by the civilized world, and defined with specificity comparable to crimes against humanity as described in the 18th century.[190] The Court in *Kiobel* further limited what fact sets could amount to a violation of the ATS—only violations that have a significant connection with the United States may be brought under the ATS. Therefore, an ATS plaintiff need prove that the defendant has violated either a United States treaty or a customary international law regarding climate change, and that the violation is sufficiently connected to the United States.[191] This article has examined the current status of international law on climate change and has argued that between the UNFCCC, the Kyoto Protocol, and the Convention on Air Pollution, a customary international law has emerged reflecting that nations have a responsibility to address climate change. It argues that an ATS plaintiff may at this point succeed where other ATS plaintiffs have failed because climate change is the result of transboundary harm, and the failure to address it is a sufficiently specific harm.

188. Clean Air Act, 42 U.S.C. § 7543(a) (2006); Energy Policy and Conservation Act, 42 U.S.C. § 6396 (2006).

189. Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

190. *Id*.

191. *See* Kiobel v. Royal Dutch Petroleum, Co., 621 F.3d 111, 148–49.