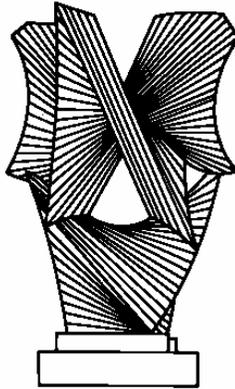


# CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 329  
(2D SERIES)

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 148



## CLIMATE CHANGE AND INTERNATIONAL HUMAN RIGHTS LITIGATION: A CRITICAL APPRAISAL

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January 2007

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# **Climate Change and International Human Rights Litigation: A Critical Appraisal**

Eric A. Posner<sup>1</sup>

January 26, 2007

**Abstract.** Litigation over the effects of climate change has taken various forms, of which litigation based on international human rights law is perhaps the most ambitious. Plaintiffs argue that major emitters of greenhouse gases have violated rights to life and health by contributing to environmental and health injuries associated with global warming. International human rights litigation in international tribunals is unlikely to have any effect, but conceivably American courts might be open to these arguments in Alien Tort Statute litigation. If so, this would be a mistake. Because the health of the global climate is a public good, because American courts have limited ability to control the behavior of corporations on foreign territory, and because optimal climate policy varies greatly across countries, it is unlikely that American courts can provide remedies that are economically sound and politically acceptable.

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 essay, 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, in some versions, to purchase the privilege from other states. 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

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differences in local capacity and economic development, international equity, and other relevant factors. Nearly everyone agrees that a treaty system would be better than litigation. But treaty negotiations have stalled, and there are numerous reasons for pessimism about international cooperation in the face of global warming,<sup>2</sup> so lawyers concerned 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 EPA has an obligation under the Clean Air Act to regulate “pollutants,” and that carbon dioxide and other greenhouse gases count as pollutants for purposes of the statute.<sup>3</sup> In principle, individuals could also sue corporations for emitting greenhouse gases under existing tort law if causation and harm can be shown.<sup>4</sup> One could also try to take advantage of international law. A handful of treaties and, possibly, norms of customary international law imply that states are liable 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.<sup>5</sup> These legal claims could potentially be pursued before domestic courts or international tribunals.

All of these approaches have serious problems. In the EPA case, even if EPA is required to regulate, the impact on climate change by 2100 will be roughly zero, even if

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<sup>2</sup> 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. 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). With conflicting interests, nations are even less likely to cooperate. However, other environmental treaties such as the Montreal Protocol have been successful, and one cannot exclude on first principles the possibility that nations might be able to reach agreement on the climate 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* (forthcoming 2007).

<sup>3</sup> See, e.g., *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). For a discussion, see Cinnamon Carlarne, *Climate Change Policies An Ocean Apart: EU & US Climate Change Policies Compared*, 14 *Penn St. Envtl. L. Rev.* 435, 453 (2006); Henry W. McGee, Jr., *Litigating Global Warming: Substantive Law in Search of a Forum*, 16 *Fordham Envt'l L. Rev.* 371, 372-78 (2005)

<sup>4</sup> See David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 *Colum. J. Envtl. L.* 1 (2003).

<sup>5</sup> For a discussion, see Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* chs. 4-5 (2005).

Congress does not reverse the decision.<sup>6</sup> 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 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, 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 likely to fare poorly in domestic courts because of foreign sovereign immunity and other doctrines that limit the liability of foreign states and individuals, plus 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.<sup>7</sup> 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 states) claims against states—both the state of which the individual is a citizen and any given foreign state. 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 can show that

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<sup>6</sup> See Cass R. Sunstein, *Of Montreal vs. Kyoto: A Tale of Two Protocols*, *Harv. Env't'l L. Rev.* (forthcoming 2007).

<sup>7</sup> See, e.g., Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy For Environmental Claims*, 6 *Yale Human Rights & Dev. L.J.* 1 (2003); Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, in *Linking Human Rights and the Environment* 8-19 (Romina Picolotti and Jorge Daniel Taillant, eds. 2003).

failure to regulate greenhouse gas emissions has resulted in a violation of their human rights.<sup>8</sup> But international tribunals generally have very limited powers. The most promising avenue lies with domestic litigation in the United States. The Alien Tort Statute allows non-Americans to bring claims in American courts based on torts that violate treaties and customary international law, and they 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. If a plausible claim can be made that the emission of greenhouse gases violates human rights, and that these human rights are embodied in treaty or customary international law, then American courts may award damages to victims.<sup>9</sup>

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 of their claims and the normative basis of this type of litigation. For if the legal basis is weak<sup>10</sup> but the normative basis is strong, governments should be encouraged to strengthen the law; and if the legal basis is strong but the normative basis is weak, governments should be encouraged to weaken the law. In this essay, 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, is not normatively attractive. To keep the discussion simple, I will use ATS litigation as my running example.<sup>11</sup>

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<sup>8</sup> 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 (Velme I. Grover ed. 2004) (describing possible OAS claims of people living in the Arctic).

<sup>9</sup> For the 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 (2002).

<sup>10</sup> See Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 *Stan. Env't L.J.* 145 (1999).

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

## I. The International Human Rights Approach

The ATS provides that “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>12</sup> 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.

*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.

*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 that 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 corporations that have acted in complicity with states.<sup>13</sup> 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.

*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

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<sup>12</sup> 28 U.S.C. §1350. 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.

<sup>13</sup> 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 farfetched. Reed, *supra*, argues that greenhouse gas emission amounts to genocide of people living in low-lying islands that will be destroyed by rising seas, but this is also farfetched.

standard tort, plaintiffs should have no trouble persuading courts that greenhouse gas emitters are potentially tortfeasors. Difficult questions about the scope of liability will have to be addressed, however, as I discuss below.

*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 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,<sup>14</sup> but the consensus is that these declarations and agreements do not, by themselves, create an international human right to a healthy or undamaged environment.<sup>15</sup> 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 of discrimination, where governments or other entities have directed pollution against disfavored groups.<sup>16</sup> It remains hotly contested whether such rights to life and health are actually international human rights, and indeed

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<sup>14</sup> For instruments codifying the right, see The African Charter on Human and Peoples’ Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58, at art 24 (providing a “right to a general satisfactory environment favorable to development”); The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador,” Nov. 17., 1988, art. 11, O.A.S. Treaty Series No. 69 (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 (Stockholm Declaration), Pmb. U.N. Doc. A/CONF.48/14 (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, U.N. GAOR, 37th Sess., U.N. Doc. A./RES/37/7 (1982), reprinted in 22 I.L.M. 455 (providing the right for all persons to access “redress when their environment has suffered damage”); Hague Declaration on the Environment, Mar. 11, 1989, 22 I.L.M. 1308 (“remedies to be sought involve ... the right to live in dignity in a viable global environment”); U.N. Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (“human beings ... are entitled to a healthy and productive life in harmony with nature.”). For a discussion of these instruments, see Alexandre Kiss, “The Right to Conservation of the Environment,” in *Linking Human Rights and the Environment*, supra, at 31-46.

<sup>15</sup> 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).

<sup>16</sup> See Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 *Stan. Envtl L.J.* 1, 79 (2004); Atapattu, supra; 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 (2002).

this claim has been rejected so far by American courts, at least for ATS purposes.<sup>17</sup> 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 change policy and enter treaties in order to reduce the risk of liability and the public relations costs of litigation. These and similar reasons seem to back the recent scholarship advocating international human rights litigation on account of global warming.<sup>18</sup> But litigation can also create pressure that generates bad policy. Putting aside possible indirect political effects, and assuming that 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 American courts, in ATS and similar suits, be encouraged to recognize customary international human rights norms, such as norms requiring the protection of

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<sup>17</sup> See, e.g., *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006).

<sup>18</sup> See Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 Wash. Univ. L.Q. 1788, 1855 (2005); 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) [hereafter, *Human Rights Approaches*]. Anderson also surveys the disadvantages. *Id.*, 22-23. For other criticisms of the international human rights approach to environmental protection, see J.G. Merrills, *Environmental Protection and Human Rights: Conceptual Aspects*, in *Human Rights Approaches* 25; Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in *Human Rights Approaches* 43. Other relevant essays can be found in *Human Rights and the Environment* (Lyuba Zarsky ed. 2002); see also Donald M. Goldberg and Martin Wagner, *Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System*, in *Climate Change: Five Years After Kyoto*, ed. (Velma I. Grover, ed. 2004).

life and health in general, that are being violated by corporations or states that contribute to global warming?

#### A. Assumptions

To keep the 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.<sup>19</sup> 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 may have assets in the United States.<sup>20</sup> American corporations are, of course, vulnerable. Thus, if greenhouse gas-related human rights litigation is to succeed, it will need to target corporations—domestic, foreign, multinational—and it will also be necessary that the prospect of litigation and damages will deter corporations from offering their services to foreign states and officials. If none 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 (all that I say 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 of industry

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<sup>19</sup> See Foreign Sovereign Immunity Act, 28 U.S.C. § 1604

<sup>20</sup> See *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *National Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997).

or in other ways effecting a radical transformation of economic activity around the world.<sup>21</sup>

Third, throughout my discussion I will assume that the problems of causation can be overcome, though I have doubts on this score. 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,<sup>22</sup> 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 imagine arguing that (1) \$100 million multiplied by X should be paid (2) by all firms (and indeed individuals) who contribute 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. And science is also unlikely to be able to allocate responsibility among all the possible greenhouse gas emitters around the world—corporations, individuals, governments, others. If these and similar calculations cannot be performed, either courts 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) and

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<sup>21</sup> 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. See Stern Review: The Economics of Climate Change, Executive Summary xiii (2006), available at: [http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/sternreview\\_summary.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_summary.cfm). This estimate is on the high end; Nordhaus' estimate is significantly lower. See Nordhaus & Boyer, *supra*. The difference is mainly attributable to the fact that the Stern Review does not discount future costs and benefits, whereas Nordhaus does. See William D. Nordhaus, *The Stern Review on the Economics of Climate Change* (2006), available at: <http://nordhaus.econ.yale.edu/SternReviewD2.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.

<sup>22</sup> See, e.g., Michael Saks and Peter Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 *Stan. L. Rev.* 815 (1992).

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, while climate-based environmental regulation remains lax in other countries, then the slack in supply will be taken up by new factories constructed in foreign countries with weaker regulation. This was one of the reasons, described above, for 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 on first sight.

#### 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 the potentially large liability that would result from a successful ATS suit, and possibly to avoid the public relations embarrassment of such litigation. 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. Or 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. Another question is 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 tropical diseases if such is the case, reductions in healthiness 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 these questions 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. But 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. Possibly these rights would exclude “existence value” harms like the one discussed above, but possibly not. Possibly these rights could be monetized, so that a cost-benefit comparison could be done, but possibly not. Courts

would thus need to make the tradeoffs between economic activity, which generates wealth, jobs, 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.<sup>23</sup>

The upshot is that even if courts could, and were willing to, handle these complexities, and further that if they did so in a way that permitted 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. 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.<sup>24</sup> 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 for regulation.<sup>25</sup> 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-proofness is a potential problem. So we prefer the EPA to a system of national pollution regulation created by courts pursuant to

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<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 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 and Safety*, 13 *J. of Legal Stud.* 357 (1984); in the context of environmental litigation, see Anderson, *supra*, at 22-23.

common law nuisance law 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 just those who go to the trouble of litigating; they can design programs such as emissions trading that are beyond the powers of courts. And fee-consuming lawyers are cut out of the picture. Nonetheless, human rights litigation is appealing just because Congress and the EPA refuse to act; so the argument that regulation by agency is superior to regulation by court cannot be a decisive objection to litigation. 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.<sup>26</sup> 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 U.S. can be seized by plaintiffs. If an American court directs them 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.

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 emissions 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

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<sup>26</sup> Judges have long expressed skepticism about their own ability to predict and evaluate the foreign relations implications of their own 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*, Yale L.J. (forthcoming 2007).

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 it 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 set up by the courts. Sanctions are traditionally created by Congress and the president, 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 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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> Even on a very simple view of the world that all that really matters is climate policy, American judicial determination of that policy is likely to have bad effects, simply because American courts, unlike governments, have no idea whether liability rules that make sense for American firms will make sense for foreign firms. And, of course, 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

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<sup>27</sup> See Gary Clyde Hufbauer and Barbara Oegg, *Beyond the Nation-State: Privatization of Economic Sanctions*, 10 *Middle East Pol'y* 126, 133-34 (2003).

<sup>28</sup> On the geographically diverse effects of climate change, see Stern Review, Pt. 2, p. 75, available at: [http://www.hm-treasury.gov.uk/media/9A2/97/Chapter\\_3\\_Global\\_Impacts.pdf](http://www.hm-treasury.gov.uk/media/9A2/97/Chapter_3_Global_Impacts.pdf); Nordhaus & Boyer, *supra*, at 159-60.

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

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 avoid paying damages in ATS litigation is to remove attachable assets from the United States. This would be extremely costly, of course; in essence, corporations would have to give up the U.S. market. But at the margin, some corporations will do this so that they can operate greenhouse gas-emitting factories in foreign countries without paying damages to victims in American court. Many corporations would continue to be able to serve the American market by manufacturing goods abroad and exporting them. So the net effect of ATS litigation would be to cause corporations and their assets to migrate to other countries, although some corporations would remain and reduce their emissions at the margin in order to preserve access to the U.S. market.<sup>30</sup> But 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 little or nothing to solve the problem of global warming. It 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. And 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 that offset their ATS liability. This seems a plausible expectation 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.

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<sup>30</sup> 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, they are more likely to work on friends than enemies. See Gary C. Hufbauer et al., *Economic Sanctions Reconsidered: History and Current Policy* (2nd ed. 1990).

This is not just a problem with poor countries. Alien tort statute litigation creates tension between the U.S. and foreign states that object to the application of American-style litigation, with its high awards, on their corporations. South Africa, for example, objected to ATS litigation alleging that foreign corporations were complicit in Apartheid.<sup>31</sup> 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 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 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.<sup>32</sup> 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 global environmental policy that makes sense to the judges but does not reflect the needs and interests of people living all over the world. 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

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<sup>31</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

<sup>32</sup> See Curtis Bradley, *The Costs of International Human Rights Litigation*, 2 *Chi. J. Int'l L.* 457, 460-62 (2001); Hufbauer & Oegg, *supra*.

corporations might find it cheaper to comply with judicial policy than withdrawing from the American market. All this could be true, but it is unlikely to be true.

### 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 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 in low-lying islands and 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 and people who become vulnerable to diseases that migrate north; and people who rely on glaciers for their water.<sup>33</sup> 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 bills.<sup>34</sup>

We could imagine suits being brought on behalf of all these people. Although, in the near term probably the suits will be brought on behalf of the worst-off victims in the poorest countries, suits will be brought on behalf of wealthier victims 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 valuable assets that can be destroyed whereas the impoverished victim does not. This means that plaintiffs' lawyers will migrate toward the middle class and the relatively wealthy. In these ways, both the incentives of lawyers and

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<sup>33</sup> See Stern Review, *supra*.

<sup>34</sup> For a discussions, see Stern Review, *supra*; William D. Nordhaus and Joseph Boyer, *Warming the World: Economic Models of Global Warming* (2003).

the principles of the law imply that the litigation will redistribute wealth from multinational corporations to middle class or relatively wealthy victims. Corporations will pass on the costs to their 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—even the very poor who must commute on buses, for example—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 itself. 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.<sup>35</sup> Victims often end up receiving a small portion of their claim, the rest going to lawyers and administrative expenses.<sup>36</sup>

On the other side, if the tort awards are reasonably accurate, corporations respond by reducing greenhouse gas emissions, and as a result climate change proceeds at a slower pace, 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 poor people who will be alive in the future. The reason is that 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.<sup>37</sup> 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; and poor and wealthier people in the distant future will be made better off, if all goes well, and litigation does not suppress economic growth by more than it helps the

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<sup>35</sup> See *The Asbestos-Fraud Express*, Wall St. J., June 2, 2006, at A18.

<sup>36</sup> W. Kip Viscusi, *Regulation through Litigation* (2002).

<sup>37</sup> Stern Review, *supra*, Part I, pp. 11-12.

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.<sup>38</sup> 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.<sup>39</sup> Defenders of the EPA case, mentioned above, 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.<sup>40</sup> 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 largely ineffectual state legislatures. Whatever the merits of policy-driven litigation in the domestic arena, however, the assumption that it can drive global greenhouse gas policy at all, or in the right direction, is of doubtful plausibility.

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<sup>38</sup> See Thomas C. Schelling, *Intergenerational Discounting*, 23 *Energy Policy* 395 (1995).

<sup>39</sup> This is a trope in environmental litigation; see, e.g., Anderson, *supra*, at 21-22.

<sup>40</sup> Viscusi, *supra*.

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