

CLIMATE CHANGE AND INTERNATIONAL HUMAN RIGHTS
LITIGATION: A CRITICAL APPRAISAL

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What is the appropriate legal and political strategy for limiting the emission of greenhouse gases? A number of scholars have advocated litigation, a subset of which would be international human rights litigation in which victims of the climatic effects of greenhouse gas emissions would obtain damages from corporations, and possibly states, that are responsible for the emissions. In this Commentary, I will argue that there is little reason to believe that international human rights litigation would lead to a desirable outcome.

Litigation seems attractive to many people mainly because the more conventional means for addressing global warming—the development of treaties and other international conventions, such as the Kyoto Accord—have been resisted by governments. A rational treaty system would require states to reduce greenhouse gas emitting activities on their territory or, under other proposals, to purchase the privilege to conduct such activities from other states that operate below a threshold emission level. The treaty approach has obvious appeal: it would permit states to design a system that creates the most efficient incentives for reducing greenhouse gases, while taking account of differences in local capacity and economic development, international equity, and other relevant factors. Nearly everyone agrees that a treaty system would be preferable to litigation. But treaty negotiations have stalled, and there are numerous reasons for pessimism about international cooperation in the face of global warming,¹ so lawyers con-

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¹ The major problem is that of collective action. A healthy climate is a public good, and so states have an incentive not to cooperate in producing it. For an analysis of cooperation and coordination in the context of international law, see JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). Aggravating this problem, it appears that some states have little to fear from global warming, whereas others—especially poor nations and low-lying island nations—have much to fear. See WILLIAM D. NORDHAUS & JOSEPH BOYER, *WARMING THE WORLD: ECONOMIC MODELS OF GLOBAL WARMING* 95-98 (2000) (providing data for specific countries and regions). With conflicting interests, nations are even less likely to cooperate. However, other

cerned about global climate change have been searching for other approaches.

These approaches all involve the creative use of litigation on the basis of existing domestic and international law. For example, one could pursue purely domestic litigation options in the United States based on American law. The State of Massachusetts has sued the EPA, arguing that, in the context of motor vehicle regulation, the EPA has an obligation under the Clean Air Act to regulate carbon dioxide emissions.² In principle, individuals could also sue corporations for emitting greenhouse gases under existing tort law if causation and harm can be shown.³ One could also try to take advantage of international law. A handful of treaties and, possibly, norms of customary international law imply that states can be held responsible for emitting pollution that injures people living in other states, and one could argue that, if these rules do in fact prohibit such pollution, they apply to greenhouse gases as well.⁴ These legal claims could potentially be pursued before domestic courts or international tribunals.

All of these approaches have serious problems. In the EPA case, regardless of whether the EPA is ultimately required to regulate, the impact on climate change by 2100 will be roughly zero.⁵ Domestic tort litigation involving American plaintiffs and defendants seems questionable because of causation problems: how can a particular victim of, say, flooding show that the flooding was caused, in the legally

environmental treaties, such as the Montreal Protocol, have been successful, and so it is possible that a climate treaty could succeed as well. For a discussion of these issues, see Richard H. Steinberg, *Power and Cooperation in International Environmental Law*, in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 485 (Andrew T. Guzman & Alan O. Sykes eds., 2007).

² See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1446-47 (2007) (holding that greenhouse gas emissions from motor vehicles, including carbon dioxide, count as "pollutants" under the Clean Air Act). For a discussion of the ability of litigation to encourage federal responses to climate change, see Cinnamon Carlarne, *Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared*, 14 PENN ST. ENVTL. L. REV. 435, 453-57 (2006); Henry W. McGee, Jr., *Litigating Global Warming: Substantive Law in Search of a Forum*, 16 FORDHAM ENVTL. L. REV. 371, 372-77 (2005).

³ See David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 16-27 (2003) (discussing possible harms and theories of causation in the context of climate change litigation).

⁴ For further discussion of the application of existing international law to climate change, see RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 137-332 (2005).

⁵ See Cass R. Sunstein, *Montreal Versus Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. (forthcoming 2007) (manuscript at 15-16), available at <http://ssrn.com/abstract=913395> (discussing the EPA's ability to affect global warming).

relevant sense, by the greenhouse gas emissions of an American corporation? More important, such litigation cannot address a global problem. Most greenhouse gas emissions take place in foreign countries, and most of the victims live, or will live, in foreign countries. Liability based on American activities alone would have only a marginal effect on the climate, especially if, as seems likely given the potential magnitude of damage awards, it would mainly cause industry to migrate overseas. Congress would not permit this to happen, and would modify tort law that placed American industry at such a profound global disadvantage.

Litigation targeting the U.S. government for failing to regulate greenhouse gas emissions is even less likely to succeed because of sovereign immunity. Litigation against foreign states based on international law is equally likely to fare poorly in domestic courts because of foreign sovereign immunity and other doctrines that limit the liability of foreign states and individuals. This barrier is compounded by the weakness of international environmental treaties and customary law. The weakness of the law also makes litigation before international tribunals largely pointless, except, perhaps, as a way of attracting attention; further, international tribunals have no power to coerce states to comply with their judgments.

But if international environmental law is weak, international human rights law is, by comparison, robust. Scholars have therefore argued that international environmental law claims are more likely to succeed if they can be reconceptualized as international human rights claims.⁶ Most states belong to human rights treaties, and many of the obligations embodied in these treaties have become norms of customary international law. Human rights treaties potentially give individuals (as opposed to foreign governments) claims against states—both the state of which the individual is a citizen and any given foreign state implicated in an alleged rights violation. In theory, individuals or groups could bring human rights claims against their own state and foreign states in certain international tribunals, and prevail if they could show that failure to regulate greenhouse gas emissions has re-

⁶ E.g., Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 35-36 (2003); Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT 1, 11-18 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

sulted in a violation of their human rights.⁷ Because international tribunals generally have very limited powers, the most promising avenue lies with domestic litigation in the United States. The Alien Tort Statute (ATS)⁸ allows non-Americans to bring claims in American courts based on torts that violate treaties and customary international law. Litigants can bring these claims against American and foreign corporations and government officials, even if sovereign immunity bans claims against most states. ATS litigation has been distinctive because it has produced awards and even payment of damages (in settlements), so today it is the most prominent and effective means for litigating international human rights claims. If a plausible claim can be made that the emission of greenhouse gases violates human rights, and that these human rights are embodied in a treaty or customary international law, then American courts may award damages to victims.⁹

Whether victims of global warming pursue human rights claims in American courts on the basis of the ATS or instead find another forum that provides better legal options or greater political visibility, we should distinguish the legal basis for their claims from the normative basis of this type of litigation. For if the legal basis is weak¹⁰ but the normative basis is strong, governments should be encouraged to strengthen the law; if the legal basis is strong but the normative basis is weak, governments should be encouraged to weaken the law. In this Commentary, I will focus on normative issues and address the legal questions only to the extent that doing so is unavoidable. My argument is that the claim that individuals have an international human right of some sort that is violated by the emission of greenhouse gases, and that such a right should be vindicated in human rights litigation,

⁷ See, e.g., Donald M. Goldberg & Martin Wagner, *Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System*, in CLIMATE CHANGE: FIVE YEARS AFTER KYOTO 191 (Velma I. Grover ed., 2004) (describing possible Organization of American States claims of people living in the Arctic).

⁸ 28 U.S.C. § 1350 (2000).

⁹ For a more detailed presentation of this argument, see RoseMary Reed, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL'Y J. 399, 405-20 (2002).

¹⁰ See Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 146-47 (1999) (describing the jurisdictional barriers faced by foreign claimants suing U.S. multinationals in U.S. courts).

is not normatively attractive. To keep the discussion simple, I will use ATS litigation as my running example.¹¹

I. THE INTERNATIONAL HUMAN RIGHTS APPROACH

The ATS provides that “[t]he 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.”¹² To use this statute against global warmers, human rights advocates would need to find a plaintiff and a defendant, and be able to show that emitting greenhouse gases is a tort that violates international law.

A. *The Plaintiff*

To win a tort case, one needs an injury, and so the plaintiff would have to be someone who has been injured by global warming. It is hard to claim that a higher temperature causes an “injury,” as that term is conventionally understood in tort cases. But if one could show that one’s life, health, or property was damaged or destroyed by flooding, disease, or some other hazardous phenomenon connected to global warming, then one could be a plaintiff in an ATS suit. Of course, the problems of proving causation are immense, but I will put these aside for now.

B. *The Defendant*

Here, we have an embarrassment of riches. Virtually everyone in the world engages in activities that emit greenhouse gases and thus contribute, however minimally, to global warming and its ill effects. Plaintiffs may pick and choose, of course, and so they are likely to choose either wealthy corporations or states. International law contains a bit of a Catch-22, however: international law generally creates obligations for states, not for corporations or individuals; but states are usually protected by sovereign immunity, so they cannot be sued in U.S. courts. Plaintiffs have managed to escape this Catch-22 in two ways: by suing foreign officials rather than foreign states and by suing

¹¹ Many of the points I will make are specific to ATS litigation, but others are more general.

¹² 28 U.S.C. § 1350 (2000). Technically, the ATS is just a jurisdictional statute, and, in principle, individuals could bring similar tort claims in state courts. In practice, state courts have been less receptive than federal courts to international human rights litigation and have been used less for such litigation.

corporations that have acted in complicity with states.¹³ The latter is more promising in terms of generating damages, and so I will generally assume for purposes of discussion that the defendant is a corporation.

C. *The Tort*

The plaintiff must show that the defendant has committed a tort. This is relatively straightforward: because emitting pollution that harms third parties is a standard tort, plaintiffs should have no trouble persuading courts that greenhouse gas emitters are potential tortfeasors. Difficult questions about the scope of liability will have to be addressed, however, as I discuss below.

D. *Violation of International Law*

Does emission of greenhouse gases by a state or corporation violate international law? International legal restrictions on pollution are weak or nonexistent, or apply only in limited domains. Various international declarations and agreements refer to the importance of the environment, and even to a “right” to live in a healthy environment,¹⁴ but the consensus is that these declarations and agreements

¹³ There is also the possible argument that greenhouse gas emission is an international crime, or violation of a *jus cogens* norm, in which case state action is not necessary. This seems far fetched. *But see* Reed, *supra* note 9, at 400-04 (arguing that greenhouse gas emission amounts to genocide of people living in low-lying islands that will be destroyed by rising seas).

¹⁴ For instruments codifying the right, see Organization of African Unity, Banjul Charter on Human and Peoples’ Rights art. 24, *opened for signature* June 27, 1981, 21 I.L.M. 58 (providing a “right to a general satisfactory environment favorable to . . . development”); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, *done* Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 161 (entered into force Nov. 16, 1999) (“Everyone shall have the right to live in a healthy environment and to have access to basic public services.”). For instruments recognizing the importance of the environment, see Declaration of the United Nations Conference on the Human Environment princ. 1, U.N. Doc. A/CONF.48/14 (June 16, 1972), *reprinted in* 11 I.L.M. 1416 (“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”); World Charter for Nature, G.A. Res. 37/7, Annex, ¶ 23, U.N. Doc. A./RES/37/7/Annex (Oct. 28, 1982) (providing the right for all persons to access “redress when their environment has suffered damage”); Hague Declaration on the Environment, *done* Mar. 11, 1989, 28 I.L.M. 1308 (“[R]emedies to be sought involve . . . the right to live in dignity in a viable global environment”); United Nations Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 1, U.N. Doc. A/CONF.151/5/Rev.1 (June 13, 1992), *reprinted in* 31 I.L.M. 874 (“Human beings . . .

do not, by themselves, create an international human right to a healthy or undamaged environment.¹⁵ There is also no international human right to be free of global warming or pollution per se.

Thus, international human rights litigation directed against polluters has drawn on human rights that are not specific to environmental protection—namely, general rights to life and health, and rights to be free from discrimination where governments or other entities have directed pollution against disfavored groups.¹⁶ It remains hotly contested whether such rights to life and health are actually international human rights, and indeed this claim has been rejected so far by American courts, at least for ATS purposes.¹⁷ Still, this theory provides the best hope for plaintiffs. An international human rights claim directed at greenhouse gas emitting states or corporations would have to be based on an argument that the polluters, by emitting greenhouse gases, violated victims' rights to life or health, or discriminated against them.

II. THE COSTS AND BENEFITS OF INTERNATIONAL HUMAN RIGHTS LITIGATION

From the perspective of litigation strategy, the appeal of the international human rights approach is easy to understand. International litigation against states might pressure governments to adopt more environmentally friendly policies; domestic litigation against multinational corporations might pressure them to reduce their greenhouse gas emissions. Litigation can generate press attention, mobilize public interest groups, galvanize ordinary citizens, and, ultimately, gain compensation for victims. At a minimum, it creates pressure that might generate wiser policy, as governments may finally enter treaties in order to reduce the risk of liability and the public

are entitled to a healthy and productive life in harmony with nature.”). For a discussion of these instruments, see Alexandre Kiss, *The Right to the Conservation of the Environment*, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 6, at 31.

¹⁵ See, e.g., Sumudu Atapattu, *The Right to a Healthy Life or the Right To Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 74-78 (2002) (analyzing the provisions of these instruments and concluding that none provides a human right to the environment).

¹⁶ See *id.* at 98-103; Linda A. Malone & Scott Pasternack, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 365, 367 (2002); Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71, 79 (2005).

¹⁷ E.g., *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1077 (9th Cir. 2006) (noting the lower court's rejection of this argument).

relations costs of litigation. These and similar reasons seem to support the recent scholarship advocating international human rights litigation on account of global warming.¹⁸ But litigation can also create pressure that generates bad policy. Putting aside possible indirect political effects, and assuming that political progress on global warming will continue to be slow or nonexistent, the question for scholars is whether this litigation, if successful, is likely to have beneficial effects on people's lives. I will frame the question as follows: should U.S. courts, in ATS and similar suits, be encouraged to recognize customary international human rights norms, such as norms requiring the protection of life and health in general, that are being violated by corporations or states that contribute to global warming?

A. Assumptions

To keep this discussion manageable, I will make several simplifying assumptions.

First, in answering the question, I will focus on corporations rather than other potential defendants, such as foreign states and foreign government officials. States are highly unlikely to be found liable in ATS litigation, at least under current law, because of foreign sovereign immunity.¹⁹ Foreign government officials may be found liable; however, they are unlikely to have assets in the United States. Foreign corporations can be held liable—especially if they have acted in complicity with states—and these corporations are far more likely to have

¹⁸ See Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1, 21-22 (Alan E. Boyle & Michael R. Anderson eds., 1996) (noting the advantages of human rights-based environmental protection); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789, 1855 (2005) (noting the advantages of climate change litigation). Anderson also surveys the disadvantages. Anderson, *supra*, at 22-23. For other criticisms of the international human rights approach to environmental protection, see Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra*, at 43, 63 (questioning whether a distinct right to “a decent, viable, or satisfactory environment” is necessary); J.G. Merriam, *Environmental Protection and Human Rights: Conceptual Aspects*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra*, at 25 (discussing the problematic conceptual implications of environmental rights for existing notions of human rights). Other relevant essays can be found in HUMAN RIGHTS AND THE ENVIRONMENT: CONFLICTS AND NORMS IN A GLOBALIZING WORLD (Lyuba Zarsky ed., 2002); see also Goldberg & Wagner, *supra* note 7, at 191.

¹⁹ See Foreign Sovereign Immunity Act, 28 U.S.C. § 1604 (2000) (providing sovereign immunity to foreign states).

assets in the United States.²⁰ American corporations are, of course, vulnerable in this regard. Thus, if greenhouse gas related human rights litigation is to succeed, it will need to target corporations—domestic, foreign, and multinational—and it will also be necessary for the prospect of litigation and damages to deter corporations from offering their services to foreign states and officials. If neither of these assumptions is correct, human rights litigation based on the ATS will have no impact on global warming.

Second, I will assume that the proper level of liability for corporations is equal to the value of the negative external effects of their activities on climate change. As climate change is not an intrinsic harm, but is a harm only insofar as it has a negative impact on human beings, the relevant negative external effects are those that are net of any beneficial effects from global warming, such as enhanced agricultural productivity in northern latitudes. It necessarily follows that the awards should not be maximal (and this applies to injunctions as well): corporations should not be forced to shut down factories unless the climate costs of their activities exceed the value they produce in the form of consumer surplus and returns to shareholders. Thus, I put aside the unlikely possibility that the optimal global warming policy involves shutting down all industry or other means effecting a radical transformation of economic activity around the world.²¹

Third, throughout my discussion I will assume that the problems of causation can be overcome, though I have doubts on this score.

²⁰ See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 335-41 (S.D.N.Y. 2005) (holding that corporations can be liable for violating *jus cogens* norms and for aiding and abetting government violation of international law).

²¹ The *Stern Review*, for example, estimates that the cost of a reasonable response to global warming would be about one percent of global GDP per year. NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* xvi (2007), prepublication version available at http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm. This estimate is on the high end; Nordhaus's estimate is significantly lower. NORDHAUS & BOYER, *supra* note 1, at 174 (estimating these costs, in present terms, at \$5 billion per year). The difference is mainly attributable to the fact that the *Stern Review* does not discount future costs and benefits, whereas Nordhaus does. William Nordhaus, *The Stern Review on the Economics of Climate Change* 14-15 (Nov. 17, 2006) (unpublished manuscript) available at <http://nordhaus.econ.yale.edu/SternReviewD2.pdf>. In addition, the *Stern Review* has been criticized for selective use of scientific studies. Richard S.J. Tol, *The Stern Review of the Economics of Climate Change: A Comment* (Oct. 30, 2006) (unpublished manuscript) available at http://www.climate-science.org.nz/assets/2006114145380.TOL_sternreview.pdf. The point for present purposes is that even the pessimistic estimate, if converted into a liability rule, implies that liability would not be so high as to drive most firms out of business.

Certainly, it would be impossible for a victim of global warming to show that one particular corporation or factory caused his injury. Any theory would need to allocate liability on the basis of market share or some other proxy for degree of responsibility, and although American courts sometimes do this,²² the difficulties of using such theories for global warming are considerable. Suppose that it can be shown that, over a certain period, global warming increases the probability of flooding in some coastal region by x percent. A flood during that period causes the destruction of \$100 million of property, but there is no way to prove that the flood would not have occurred if the corporate defendants in question had not emitted excessive greenhouse gases. One might argue that (1) \$100 million multiplied by x should be paid (2) by all firms (and, indeed, individuals) who contributed to the x percent increase in the probability of flooding through their greenhouse gas emissions, allocated according to their share of responsibility. However, even if courts accept this logic (which seems unlikely), they are likely to demand a great deal of evidence for the x percent figure—and science will probably fail to meet that demand. Science is also unlikely to be able to allocate responsibility among all the possible greenhouse gas emitters around the world—corporations, individuals, governments, and others. If these and similar calculations cannot be performed, courts either will deny liability, in which case the whole international human rights approach will fail, or will assign liability in an arbitrary fashion, with the result that many greenhouse gas emitters will be excessively deterred (because their activities in fact have little or no causal effect on the flooding) while others will be insufficiently deterred. These formidable problems throw into doubt the enterprise, but I will put them aside for now.

Fourth, I assume that progress with global warming depends on litigation succeeding against corporations around the world, and not just American corporations. As noted above, a healthy climate is a public good; if one state drastically reduces its greenhouse gas emissions, and other states do not, then the greenhouse gas problem will not be solved. This is true even for the biggest greenhouse gas emitter, the United States. If factories are shut down in the United States, and climate-based environmental regulation remains lax in other countries, then the slack in supply will be taken up by new factories

²² See Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 819-26 (1992) (examining the use of statistical techniques in mass tort litigation).

constructed in foreign countries with weaker regulation. This was one of the reasons, described above, why domestic tort litigation against corporations in the United States could not, by itself, make progress with global warming. International litigation, since it would target foreign as well as domestic corporations and thus apply a consistent liability standard around the world, holds out more hope on this score, at least at first glance.

B. *The Costs and Benefits*

Let us now consider some relevant costs and benefits of international human rights litigation directed at corporations.

On the benefits side, the argument is simple. Nearly everyone agrees that global warming is a serious problem and that the only way to address it is by reducing greenhouse gas emissions. A treaty regime that requires states to tax or otherwise restrict greenhouse gas emissions would be optimal, but such a treaty regime is far away. In the meantime, any regulatory or legal activity that increases the cost of activities that involve the release of greenhouse gases can only have a beneficial effect. Human rights litigation would do just this. Though far from ideal, it would cause large corporations to reduce their greenhouse gas emissions at the margin to avoid either the potentially large liability that would result from a successful ATS suit or the public relations embarrassment of such litigation, successful or not, or both. Awards would compensate impoverished victims of global warming around the world, permitting them to rebuild their lives on higher ground.

Unfortunately, the story is not so simple. To see why, we need to fill in some of the details about how an ATS lawsuit might proceed.

Suppose that ATS litigation against multinational greenhouse gas emitting corporations results in large awards of damages. In reaching this outcome, courts would need to make numerous judgments about liability and harm along the way. For example, they would need to decide whether only negligent emissions of greenhouse gases can create liability, or whether a standard of strict liability should be applied. In the former case, some judgment would need to be reached about what counts as due care in this context. Can corporations evade liability if they can show that the costs of reducing emissions exceed the benefits in terms of reducing the impact on climate change? What if they did not know or anticipate the dangers of global warming at the time they built greenhouse gas emitting factories? Further, courts

would face difficult valuation problems that are familiar from environmental regulation and litigation. One question, for example, would be whether the destruction of a glacier as the result of rising temperatures should be considered a compensable harm, because people care about the glacier and its ecosystem, or not, because people are not harmed in a pecuniary or physical sense. Other questions include how to value the loss of life caused by flooding and other natural disasters, the loss of life resulting from an increase in the prevalence of any tropical diseases, reductions in health and well-being resulting from the same, and second-order harms caused by loss of consortium, the deaths and injuries of children, and so forth. Courts have a great deal of discretion to decide these questions in the American tort system, even though many of them are clearly policy questions that are normally—even in the United States, but more so in other countries—resolved by governments, which can balance the values and interests of different people.

In principle, the discretion of American courts would be constrained by international law. The ATS permits a remedy only if the act in question is an international law violation as well as a tort. International human rights are extremely vague, and the relevant rights in hypothetical global warming litigation—rights to life and health—are at the extreme point of vagueness. Perhaps these rights would exclude “existence value” harms like the one discussed above, but perhaps not. Perhaps these rights could be monetized, so that a cost-benefit comparison could be made, but perhaps not. Courts would thus need to make the tradeoffs between economic activity, which generates wealth, jobs, and funds for desirable government programs, such as health care and environmental protection, on the one hand, and “life” and “health,” on the other. Of course, courts could avoid making substantial policy judgments by understanding life and health rights in the narrowest possible way. This would reduce liability to a minimum and not interfere much with the activity of firms, and thus not with the regulatory choices of governments. But this would also mean that no progress would be made with global warming.²³

The upshot is that, even if courts could and were willing to handle these complexities, and, further, if they did so in a way that permitted

²³ This would also be the case if the state action requirement were interpreted strictly, so that, for example, corporations could be liable only insofar as their greenhouse gas emissions were directed or encouraged by a state. This would drastically limit the scope of liability, so that the litigation would be ineffectual.

substantial progress with global warming, then they would implicitly be making climate change policy both for the United States and for the world: for the United States, because defendants that are American companies would need to bring their greenhouse gas emissions into line with the policies chosen by American courts; and for the rest of the world, because defendants that are foreign companies or multinationals would need to bring their greenhouse gas emissions from factories in foreign countries into line with the policies chosen by courts if they want to maintain access to the American market.²⁴ The two types of defendants raise slightly different considerations, so they should be addressed separately.

The case for American courts regulating American companies through the ATS is stronger than the case for American courts imposing their policy views on foreign countries through the ATS, but the case is still weak. The reasons are familiar from the literature on the comparative advantages of courts and agencies with respect to regulation.²⁵ Regulatory bodies are superior when victims are dispersed and their losses are relatively small, when centralized enforcement permits the development of expertise oriented toward the problem at hand, and when judgment-proof defendants are a potential problem. So we prefer regulation by the EPA to a system of national pollution regulation created by courts pursuant to the common law of nuisance, because most victims of pollution are not injured enough for lawsuits to be worthwhile, the EPA has better information than victims about the effects of pollution, and polluters will not be deterred adequately if they go bankrupt, whereas they can be adequately deterred by inspections and fines.

Agencies or legislatures also can take into account the interests of everyone rather than merely those people who go to the trouble of litigating; they can design programs, such as emissions trading, that are beyond the powers of courts to create. Regulation also cuts fee-consuming lawyers out of the picture. Nonetheless, human rights litigation is appealing because Congress and the EPA refuse to act—the argument that regulation by agency is superior to regulation by court

²⁴ A rather odd qualification is that the level of emissions would be somewhat less than the global optimum, because the well-being of only aliens—*not Americans*—could be taken into account.

²⁵ There is a large literature on this topic. For an early discussion of the basic tradeoffs between litigation and regulation, see Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984); in the context of environmental litigation, see Anderson, *supra* note 18, at 22-23.

cannot be a decisive objection to litigation as a result. The best argument for encouraging courts to address the problem of global warming is that this problem has not been adequately addressed by the political branches; bad judicial regulation might be better than no regulation at all.

The more significant problem is that American courts would be making climate policy not just for the United States, but for the world—at least, to the extent that other governments benefit from, and need, multinational corporations that keep assets in the United States. If foreign corporations need access to the American market, then they must comply with American law. If they do not comply with American law, then assets they bring to the United States can be seized by plaintiffs. If an American court directs foreign corporations to reduce greenhouse gas emissions, then they must shut down at least some of their factories, including factories located overseas, or otherwise adopt controls, or abandon the American market altogether.

In the former case, American law effectively supersedes the less restrictive law that prevails in the foreign state. If, say, China does not regulate greenhouse gas emissions, and an American court orders a Chinese corporation to pay an award based on greenhouse gas emitted in China that contributed to flooding in India, then the corporation, to maintain access to American markets, must comply. To avoid further liability, the Chinese corporation would need to bring its Chinese operations into compliance with the tort standard used by the American court. If, for example, the court holds that a certain level of emissions is negligent, the Chinese corporation would need to reduce the emissions of its Chinese factories. The more lax Chinese environmental law would not permit the corporation to escape this outcome.

In the latter case, American courts would be, in effect, setting up a regime of sanctions, under which American markets would be effectively closed to foreign corporations that do not comply with the emissions standards established by the courts. Sanctions are traditionally created by Congress and the President,²⁶ because they are a matter of policy, and, more important in the present context, are extremely sensitive, as they can provoke economic retaliation by foreign countries. Although nominally directed at foreign corporations, these

²⁶ See Gary Clyde Hufbauer & Barbara Oegg, *Beyond the Nation-State: Privatization of Economic Sanctions*, 10 MIDDLE E. POL'Y 126 (2003) (describing several instances in which sanctions were imposed).

sanctions would effectively be a challenge to the economic, environmental, and development policies of other nations on the ground that those policies are insufficiently sensitive to the dangers of climate change.²⁷

This would be odd. There is no reason to think that American courts could or should develop greenhouse gas policy for Australia, Ecuador, Sweden, and Chad. Each country has its own needs and interests. Some countries are not badly affected by climate change but are deeply concerned about economic development, without which most of their citizens will remain forever impoverished; others are or will be more significantly affected.²⁸ Some countries may be worried that, to avoid further liability, corporations will shut down factories that supply jobs to many citizens, with the result that social unrest will occur.²⁹ Even on a very simple view of the world, in which all that really matters is climate policy, American judicial determination of that policy is likely to have bad effects, simply because American courts, unlike foreign governments, have no idea whether liability rules that make sense for American firms will make sense for foreign firms.³⁰ Of course, foreign governments care about other things besides climate policy—security, culture, economic activity, the social welfare system, and so on—and must balance concerns about the climate with concerns about these other factors. Restrictive greenhouse gas rules created by American courts could not possibly take account of this type of legitimate local variation.

Foreign states object when American courts try to control activities on their territory, and so we would have to expect a reaction from affected individuals, groups, and states if this ATS litigation were to succeed. As noted above, a simple way for multinational corporations to

²⁷ *Id.* at 134 (discussing the potential for ATS liability to act as “broad-ranging sanctions against . . . a long list of countries”).

²⁸ On the geographically diverse effects of climate change, see NORDHAUS & BOYER, *supra* note 1, at 159-60 tbls.8.6 & 8.7; STERN, *supra* note 21, at 88 fig.3.8.

²⁹ This would be even clearer in a hypothetical world where foreign governments or states were held liable for having inadequate greenhouse gas emission laws—it is surely ironic for American courts to hold foreign governments liable for failing to implement controls that the American government itself has failed to implement. But this would be the effect of holding foreign corporations liable, as discussed in the text.

³⁰ Judges have long expressed skepticism about their ability to predict and evaluate the foreign relations implications of their decisions in cases involving the interests of foreign states, and so they often defer to the advice of the executive branch. See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007) (arguing that courts should employ a *Chevron*-like deference to executive actions touching on foreign relations).

avoid paying damages in ATS litigation is to remove attachable assets from the United States. This would be extremely costly, of course; in essence, many corporations would have to give up or reduce their presence in the U.S. market. But, at the margin, some corporations would do this so that they could operate greenhouse gas emitting factories in foreign countries without paying damages to victims in American courts. Many corporations would continue to be able to serve the American market by manufacturing goods abroad and exporting them. Although some corporations would remain and reduce their emissions at the margin in order to preserve access to the U.S. market, the net effect of ATS litigation would be to cause corporations and their assets to migrate to other countries.³¹ As other firms withdraw assets or migrate abroad, ATS liability awards would have less and less effect on the activities of corporations around the world, and eventually would do nothing to solve the problem of global warming. ATS liability would serve as a tax on doing business in the United States—one that, because of the collective nature of the climate problem, would have little or no effect on global warming. Furthermore, we would have to expect some American industry to move overseas in order to avoid this tax.

Another possibility is that foreign corporations would persuade their home governments to give them subsidies to offset their ATS liability. This seems plausible for countries where corporations have a lot of political influence, and where governments fear social unrest caused by short-term unemployment resulting from the shutting down of greenhouse gas emitting factories. Thus, ATS awards would essentially be payments from the taxpayers of poor countries to victims, many of whom could be relatively wealthy—such as owners of houses in low-lying coastal plains.

This is not just a problem with poor countries. ATS litigation creates tension between the United States and foreign states that object to the application of American-style litigation, with its high awards, to their corporations. South Africa, for example, objected to ATS litiga-

³¹ ATS litigation like this would be similar to ordinary government sanctions on countries that engage in bad behavior, the difference being that the political branches, not the courts, decide when to impose sanctions. Sanction regimes are often ineffective, and their effectiveness is highly dependent on specific conditions being satisfied—for example, sanctions are more likely to work on friends than enemies. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 99 (2d ed. 1990).

tion alleging that foreign corporations were complicit in apartheid.³² ATS litigation against foreign corporations that contribute to greenhouse gas emissions is likely to produce similar tensions. Given that even European countries have been slow to address the problem of global warming, we can assume that European governments are reluctant to impose significant costs on their domestic corporations. If so, they are not likely to approve of American litigation that has the same effect.

If all this is true, then we should expect a backlash in foreign countries against ATS liability, at least if the latter is substantial enough to have a significant impact on the activities of corporations that emit greenhouse gases. Foreign countries might retaliate against the United States by reducing their willingness to cooperate along other dimensions of international relations of significance to Americans and the American government—trade and security, for example.³³ Even more troublesome, foreign countries can nullify the effect of ATS litigation by reducing their own greenhouse gas controls. If the political economy in any given foreign country is such that corporations will be subject to only limited regulation, then ATS litigation that results in a greater de facto degree of regulation would likely be met with a relaxing of controls.

The problem can be summarized as follows. If ATS litigation results in significant liability, then either massive evasion will occur as corporations withdraw from the United States and foreign countries immunize corporations that do substantial business on their territory, or—even worse, but highly unlikely—massive evasion will *not* occur and American courts will draw up a global environmental policy that makes sense to judges but does not reflect the needs and interests of people worldwide. In the first case, ATS litigation could well impose costs on Americans without creating any global benefits. In the second case, ATS litigation could harm foreigners more than it helps them. To be sure, these negative effects are not inevitable. Courts might turn out to be good policymakers, other nations could end up acquiescing in this policy, and corporations might find it cheaper to

³² See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting that South Africa sought to address the legacy of apartheid through reconciliation, not litigation).

³³ See Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 460-62 (2001) (disussing the inability of private litigants to gauge these U.S. interests); Hufbauer & Oegg, *supra* note 26, at 134 (asserting that ATS litigation may interfere with "U.S. trade and financial ties with the targeted countries").

comply with judicial policy than to withdraw from the American market. All this could turn out to be true, but it is unlikely.

C. *Distributional Implications*

Supposing ATS litigation on the basis of global warming succeeds, it will have distributional implications that may not be desirable. Much depends on how plaintiffs' lawyers design the litigation and how courts determine the contours of the tort claims, so the discussion is necessarily speculative—even more so than the cost-benefit discussion above.

The victims of global warming are dispersed throughout the world. In the near future, at least, they will be concentrated in poor countries on low-lying islands and in coastal regions, where rising sea levels result in more frequent floods, erosion, and the destruction of property. Other victims will include farmers whose land can no longer support traditional crops because of climatic changes, people who become vulnerable to diseases that migrate north, and people who rely on glaciers for their water.³⁴ Many people will be affected only in marginal ways—perhaps food prices will be higher than they would otherwise be, or air conditioning bills will be higher, or more storms will result in more damage and higher insurance costs.³⁵

We could imagine suits being brought on behalf of all these people. However, suits in the near term will probably be brought on behalf of the worst-off victims in the poorest countries, with suits by wealthier victims to follow only if the first type of lawsuit succeeds. If, for example, it can be shown that global warming-influenced flooding wiped out an impoverished village in Bangladesh, then it can be shown that global warming-influenced flooding wiped out middle-class homes in Bangladesh. Conventional tort remedies, which are used in ATS cases, imply that the middle-class victims would be entitled to higher awards than the impoverished victims, for the simple reason that the middle-class victim has more valuable assets that can be destroyed than the impoverished victim does. This means that plaintiffs' lawyers will migrate toward the middle-class and the relatively wealthy. In these ways, both the incentives of lawyers and the principles of the law imply that the litigation will redistribute wealth

³⁴ See STERN, *supra* note 21, at 66 tbl.3.1 (charting the possible effects of various climate increases).

³⁵ For a discussion of the potential damages attributable to climate change, see *id.* at 138-39; NORDHAUS & BOYER, *supra* note 1, at 69-98.

from multinational corporations to middle-class or relatively wealthy victims. Corporations will pass their costs on to customers. As the costs of products increase, the poor around the world will be hit hardest. An energy corporation that raises prices to finance ATS awards will pass the cost on to consumers, and higher energy bills will be felt more keenly by the poor than by the relatively wealthy.

This outcome is not a certitude, but it seems likely for two reasons. First, the American tort system, through which human rights litigation must flow, takes the distribution of wealth as given and rarely tries to redistribute. Second, the American tort system favors large claims over small claims, because plaintiffs must incur the high risks and fixed costs of litigation. When plaintiffs are scattered around the world, the task falls to entrepreneurial plaintiffs' lawyers, who have strong economic incentives to aggregate a few large claims rather than millions of small claims. And when they do aggregate many small claims, experience has shown that administrative costs are high and the risks of corruption and abuse are substantial.³⁶ Victims often end up receiving only a small portion of their claims, with the rest going to lawyers and administrative expenses.³⁷

On the other side, if tort awards are reasonably accurate, if corporations respond by reducing greenhouse gas emissions, and if, as a result, climate change proceeds at a slower pace, then millions of people around the world will be benefited, and most of these people will be poor. However, these particular beneficiaries are not poor people living today, but rather poor people who will be alive in the future. The reason is that an enormous stock of greenhouse gas emissions has built up in the atmosphere, and so progress against climate change can occur only after this stock has been reduced, which would take many years, even if corporations radically reduced their emissions.³⁸ The effect of litigation today would be to benefit poor victims today very little or not at all, or even make them worse off as many would have to pay higher prices. Wealthier victims would probably do better

³⁶ See *The Asbestos-Fraud Express*, WALL ST. J., June 2, 2006, at A18 (explaining that consolidation of claims encourages lawyers to add more plaintiffs, perhaps fraudulently).

³⁷ See David Rosenberg, *The Regulatory Advantage of Class Action*, in REGULATION THROUGH LITIGATION 244, 245-46 (W. Kip Viscusi ed., 2002) (discussing the problems of "fractional aggregation," as opposed to class actions, which are less prone to this problem).

³⁸ STERN, *supra* note 21, at 15-16 & tbl.1.1 (predicting a continuing rise in temperature even if global emissions were stabilized or eliminated altogether).

in the present, and poor and wealthier people in the distant future would be made better off, if all went well and litigation did not suppress economic growth by more than it helps the climate. And poor people in the distant future are likely to be better off than poor people today, at least if historical trends continue and global warming is moderate rather than catastrophic.³⁹ Such a distributional outcome is morally questionable at best.

CONCLUSION: POLITICAL RAMIFICATIONS

Having said all this, I should acknowledge again that the main purpose of litigation may not be to persuade courts to determine greenhouse gas emission policy, but to attract public attention and pressure governments to reach political solutions, including treaties and domestic laws.⁴⁰ Supporters of the recent decision in *Massachusetts v. EPA* no doubt believe that, even if EPA regulation by itself would not affect global warming, a victory might lead other countries and their regulatory agencies to take global warming more seriously. If this is correct, then there is nothing objectionable about the litigation. But it is a gamble, and an odd one at that. If the courts take this and similar litigation seriously, and plaintiffs prevail, we may be in a worse world unless governments act, and governments might not act.

In the United States, litigation drives policy to a greater extent than it does in other countries. Consider how tort litigation has driven smoking policy, for example, or how constitutional litigation has driven policy on schools, prisons, and abortion. That litigation can be effective for changing policy cannot be denied; that litigation leads to better policy than can be achieved through politics is hotly contested.⁴¹ American lawyers concerned with human rights and climate change understandably look toward this litigation experience as they try to develop ways to circumvent the recalcitrant political branches of the national government and the ineffectual state legislatures. Whatever the merits of policy-driven litigation in the domestic

³⁹ See Thomas C. Schelling, *Intergenerational Discounting*, 23 ENERGY POL'Y 395, 399 (1995).

⁴⁰ This is a theme in the literature on environmental litigation. See Anderson, *supra* note 18, at 22 (noting the possible indirect benefits of environmental gains litigation).

⁴¹ Richard A. Epstein, *Implications for Legal Reform*, in REGULATION THROUGH LITIGATION, *supra* note 37, at 310.

arena, however, the assumption that it can drive global greenhouse gas policy at all, or in the right direction, is doubtful.