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# Environmental Claims Under the Alien Tort Statute

Kathleen Jaeger\*

“[P]laintiffs’ imaginative view of this Court’s power must face the reality that United States district courts are courts of limited jurisdiction. While their power within those limits is substantial, it does not include a general writ to right the world’s wrongs.”

Judge Rakoff  
*Aguinda v. Texaco Inc.*<sup>1</sup>

## I. INTRODUCTION

Transnational companies operating in developing countries have in a number of instances caused large scale environmental harm where they operate.<sup>2</sup> A combination of lax environmental laws and weak enforcement meant corporate environmental accountability was non-existent. This situation changed somewhat with the landmark case *Filártiga v. Peña-Irala*.<sup>3</sup> In this case the Alien Tort Statute (ATS) was first utilized – the statute 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.”<sup>4</sup> *Filártiga* opened up U.S. courts to address human rights abuses that

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1. *Aguinda v. Texaco Inc. (Aguinda II)*, 945 F. Supp. 625, 628 (S.D.N.Y. 1996).

2. For a more general background on how multi-national corporations (MNCs), especially extractive industries, can be involved in environmental destruction and human rights abuses, see Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE L. REV. 745, 749-751 (2004).

3. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

4. 28 U.S.C. § 1350. The Alien Tort Statute (ATS), originally enacted by Congress in 1789 and was also referred to as the Alien Torts Claims Act (ATCA) but after the Supreme Court in *Sosa*

occurred abroad and the same seemed possible for cases of environmental harm. Over the last two decades a number of suits have been brought in U.S. courts against large corporations to hold them accountable for environmental harm, yet so far none have been successful. In a concise manner, this Article seeks to comment and give some background on the present state of environmental litigation under the ATS by looking at how environmental claims have been received by the courts and how these claims can be classified doctrinally. While I briefly introduce the salient procedural and substantive law issues characteristic of an ATS case, this Article is not intended as an advocates' guide for litigating environmental claims under the ATS<sup>5</sup> nor is it a manifesto of how a broad range of environmental torts *should* be recognized under the ATS.<sup>6</sup> Part II briefly explains what characterizes an environmental ATS claim and how these claims can be brought either utilizing an international environmental law approach or a human rights based approach. Part III provides an inventory of the existing case law. Part IV assesses the range of environmental ATS claims that have been put forward in litigation or literature to determine which of these are likely to withstand the scrutiny of the courts. I conclude that under the current reading employed by the Supreme Court *Sosa v. Alvarez-Machain*,<sup>7</sup> environmental law norms are not yet part of "the law of nations" and presently environmental harm may only be addressed in an ATS case where human rights abuses and environmental wrongs overlap.

## II.

### BASIC PRINCIPLES OF AN ENVIRONMENTAL CLAIM UNDER THE ALIEN TORT STATUTE

For a plaintiff to address environmental harm under the ATS he has to meet the requirements of the statute, namely bringing the suit as an alien, suing in tort only, and showing that the tort violates the law of nations or a treaty of the United States.<sup>8</sup>

#### A. Environmental Torts

A tort is traditionally defined as a "civil wrong, other than a breach of contract, for which a remedy may be obtained, usually in the form of damages; a

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v. *Alvarez-Machain*, 542 U.S. 692 (2004) used the term "Alien Tort Statute," courts have generally adopted that name.

5. For this purpose an extensive and very instructive "practical assessment" is provided by Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000).

6. An instructive article of this kind includes Abadie, *supra* note 2, at 787 (advocating that transboundary pollution be cognizable under the ATS).

7. *Sosa*, 542 U.S. at 731-32.

8. On the statutory requirements "alien" and "in tort only" see PETER HENNER, *HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY, AND ANALYSIS* 16-19 (2009).

breach of duty that the law imposes on persons who stand in a particular relation to one another.”<sup>9</sup> In an ATS case the duty must be imposed on the defendant by the “law of nations” or “a treaty of the United States.” It is important to note that even though we might speak of an environmental ATS case, legally it is still the plaintiff that was injured by the defendant’s actions, not the environment.<sup>10</sup> The plaintiff does not act as an agent for the environment and his claim does not generally require a certain relationship to the environment.<sup>11</sup>

### B. Different Avenues for Environmental ATS claims

The statutory language of the ATS provides for two separate avenues a plaintiff can pursue as a basis for his claim; a plaintiff can claim a tort either in violation of “the law of nations” or “a treaty of the United States.”

#### 1. Torts in Violation of the Law of Nations

The large majority of ATS cases, including those concerned with environmental harm, were brought under the “law of nations” prong of the ATS. The “law of nations” to some extent resembles customary international law.<sup>12</sup> Just how the two overlap is a matter of constant debate in courts and among scholars, with some arguing that only that subset of customary international norms that are peremptory (*jus cogens*)<sup>13</sup> should form the “law of nations.” In the first “modern” ATS case, *Filártiga v. Peña-Irala*, where a Paraguayan family sued a former Paraguayan police member for having tortured and

9. BLACK’S LAW DICTIONARY (8th ed. 2004).

10. In the present context assigning rights directly to the environment remains “unthinkable.” CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING* 6 (1974).

11. Of course, in most ATS cases involving environmental damage the plaintiff will allege that full enjoyment of his rights depends on an unharmed environment.

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) defines customary international law as resulting from “a general and consistent practice of states followed by them from a sense of legal obligation.” The sense of legal obligation is often referred to as *opinio juris* (short for *opinio juris sive necessitatis*).

13. *Jus cogens* is defined as “a peremptory norm of general international law” which is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332.

In *Doe v. Unocal Corp.*, for example, the court argued that only *jus cogens* norms are actionable. 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005). Similarly, in *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) the court found that *jus cogens* norms are the standard. Scholars advocating this narrow view of the “law of nations” include David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 WASH. & LEE L. REV. 1219, 1223, 1245-1249, 1268-70 (2005); Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193, 265-66 (2005), cited in Bradford Mank, *Can Plaintiffs use Multinational Environmental Treaties as Customary Law to Sue under the Alien Tort Statute?*, 2007 UTAH L. REV. 1085 n.43.

eventually killed a member of their family, the Second Circuit found that torture violated the law of nations and was therefore actionable under the ATS.<sup>14</sup> As to what fell under the law of nations the court instructed that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”<sup>15</sup> The court instructed that the law of nations is to be determined by looking at the “works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”<sup>16</sup> In the wake of *Filártiga* many courts have required that a norm actionable under the ATS be specific or definable, universal and obligatory.<sup>17</sup> In 2004 the Supreme Court in *Sosa v. Alvarez-Machain*, its first decision concerning the modern day scope of ATS, instructed that courts may allow ATS suits based on present day customary international law rules, but required for those rules to be comparable to the international law rules recognized at the time the ATS was enacted in 1794.<sup>18</sup> As to the recognition of new ATS claims, the court advised that “judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”<sup>19</sup>

Thus, the current standard for bringing environmental claims under the ATS is that the allegedly violated norm must be as definite and universally accepted as the norms constituting the “law of nations” when the ATS was enacted more than 200 years ago.

## 2. *Torts in Violation of a Treaty of the United States*

The other, by far less frequently employed avenue the ATS provides for is a tort violating a “treaty of the United States.”<sup>20</sup> While plaintiffs in an ATS case will often refer to international treaties (to which the United States may or may not be a party) to support their claim, this is not the same as actually basing an

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14. *Filártiga*, 630 F.2d at 880.

15. *Id.* at 881.

16. *Id.* at 880.

17. *See, e.g.*, In re Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 370, 383 (E.D. La. 1997); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988). An analysis of this standard from an environmental perspective is provided by Herz, *supra* note 5, at 553-56.

18. *Sosa*, 542 U.S. at 732 “[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”

19. *Id.* at 729.

20. On this basis for an ATS claim *see also* HENNER, *supra* note 8, at 21-22. Henner predicts that *Medellin v. Texas*, 552 U.S. 491 (2008), might preclude ATS claims brought under the Treaty of the United States prong in the future.

ATS claim on a treaty provision.<sup>21</sup> Article VI clause 2 of the U.S. constitution prescribes that treaties are part of the “supreme law of the land,” however, treaties do not generally contain private rights enforceable in courts.<sup>22</sup> A treaty provision may serve as a basis for an ATS claim only if the treaty is self-executing, meaning that the treaty itself creates a private cause of action.<sup>23</sup> If a plaintiff seeks to enforce a non-self-executing treaty he can only do so if Congress has passed legislation which creates a private right of action.<sup>24</sup> Self-executing treaties form the exception.<sup>25</sup>

### C. Approaches to Bringing an Environmental ATS Claim

#### 1. International Environmental Law

Bearing the distinction between ATS claims brought under the “law of nations” and “treaty of the United States” in mind, two further divisions can be drawn when considering the source of law for environmental claims under the ATS. Firstly, a claim may be based on norms of international environmental law, whether part of customary law (and thus falling under the “law of nations” prong) or of an international environmental treaty (consequently falling under the “treaty of the United States” prong of the ATS). A subpart of international law,<sup>26</sup> international environmental law encompasses “the entire corpus of international law, both public and private, relevant to environmental issues or problems.”<sup>27</sup> In ATS cases it is mainly public international environmental law that is invoked as “law of nations.” Apart from international treaties and customary international law, the third group of norms that make up a large portion of international environmental law falls into a grey area between “hard” and “soft law”: these norms can be described as an “ever growing number of

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21. Also stressing this distinction, Mank, *supra* note 13, at 1093.

22. As discussed in *Sosa*, 542 U.S. at 728.

23. See, e.g., *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (“It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights.”). For a broader approach, see Herz, *supra* note 5, at 553 n.44 (arguing in favor of allowing ATS suits based on non-self-executing treaties, saying that otherwise the treaty provision in the ATS is redundant because plaintiffs can already sue to enforce self-executing treaties under 28 U.S.C. § 1331 “arising under” jurisdiction.).

24. See *Jama v. U.S. L.N.S.*, 22 F. Supp. 2d 353, 362 (D.N.J. 1998).

25. In addition, the United States often signs treaties only after having made reservations, understandings, and declarations limiting the domestic effect of the treaty. In some instances Congress expressly declares that a treaty is not self-executing. See *Sosa*, 542 U.S. at 728.

26. Indeed it has been argued that international environmental law is nothing more than the application of international law to environmental problems. See Ian Brownlie, *Editor's Preface* of BRIAN D. SMITH, *STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION* (1988).

27. PATRICIA W. BIRNIE AND ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 2 (2d ed. 2002). A concise history of international environmental law is provided by DAVID HUNTER, JAMES SALZMAN AND DURWOOD ZAEKKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 162 (3d ed. 2007).

amorphous ‘concepts’ and ‘principles,’ whose nature and normative quality are far from clear.”<sup>28</sup> It is partly due to this “relative normativity”<sup>29</sup> and consequent lack of definitiveness of environmental norms that courts have been reluctant to accept environmental ATS claims.

## 2. Human Rights

Human rights forms the other field of international law on which an environmental ATS claim may be based. Ecologically destructive projects often face harsh opposition from the affected community, especially if there is no chance of having the public’s concerns heard throughout the planning process. Quashing such protests government forces, often with some MNCs’ involvement, has led to brutal civil rights violations. But while such human rights violations may well be addressed in an ATS suit<sup>30</sup> they differ from an environmental ATS claim in which the human rights violation was a result of the environmental harm itself. In this sense ATS claims may argue that environmental degradation violated individual human rights such as the right to life as a classic first generation civil and political right,<sup>31</sup> the right to health as a second generation social and economic right,<sup>32</sup> or as an environmental right, the right to a clean environment as a third generation human right that is yet to be widely accepted.<sup>33</sup> Collective human rights that could possibly be brought as group claims in an environmental ATS case include claims of a violation of the

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28. Ulrich Beyerlin, *Different Types of Norms in International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 425-26 (Daniel Bodansky et al., eds. 2007).

29. *Id.*

30. Such an ATS suit arose out of protests against Chevron’s oil exploration activities in the Niger Delta. Nigerian military, allegedly acting under Chevron’s orders, killed and injured several of the protesters who had in large numbers occupied an oil platform. *Bowoto v. Chevron Corp.*, 557 F.Supp.2d 1080 (N.D. Cal. 2008).

31. The right to life has been recognized by the international community in a number of human rights instruments. Examples include International Covenant of Civil and Political Rights, art. 6, Dec. 6, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 222, 224; Universal Declaration of Human Rights, art. 3, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); and American Convention on Human Rights, art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

32. As laid out in International Covenant on Economic, Social, and Cultural Rights, art. 12, Dec. 19, 1966, 993 U.N.T.S. 4, 5 and also contained in Convention on the Rights of the Child, art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

33. A number of international and regional human rights instruments contain references of a right to environment. CRC, art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, Nov. 14, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 58 (1989); African Charter of Human and Peoples Rights, June 27, 1981, art. 24, 1520 U.N.T.S. 217. For a detailed discussion of the right to environment, see Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103 (1991).

right to sustainable development,<sup>34</sup> racial discrimination,<sup>35</sup> and claims of genocide.<sup>36</sup>

#### D. Procedural Hurdles

Claimants in ATS cases, environmental or other, have mainly had to grapple with four procedural hurdles. First, the doctrine of *forum non conveniens* allows courts to dismiss a case involving actions by non-U.S. citizens on the grounds that a foreign court is a more adequate forum to resolve the case as this would serve the convenience of the parties and the interest of justice better. The court will on the one hand weigh the public interest which includes the foreign state's interest, burdens on the court, and conflict of law considerations, and on the other hand the private interest, looking at the access of evidence.<sup>37</sup> A second possible hurdle to an ATS claim is the act of state doctrine which states that a U.S. court is prohibited from adjudicating claims when doing so would require the court to invalidate the official acts of a foreign sovereign which the latter performed on its territory, unless the official acts form a violation of *ius cogens* or of an international treaty.<sup>38</sup> Third, a court may dismiss a case on the basis of the political question doctrine when it finds it inappropriate for the judiciary to accept a case as doing so would interfere with the constitutional or policy prerogatives of the legislative or executive.<sup>39</sup> Fourth,

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34. The World Charter for Nature states: "1. Nature shall be respected and its essential processes shall not be impaired . . . 11. Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used." G.A. Res. 37/7, ¶ 1, U.N. Doc. A/37/51 (Oct. 28, 1982). Similarly, Principle 1 of the Rio Declaration announces: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." Rio Declaration on Environment and Development, principle 1, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1.

35. Racial discrimination is prohibited by a number of human rights treaties. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, S. Exec. Doc. C, 95-2 (1978); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 1, 7, Dec. 18, 1990, G.A. Res. 45/158 annex, U.N. GAOR, 45th Sess., Supp. 49A, U.N. Doc. A/45/49 (1991). For a detailed discussion of framing environmental ATS claims as a violation of racial discrimination, see Sarah M. Morris, *The Intersection of Equal and Environmental Protection: a New Direction for Environmental Alien Tort Claims after Sarei and Sosa*, 41 COLUM. HUM. RTS. L. REV. 275 (2009).

36. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

37. See James Boeving, *Half Full... Or Completely Empty? Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT'L ENVTL. L. REV. 109, 120 n.68 (2005). Abadie points out that corporate defendants have great interest in having their case heard in a foreign forum where they often have close ties with, and likely a certain amount of influence on local government. Abadie, *supra* note 2, at 768.

38. Mank, *supra* note 13, at 1099, clarifying that the doctrine might also be inapplicable in other cases of clear violations of customary international law.

39. *Id.* at 1099 and n.93. The Supreme Court in *Baker v. Carr* laid out a six factor test for applying the doctrine, 369 U.S. 186, 217 (1962). See also Amy Endicott, *The Judicial Answer?*

the international comity doctrine allows courts to use their discretion in deciding whether it is appropriate for an American court to hear a case that involves issues of great concern to a foreign sovereign.<sup>40</sup>

### III.

#### ATS ENVIRONMENTAL JURISPRUDENCE<sup>41</sup>

Starting with *Amlon Metals, Inc. v. FMC Corp.*<sup>42</sup> in 1991 courts have addressed a number of environmental claims under the ATS. None of them has been successful. The most common “fact pattern,” if one can call it that, is that of a multinational company operating in a developing country as the defendant and an alien plaintiff who claims to have suffered harm through environmental damage allegedly caused by the company.<sup>43</sup>

##### A. *Amlon Metals, Inc. v. FMC Corp.*

In *Amlon Metals, Inc. v. FMC Corp.* plaintiffs sued for defendant’s failure to ensure that the copper residue Amlon shipped to England was free from harmful impurities and that the transported material would not be a hazardous waste.<sup>44</sup> Plaintiffs brought suit under the ATS<sup>45</sup> alleging that defendant’s conduct violated the “law of nations,” in particular the Stockholm Principles.<sup>46</sup> Principle 21 of the Stockholm Declaration grants states the “sovereign right to exploit their own resources pursuant to their own environmental policies” and imposes on them the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>47</sup> In order to support their

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*Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 BERKELEY J. INT’L L. 537 (2010).

40. Mank, *supra* note 13, at 1100 and n.95.

41. Not included in this inventory of case law is *Bano v. Union Carbide Corp.*, which came out of the chemical disaster in Bhopal, India in 1984. 273 F.3d 120 (2d Cir. 2001). The court never decided on substantive ATS claims as the case was dismissed on the grounds that the case was “fully litigated and settled in India.” *Id.* at 127. See Natalie L. Bridgeman, *Human Rights Litigation under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 at 23 (lamenting this dismissal as a lost opportunity for a court to examine the relationship between human rights and the environment on a drastic set of facts.)

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

43. See Mank, *supra* note 13, at 1100. Oil companies make up a considerable share of these defendants. For an assessment of holding oil companies liable under the ATS after *Sosa* (but not including any environmental ATS cases), see James Goodwin & Armin Rosencranz, *Holding Oil Companies Liable for Human Rights Violations in a Post-Sosa World*, 42 NEW ENG. L. REV. 701.

44. *Amlon Metals*, 775 F. Supp. at 669-670.

45. Not discussed in this Article are the claims brought under the Resource Recovery and Conservation Act, 44 U.S.C. §§ 6901-6992 (1985). *Id.* at 669.

46. *Id.* at 671.

47. *Amlon Metals*, 775 F. Supp. at 671 (quoting Report of the U.N. Conference on the Human

claim plaintiffs also referred to the Restatement (Third) of Foreign Relations Law section 602(2).<sup>48</sup> The court found that the plaintiffs' reliance on the Stockholm Principles was "misplaced" because the Principles "do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders."<sup>49</sup> As to the Restatement (Third) the court decided that it does not "constitute a statement of universally recognized principles of international law. At most . . . the Restatement iterates the existing U.S. view of the law of nations regarding global environmental protection."<sup>50</sup>

Compared to later environmental ATS cases *Amlon Metals* was unusual in the way that both parties were corporations. The case was a first test for how courts would receive claims based on general principles of international environmental law but it did not provide guidance as to what is sufficient to state such claims.<sup>51</sup> The lack of international consensus that the courts identify when speaking of the (only) general sense of responsibility that Principle 21 conveys has been pointed out as a characteristic weakness of an environmental ATS claim.<sup>52</sup>

#### B. *Beanal v. Freeport-McMoran, Inc.*<sup>53</sup>

Freeport operated mines in Tamika, Irian Jaya (Indonesia) and was accused by plaintiff Beanal, a resident of Tamika, of having committed cultural genocide of his Amungme tribe, environmental torts and human rights abuses.<sup>54</sup> For the purposes of this Article only the environmental torts and cultural genocide, both

Env't, Stockholm, Swed., June 5-16, 1972, *Declaration of Principles* [Stockholm Declaration], principle 21, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416 (1972)).

48. The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 602(2) (1987) discusses the standards of "Remedies for Violation of Environmental Obligations," and states that "[w]here pollution originating in a state has caused significant injury to persons outside that state, or has created a significant risk of such injury, the state of origin is obligated to accord to the person injured or exposed to such risk access to the same judicial or administrative remedies as are available in similar circumstances to persons within the state."

49. *Amlon Metals*, 775 F. Supp at 671.

50. *Id.* Herz criticizes the court for not looking further at the Restatement for an interpretation of Principle 21 as he reads the Restatement to show sufficient definitiveness of the Principle. Herz, *supra* note 5, at 636.

51. See also Bridgeman, *supra* note 41, at 19.

52. Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 156.

53. *Beanal v. Freeport-McMoran, Inc. (Beanal I)*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d. 161 (5th Cir. 1999).

54. *Beanal I*, 969 F. Supp. at 366. The human rights abuses complained of are (1) arbitrary arrests and detention, (2) torture, (3) surveillance, (4) destruction of property, and (5) severe physical pain and suffering. *Beanal I*, 969 F. Supp. at 369.

made under the ATS, are of interest.<sup>55</sup>

As a basis for his environmental torts claims, plaintiff alleged that Freeport's activities caused "destruction, pollution, alteration, and contamination of natural waterways, as well as surface and ground water sources; deforestation; destruction and alteration of physical surroundings."<sup>56</sup> Beanal invoked three international environmental law principles to support his ATS claim:<sup>57</sup> (1) the Polluter Pays Principle,<sup>58</sup> (2) the Precautionary Principle,<sup>59</sup> and (3) the Proximity Principle.<sup>60</sup> Relying heavily on an international environmental law treatise<sup>61</sup> the court rejects all three claims on the grounds that the "principles relied on by Plaintiff, standing alone, do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content."<sup>62</sup> Importantly, the court went on to find that the invoked principles "apply to members of the international community rather than non-state corporations. . . . A non-state corporation could be bound by such principles by treaty, but not as a matter of international customary law."<sup>63</sup> Beanal also complained that the alleged human rights abuses and environmental violations had resulted in "the demise of the culture of the indigenous tribal people," which amounted to a "cultural genocide."<sup>64</sup> Noting that genocide requires the "destruction of a group, not a culture,"<sup>65</sup> the court dismissed Beanal's claim for failure to make his allegation

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55. The torture claim was brought also under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 n.1 (1992). The court found that as a corporation Freeport was not bound by the TVPA. *Beanal I*, 969 F. Supp. at 382.

56. *Beanal I*, 969 F. Supp. at 369.

57. *Id.* at 383.

58. This principle states that the costs of pollution are to be borne by the polluter. See PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION 213-17 (1995).

59. "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Rio Declaration, principle 15, *supra* note 34.

60. The proximity principle suggests that hazardous waste should be disposed of in the state of its creation, to the extent that such disposal is reasonable. SANDS, *supra* note 58, at 517.

61. Namely SANDS, *supra* note 58.

62. *Beanal I*, 969 F. Supp. 363 at 384. Without further comment the courts cite Sands when he compares three said principles with two other principles (principle 21 of the Stockholm Declaration and the good neighbourliness/international co-operation principle) which Sands finds to be "sufficiently substantive at this time to be capable of establishing the basis of an international cause of action; that is to say, to give rise to an international customary legal obligation the violation of which would give rise to a legal remedy." *Id.*; SANDS, *supra* note 58, at 184.

63. *Id.* Citing *Xuncax*, 886 F.Supp. at 186. To support this finding the court notes that the Restatement (Third) in the section on international environmental law (§§ 601-602) also mentions only state obligations and liability. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601-602.

64. *Beanal I* at 372. The court starts off noting that plaintiff's complaint was "less than crystal clear." *Id.*

65. *Id.* at 373.

sufficiently specific.<sup>66</sup>

The judgment was affirmed by the Fifth Circuit Court of Appeals<sup>67</sup> which noted that the principles of international environmental law invoked by Beanal “merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts.”<sup>68</sup> Beanal’s reference to the Rio Declaration was found inappropriate in the sense that the Declaration seeks to prevent transboundary environmental harm; Beanal never made any claims of this nature.<sup>69</sup> As a matter of policy the court advised that “federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments.”<sup>70</sup> Though urged by plaintiff and various *amici* briefs<sup>71</sup> to recognize cultural genocide as a discrete violation of international law the court declined to merge the “amorphous right to ‘enjoy culture’, or a right to ‘freely pursue culture,’ or a right to cultural development” with the concept of genocide, as it deemed it “imprudent for a United States tribunal to declare an amorphous cause of action under international law that has failed to garner universal acceptance.”<sup>72</sup>

The *Beanal* decisions emphasize courts’ wariness of equating broad concepts of environmental responsibility with obligations under international customary law that could form a cognizable tort under the ATS.<sup>73</sup> Similarly, the courts stress that for ATS purposes individuals and not (merely) states must be the addressees of the allegedly violated obligations. The court of appeals reasoned that federal courts should exercise “extreme caution” when deciding environmental ATS cases as to not interfere with environmental policies of other governments, a valid concern that is frequently echoed in later decisions.

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66. *Id.* (“If Beanal in fact means that Freeport is destroying the Amungme culture, then he has failed to state a claim for genocide. On the other hand, if Beanal intended to state that Freeport is committing acts with the intent to destroy the Amungme group, i.e. its members, then he has failed to make this allegation sufficiently explicit.”)

67. *Beanal II*, 197 F.3d 161 (5th Cir. 1999).

68. *Id.* at 167.

69. *Id.*

70. *Id.* The court added that “the argument to abstain from interfering in a sovereign’s environmental practices carries persuasive force especially when the alleged environmental torts and abuses occur within the sovereign’s borders and do not affect neighboring countries.” *Id.*

71. *Amici Curiae* included the Sierra Club, Earthrights International, Center for Constitutional Rights, Center for Justice and Accountability, and the Four Directions Council. *Id.* at 164 n.1.

72. *Id.* Especially, as the court acknowledges in a footnote, when the drafters of the Genocide Convention rejected proposals to include cultural genocide. *Id.* n.8.

73. See Jean Wu, *Pursuing International Environmental Tort Claims under the ATCA: Beanal v. Freeport-McMoran*, 28 *ECOLOGY L. Q.* 487 at 498 (2001).

C. *Jota v. Texaco, Inc. and Aguinda v. Texaco, Inc.*

*Aguinda v. Texaco Inc.* arose out of Texaco's oil exploration activities in Ecuador and Peru which allegedly included large-scale disposal of inadequately treated hazardous wastes and destruction of tropical rain forest habitats causing harm to indigenous peoples living in the rain forest and their properties.<sup>74</sup> The District Court in a preliminary decision seemed rather responsive to claims based on Principle 2 of the Rio Declaration.<sup>75</sup> Judge Broderick contemplated that the "Rio Declaration may be declaratory of what it treated as pre-existing principles just as was the Declaration of Independence."<sup>76</sup> Pointing to domestic and international commitments the United States has made to control hazardous wastes the court further suggested that plaintiffs could possibly have a valid claim under the ATS so long as there "were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law."<sup>77</sup> The case was delayed and Judge Broderick died before he could decide on the merits. His successor Judge Rakoff dismissed the case.<sup>78</sup>

*Aguinda* was consolidated with another case and its dismissal reversed and remanded by the Second Circuit in *Jota v. Texaco, Inc.*<sup>79</sup> After Texaco had agreed to accept Ecuador's jurisdiction the district court in *Aguinda III* dismissed the case applying the *forum non conveniens* doctrine, as the cases had "everything to do with Ecuador and nothing to do with the United States."<sup>80</sup> As to the specific claims plaintiffs sought to bring under the ATS "that the Consortium's oil extraction activities violated evolving environmental norms of customary international law," the court found them to "lack any meaningful precedential support" and appeared "extremely unlikely to survive a motion to dismiss."<sup>81</sup> The Second Circuit later affirmed the dismissal on grounds of *forum*

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74. *Aguinda v. Texaco, Inc. (Aguinda I)*, 1994 WL 142006 (S.D.N.Y.) (Apr. 11, 1994) at 1. The plaintiffs sought certification of a class of about 30,000 Ecuadorans.

75. Principle 2 reiterates Principle 21 of the Stockholm Declaration: The sovereign right to exploit own resources and responsibility to ensure that no damage is caused in other states or outside national jurisdiction. Rio Declaration, *supra* note 34.

76. *Aguinda I*, 1994 WL 142006 at 7.

77. *Id.* at 24.

78. *Aguinda v. Texaco Inc. (Aguinda II)*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated by Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), *aff'd*, *Aguinda v. Texaco, Inc.* 303 F.3d 470 (2d Cir. 2002). The three (separate) grounds for dismissal were: (1) *forum non conveniens*, (2) international comity, (3) plaintiffs' failure to join two indispensable parties – the Republic of Ecuador and its state-owned oil company, Petroecuador, which were exempt from suit under the Foreign Sovereign Immunities Act.

79. The dismissal was reversed and remanded because in *Aguinda II* the District Court had granted the dismissal without an agreement by Texaco to accept Ecuador's jurisdiction. *Jota v. Texaco Inc.*, 157 F.3d 153, 155, 159 (2d Cir. 1998) (consolidating actions *Aguinda v. Texaco Inc.*, No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. (S.D.N.Y. Aug. 13, 1997)).

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

81. *Aguinda III*, 303 F. 3D at 552.

*non conveniens*.<sup>82</sup>

With their strong factual background the *Jota* and *Aguinda* cases had the potential to reach a decision on the merits and produce instructive precedent on environmental ATS claims relying on environmental law. As it is the decisions testify to the importance of the *forum non conveniens* doctrine in ATS cases and again imply that environmental policy is seen by the courts as a sovereign matter.<sup>83</sup>

#### D. *Flores v. Southern Peru Copper, Corp.*<sup>84</sup>

In *Flores* Peruvian residents sued defendants for pollution caused by defendant's copper mining, refining, and smelting operations which allegedly caused fatal lung disease to them. Plaintiffs based their claim on a violation of their "right to life, health, and sustainable development."<sup>85</sup> The District Court found that plaintiffs failed to demonstrate that "high levels of environmental pollution within a nation's borders, causing harm to human life, health, and development" violated "well-established, universally recognized norms of international law."<sup>86</sup>

The decision was affirmed by the Second Circuit on appeal.<sup>87</sup> The rights to life and health<sup>88</sup> were found far from meeting the "clear and unambiguous" *Filártiga* standard. As to the statements relied on by plaintiffs the court deems them as "vague and amorphous" and the principles expressed in these statements as "boundless and indeterminate."<sup>89</sup> The court then considered (and eventually rejected) plaintiffs' claims under a more narrowly-defined customary international law rule against intra national pollution which involved a careful look at the different types of evidence plaintiffs had submitted.<sup>90</sup>

82. *Id.* at 470 – 480.

83. Judge Rakoff in *Aguinda II*, for instance, approvingly quoted the Fifth Circuit in *Beanal III*: "Federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments." *Id.* at 552-553 (quoting F.3d 161, 167 (5th Cir. 1999)).

84. *Flores v. S. Peru Copper, Corp. (Flores I)*, 253 F.Supp. 2d 510, 514 (S.D.N.Y. 2002), *aff'd*, *Flores v. S. Peru Copper, Corp. (Flores II)* 414 F. 3d 233 (2d Cir. 2003).

85. *Flores I*, 253 F. Supp. 2d at 519, 520.

86. *Id.* at 525. Citing *Filártiga*, 630 F.2d at 888. Consequently, the court granted defendants' motion to dismiss for lack of federal subject matter jurisdiction and failure to state an ATS claim. Finding Peru an adequate forum the court also dismissed the case on *forum non conveniens* grounds. *Flores I*, 253 F. Supp. 2d at 531-41.

87. *Flores II*, 414 F.3d at 266.

88. On appeal, plaintiffs only pursued their claims based on a violation of their rights to life and health; they no longer based their argument on a right to sustainable development. *Id.* at 238, n.3.

89. *Flores II*, 414 F.3d at 255.

90. *Id.* Plaintiffs had submitted (1) treaties, conventions, covenants; (2) non-binding declarations of the United Nations General Assembly; (3) other non-binding multinational

Plaintiffs in *Flores* for the most part concentrated on a human rights based approach to bring their environmental ATS claims. Rejecting the notion that a human rights approach distinguished the case from *Aguinda*, *Amlon* and *Beanal* the District Court stressed that “labels plaintiffs affix to their claims cannot be determinative.”<sup>91</sup> Although plaintiffs did not bring their claims under the “treaty of the United States” prong of the ATS, the courts still found the fact that the United States had only ratified one of the treaties plaintiffs relied on as evidence of “law of nations” rendered this evidence unpersuasive. The *Flores* decisions illustrate that environmental ATS claims brought under a human rights approach are, unsurprisingly, still have to contain norms well-established as “law of nations.”<sup>92</sup> UN General Assembly resolutions, which are not binding, non-UN declarations, and decisions of international tribunals were rejected as evidence of a “law of nations” prohibition of intra-national pollution because they were not found to be authoritative sources of international law.<sup>93</sup>

#### E. *Sarei v. Rio Tinto PLC*

The *Sarei* case is so far the only post-*Sosa* decision to address environmental ATS claims. In fact the district court’s decided *Sarei I*<sup>94</sup> before the *Sosa* decision was issued, but the Ninth Circuit had the case reargued so it could consider the Supreme Court’s decision.<sup>95</sup>

In *Sarei I* residents of Papua New Guinea brought suit against an international mining group for dumping tailings from the mine into the local river system which destroyed the island’s environment and harmed the health of its people.<sup>96</sup> The district court rejected plaintiffs’ claims based on violations of their right to life and right to health<sup>97</sup> as it viewed these rights not sufficiently

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declarations of principle; (4) decisions of multinational tribunals, and (5) affidavits of international law scholars.

91. *Flores I*, 253 F. Supp. 2d 510, 519.

92. See Bridgeman, *supra* note 41, at 24.

93. See Boeving, *supra* note 37, at 127.

94. *Sarei v. Rio Tinto PLC and Rio Tinto Ltd (Sarei I)*, 221 F.Supp. 2d 1116 (C.D. Cal. 2002), *aff’d in part, vacated in part*, 456 F. 3d 1069 (9th Cir. 2006), *aff’d in part, vacated in part, reversed in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc rehearing granted*, 499 F.3d 923 (9th Cir. 2007), *heard on exhaustion of remedies (Sarei IV)* 650 F.Supp. 2d 1004 (C.D. Cal. 2009).

95. *Sarei v. Rio Tinto, PLC; Rio Tinto Ltd (Sarei II)*, 456 F.3d. 1069.

96. *Sarei I*, 221 F.3d. at 1120. Irrelevant for the purpose of this Article are plaintiffs’ claims accusing the defendants of war crimes, crimes against humanity, and racial discrimination committed during a long-lasting internal conflict in Papua New Guinea.

97. Similarly to *Flores* plaintiffs in *Sarei* referred to the following international documents as evidence of an established “right to life” and “right to health”: International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter of Human and Peoples’ Rights, and the Charter of Fundamental Rights of the European Union. *Sarei I*, 221 F. Supp. 2d 1116, 1156.

specific to support an ATS claim. Additionally, the court was not convinced that there was universal consensus among nations that these rights can be violated by perpetrating environmental harm.<sup>98</sup> Plaintiffs also asserted that the environmental harm stated an ATS claims under the principle of sustainable development and the United Nations Convention on the Law of the Sea (UNCLOS).<sup>99</sup> As to the principle of sustainable development the court found that it did not constitute a “specific, universal, and obligatory” norm that could form a rule part of the law of nations.<sup>100</sup> Plaintiffs had claimed that marine pollution caused by the defendant violated two provisions of UNCLOS regarding pollution.<sup>101</sup> While noting that the US was not a party to UNCLOS the court recognized its provisions as customary international law and “and thus [it] appears to represent the law of nations.”<sup>102</sup> The court then concluded that plaintiffs had a cognizable ATS claim.<sup>103</sup> As the activities of the defendant were closely connected to acts of a foreign sovereign (in fact, defendant’s mining activities were regulated by an agreement with the Papua New Guinean government<sup>104</sup>) the court eventually used its discretion to dismiss the entire case based on the act of state doctrine.<sup>105</sup>

The district court’s decision that UNCLOS could be the basis for an ATS claim was upheld by a divided three-judge panel on appeal.<sup>106</sup> The court expressly stated that “*Sosa*’s gloss on [the specific, universal and obligatory norms] standard does not undermine the district court’s reasoning” but also distinguished the UNCLOS claim from the other remaining claims (namely war

98. *Id.* at 1158.

99. *Id.* at 1160. United Nations Convention on the Law of the Sea, *opened for signature* December 10, 1982, 1833 U.N.T.S. 3, *reprinted* at 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

100. *Sarei I*, 221 F. Supp. 2d at 1156.

101. The court considered the following two provisions (citing plaintiff’s memorandum of points and authorities in Opp. to Motion to Dismiss at 32-33):

(1) one requiring that “states take ‘all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment’ that involves ‘hazards to human health, living resources and marine life through the introduction of substances into the marine environment;’ and

(2) another mandating that states “adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources.”

*Id.* at 1161. *Mank*, *supra* note 13, identifies the first rule as referring to UNCLOS article 194 and article 1 ¶ 4, and the second as referring to UNCLOS article 207.

102. *Sarei I*, 221 F. Supp. 2d at 1161. Amongst other sources the court points to *United States v. State of Alaska*, 503 U.S. 569, 588 n.10 (1992) (“The United States has not ratified [the United Nations Convention on the Law of the Sea], but has recognized that its baseline provisions reflect customary international law.”).

103. *Sarei I*, 221 F. Supp. 2d at 1161.

104. *Id.* at 1184.

105. *Id.* at 1193. Before the court had declined to dismiss on the basis of the *forum non conveniens* doctrine as it deemed “the private interests [that] favor retaining jurisdiction and the public interests [were] neutral.” *Id.* at 1175.

106. *Sarei II*, 456 F.3d at 1078.

crimes, violations of the laws of war, racial discrimination<sup>107</sup>) in that only the other claims “assert *jus cogens* violations that form the least controversial core of modern day ATCA jurisdiction.”<sup>108</sup> Following a petition for rehearing and for rehearing en banc the three judge panel withdrew its earlier opinion and issued a new opinion (and dissent) overriding the earlier decision.<sup>109</sup> In its final opinion the court did not ultimately decide whether the UNCLOS claims fell under the “law of nations” as its adjudication was blocked because of the act of state doctrine.<sup>110</sup>

The district court’s deliberation on UNCLOS provisions as a basis for an ATS claim—despite it being dismissed later—is viewed by commentators as being highly instructive for future plaintiffs.<sup>111</sup> *Sarei* is different from other environmental ATS cases in the way that plaintiffs’ loss was more procedural and political in nature and less substantive.<sup>112</sup> As plaintiffs also brought claims for racial discrimination *Sarei* could be instructive for future ATS plaintiffs seeking to bring claims on grounds of environmental injustice.<sup>113</sup>

#### IV.

#### WHERE DO ENVIRONMENTAL CLAIMS STAND IN 2010

*Sosa v. Alvarez-Machain* did not provide a clear and easily utilized standard as to what claims will be recognized under the ATS and specifically how environmental claims should be treated by courts.

##### A. Environmental Claims

Applying the *Sosa* standard to international environmental law norms it seems clear that they do not yet pass the test of universal recognition comparable to 18<sup>th</sup> century norms; for now they cannot support an environmental ATS claim under the “law of nations” prong.<sup>114</sup> Principles contained in declarations such as the Stockholm and Rio Declaration are not legally binding and their status and content as customary international law is in dispute. Among the soft law of declarations it is Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration that are most frequently

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107. *Id.* at 1172.

108. *Id.*

109. *Sarei III*, 487 F.3d at 1196-1197, *en banc hearing granted*, 499 F. 3d 923 (9th Cir. 2007).

110. *Id.* at 1210. A different outcome would only have been possible if the invoked UNCLOS norms were part of *jus cogens*.

111. A detailed discussion of how plaintiffs could utilize this decision is provided by Mank, *supra* note 13, 1135-36.

112. *See* Bridgeman, *supra* note 41, at 2 (evaluating plaintiffs’ claims in *Sarei* as “viable”).

113. *See* Morris, *supra* note 35.

114. *See also* Mank, *supra* note 13, 1145; Boeving, *supra* note 37; Wu, *supra* note 71, at 494-95; Bridgeman, *supra* note 41, at 2.

granted the status of customary law. Laying out a state's right to exploit its own resources pursuant to its own environmental policies they only speak of states as duty bearers and not private actors, at the outset they do not cover corporate conduct. The same can be said for the proximity principle and the precautionary principle but—despite what the court found in *Beanal*—not so easily for the polluter pays principle which allocates the responsibility for bearing the cost of pollution to the “person responsible for causing the pollution.”<sup>115</sup> It is noteworthy that international environmental law in general is much aware of the fact that damage to the environment is almost always caused by private actors.<sup>116</sup> Yet in past cases plaintiffs in an environmental case did not face less difficulty in showing that it is indeed the defendant as a non-state actor that is bound by the alleged norms.

A range of treaties are being suggested as a basis for claims under the “Treaty of the United States” prong of the ATS, often in the expressed hope that for environmental claims treaties might prove to be more easily accepted by courts.<sup>117</sup> Such treaties need to create binding obligations, clearly encompass conduct of private actors, and have been ratified by the United States (or else be self-executing<sup>118</sup>),<sup>119</sup> They include the International Convention for the Prevention of Pollution from Ships (MAPROPOL) which limits the discharge of certain pollutants from ships.<sup>120</sup>

### B. Human Rights Claims

So far no human rights claims have been successfully litigated in an environmental ATS case. But with human rights norms being recognized as

115. See SANDS, *supra* note 58, at 279.

116. See Daniel Bodansky, Jutta Brunnée, & Ellen Hey, *International Environmental Law: Mapping the Field*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 6, *supra* note 28.

117. See, e.g., Lauren A. Mowery, *Earth Rights, Human Rights: Can International Environmental Human Rights Affect Corporate Accountability?*, 13 FORDHAM ENVTL. L.J. 343, 372 (2002).

118. See *supra* Part II.B. and Boeving, *supra* note 37, at 136-37.

119. Other treaties are clearly unfit to serve as a basis for an ATS claim. These include treaties that are merely aspirational in nature, such as the Convention on Wetlands of International Importance Especially as Waterfront Habitat, Feb. 2, 1971, *as amended* in 1982 and 1987), 996 U.N.T.S. 245, [Ramsar Convention], and the International Tropical Timber Agreement, done Jan. 27, 2006, available at [http://untreaty.un.org/English/Opening\\_Signature/english\\_19\\_46.pdf](http://untreaty.un.org/English/Opening_Signature/english_19_46.pdf). Other treaties not likely to give rise to an ATS claim are those whose subject matter is not expected to apply to an ATS case, because they are concerned with Antarctica, space and nuclear weapons. See Stephen L. Kass & Jean M. McCarroll, *After 'Sosa': Claims Under The Alien Tort Claims Act - Part I*, N.Y.L.J. Aug. 27, at 3.

120. See International Convention for the Prevention of Pollution from Ships, art. 1(b), done Nov. 2, 1973, 94 Stat. 2302, 1340 U.N.T.S.184, reprinted in 12 I.L.M. 1319, amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, concluded February 17, 1978, 1340 U.N.T.S.61, reprinted in 17 I.L.M. 546. See also Boeving, *supra* note 37, at 137.

viable bases for ATS claims this approach to bringing environmental ATS claims has the most potential for success. Among human rights claims it is the civil and political rights such as the right to life that are most likely to pass the *Sosa* standard of universal recognition among nations. As seen in past environmental ATS cases, especially *Beanal* and *Flores*, courts are not yet inclined to recognize human rights claims based on second and third generation human rights.

## V.

### CONCLUSION

The quite limited number of environmental cases that have been decided by courts under the ATS does not yet form a clear picture. However, until environmental norms have gained the status required to become part of the “law of nations” it is both the usage of environmental treaties and human rights claims (in a situation where human rights abuses and environmental harm overlap) that might allow courts to address environmental harm in an ATS case.