

A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy

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Abstract

Despite their clear and significant vulnerability to climate change, small island developing states have not had the opportunity to pursue in earnest a remedy for the impacts of that change. All small island developing states face significant challenges to their economic well-being and the availability of basic resources—including food and water. Some face the loss of habitability of their entire territory. Identifying and implementing adequate repair will be difficult enough. After at least two decades of knowledge of these impacts, however, small island developing states still face the equally difficult task of just getting their claims heard. This is not for want of trying. Indeed, there has been extensive research and scholarship as well as abbreviated attempts in international fora to hold large emitters accountable. These have not been effective. Further, the latest attempt to clarify the legal responsibility of the largest emitters has been met with threats of reprisal by those large emitters. This kind of intimidation, coupled with a weak international legal regime at base, delays justice for small island developing states.

In this article, Professor Burkett explores the failure of the legal regime to provide adequate process and substantive remedy for small island developing states—either through the absence of viable legal theories, capacity constraints, or uneven power dynamics in the international arena—or all three. She argues, however, that the costs of pursuing these claims—and other novel approaches she outlines in the article—are dwarfed by the costs to small island communities of unabated climate impacts. In surveying the possible claims and introducing new approaches, Professor Burkett attempts to respond to a striking and persistent (if unsurprising) justice paradox: the current international legal regime forecloses any reasonable attempts at a remedy for victims of climate change who are the most vulnerable and the least responsible.

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I. INTRODUCTION

Despite their clear and significant vulnerability to climate change, small island developing states (SIDS) have not had the opportunity to pursue in earnest a remedy for the impacts of that change. This presents a justice paradox, in which the current international legal regime forecloses any reasonable attempts at a just remedy for the victims of climate change who are the most vulnerable and the least responsible. Worse still, attempts to seek justice in such clear instances of need may yield negative political outcomes against the claimants themselves, namely the loss of aid for other critical functions from wealthy large emitters. Nonetheless, it is still necessary for SIDS to pursue vigorously both aggressive emissions abatement as well assistance with managing climate impacts. This is true if only for the likely result that climate change losses and any bold action to mitigate or adapt to them will likely dwarf the costs of retaliation from the wealthy that island states might face. Indeed, a survey of the basket of remedies available to small island claimants in addition to novel approaches this article recommends reveals possible pathways for concerted and effective action.

All SIDS face dangerous impacts to their economic well-being and the availability of basic resources—including food and water. Some face the loss of all habitable territory. After at least two decades of knowledge of these impacts, however, SIDS are unable to get their claims heard in major legal fora—never mind the more formidable tasks of identifying and

implementing adequate abatement and reparative measures. This is not for want of trying. Indeed, there has been extensive research and scholarship on viable claims as well as abbreviated attempts in international arenas to hold large greenhouse gas emitters accountable.¹ This author's early research attempted to do the same by identifying meaningful avenues of remedy through reconciliation and reparation.² These efforts have not been wholly effective to date. Yet, scholar-advocates, like Professor Jon M. Van Dyke, insist that actions against the largest emitters are necessary in response to the injustice of delayed or tepid climate mitigation and adaptation for SIDS.³ Professor Van Dyke's passionate call to action inspired this author to revisit the possibilities for SIDS to pursue their claims through litigation and the courts.

Today, there are renewed efforts to invite the International Court of Justice ("ICJ") to advise on the legal responsibility of the largest emitters vis-à-vis climate change.⁴ This effort by Palau, a particularly vulnerable Pacific island state, however, has been met with threats of reprisal by the largest historical emitter, the United States.⁵ This kind of intimidation, coupled with a weak international legal regime at base, delays justice for SIDS. It lays bare the fact that in the face of one of the most poignant instances of grave injustice—the loss of one's land, livelihood, culture, and ancestors as a result of another's unabated emissions—our legal systems at the international, national, and subnational level, are unable to effect a swift, definitive, and just resolution. The absence of a clear legal pathway coupled with fears that some countries might retaliate effectively stifle legal action.

This article discusses the failure of the legal regime to provide adequate process and substantive remedy for SIDS—either through the lack of viable legal theories or through uneven power dynamics in the international arena. Despite skepticism about its efficacy in light of present-day exigencies, the costs of pursuing these claims—and other novel approaches the article

¹ See discussion *infra* Part II.

² See generally Maxine Burkett, *Climate Reparations*, 10 MELBOURNE J. INT'L L. 509 (2009).

³ See Jon M. Van Dyke, *Regionalism, Fisheries, and Environmental Challenges in the Pacific*, 6 SAN DIEGO INT'L L. J. 143 (2004).

⁴ Lawrence Hurley, *Island Nation Girds for Legal Battle Against Industrial Emissions*, THE NEW YORK TIMES (Sept. 28, 2011), www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html.

⁵ Duncan Clark, *Which Nations are Most Responsible for Climate Change?*, THE GUARDIAN (Apr. 21, 2011), <http://www.guardian.co.uk/environment/2011/apr/21/countries-responsible-climate-change>. See also Rachel Brown, *The Rising Tide of Climate Change Cases*, THE YALE GLOBALIST (Mar. 4, 2013, 11:30 p.m.), tyglobalist.org/in-the-magazine/theme/the-rising-tide-of-climate-change-cases/.

introduces—are dwarfed by the costs to small island communities of unabated climate impacts. In surveying the possible claims and introducing new approaches, the article attempts to respond to a striking and persistent (if unsurprising) justice paradox.

The article proceeds as follows. Part I briefly describes the current science of climate change, including forecasted impacts as well as recommendations for emissions abatement. In addition, it looks at the severe current and forecasted climate impacts to SIDS. Part II describes the geopolitical backdrop of claims against large emitters, which explains in part the uphill battle SIDS face. Part III follows with a survey of the most commonly cited claims that SIDS might pursue against the largest emitters. Part IV introduces the possibility of identifying and pursuing claims using unconventional plaintiffs and defendants, and even borrows from proposals in the international economic law realm to consider the possible efficacy of “class action litigation” to empower individual SIDS. Part IV further notes the political milieu in which SIDS might bring these claims and considers how the value of publicity and notions of interest converge may advance claims beyond their prospects in the courtroom alone. In conclusion, the article situates this paradox in the context of a larger conception of “the justice paradox” in law as articulated by Dean Robert E. Scott.⁶ Dean Scott argues that the law vacillates between meeting the needs of present justice, on one hand, and future justice, on the other. This is a perennial sway that we might embrace, according to Scott. I argue that if that vacillation consistently excludes the most vulnerable, the law in its current form is dangerously inadequate.

II. THE IMPACTS OF CLIMATE CHANGE ON SMALL ISLAND DEVELOPING STATES

“Some scientific conclusions or theories have been so thoroughly examined and tested, and supported by so many independent observations and results, that their likelihood of subsequently being found to be wrong is vanishingly small. Such conclusions and theories are then regarded as settled facts.”

- U.S. National Academy of Science and Engineering, May 29, 2010⁷

⁶ See generally Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329 (1993).

⁷ U.S. NATIONAL ACADEMY OF SCIENCES, ADVANCING THE SCIENCE OF CLIMATE CHANGE 21-22 (2010).

A. Climate Impacts Generally

It has been decades since the international community has been aware of the grave risks of climate change and the imperative of brisk and aggressive attempts to mitigate those risks, with no measurable action. During this time venerable institutions, such as the National Academy of Sciences, have declared repeatedly that human-caused climate change is a settled fact.⁸ Noted climate scientist Dr. James Hansen has stated that the current atmospheric concentration of carbon dioxide, approaching 400 parts per million, “is already in the ‘dangerous zone.’”⁹ This concentration, Hansen states, is too high to maintain “the climate to which humanity, wildlife, and the rest of the biosphere are adapted.”¹⁰ Additionally, there is significant warming in the pipeline.¹¹ In other words, global temperature might rise by two to three degrees Celsius even without additional greenhouse gas emissions. According to Hansen, “[h]umanity’s task of moderating human-caused global climate change is urgent.”¹²

The impacts are not solely prospective and, for all intents and purposes, are irreversible.¹³ The current, and often jarring, signs of climate disruption are legion.¹⁴ Further, they outpace the modeling of climate phenomenon,¹⁵

⁸ See *id.* (“The Earth system is warming and that much of this warming is very likely due to human activities.”).

⁹ James Hansen et al., *Target Atmospheric CO₂: Where Should Humanity Aim?*, 2 OPEN ATMOS. SCI. J. 217, 218 (2008).

¹⁰ *Id.* at 228.

¹¹ *Id.* at 226.

¹² *Id.* at 228.

¹³ See generally Susan Solomon et al., *Irreversible Climate Change Due to Carbon Dioxide Emissions*, 106 PROCEEDINGS OF THE NAT’L ACAD. OF SCIENCES, no. 6, 1704 (Feb. 10, 2009), available at <http://www.pnas.org/content/106/6/1704.full.pdf+html> (stating that climate change that takes place due to increases in carbon dioxide concentrations is largely irreversible for 1,000 years after emissions stop). “Irreversible” is defined as a time scale exceeding the end of the millennium in the year 3000. *Id.* at 1704. The study did not consider the possibility of geo-engineering measures. *Id.*

¹⁴ *Id.* at 1709 (“Irreversible climate changes due to carbon dioxide emissions have already taken place, and future carbon dioxide emissions would imply further irreversible effects on the planet, with attendant long legacies for choices made by contemporary society.”). See Andrew Freedman, *U.S. Dominated Global Disaster Losses in 2012: Swiss Re*, CLIMATE CENTRAL (Apr. 1, 2013), <http://www.climatecentral.org/news/us-dominated-global-disaster-losses-in-2012-insurer-reports-15814>; see also Andrew Steer, *Listening to Hurricane Sandy: Climate Change is Here*, BLOOMBERG (Nov. 2, 2012, 6:52 a.m.), <http://www.bloomberg.com/news/2012-11-02/listening-to-hurricane-sandy-climate-change-is-here.html>; and Brad Plumer, *Yes, Hurricane Sandy is a Good Reason to Worry about Climate Change*, THE WASHINGTON POST (Oct. 29, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/10/29/yes-hurricane-sandy-is-a-good-reason-to-worry-about-climate-change/>.

producing more significant impacts than predicted. Impacts include changes in rainfall, with adverse effects on water supplies for humans, agriculture and ecosystems; increased fire frequency; desertification; and, irrevocable sea-level rise.¹⁶ The latter might be so severe that sea walls and other measures to adapt will prove inadequate.¹⁷ In short, as atmospheric scientist and key contributor to the Intergovernmental Panel on Climate Change Susan Solomon explains, carbon dioxide emissions might peak to levels that would lead to eventual sea-level rise in the order of meters, "implying unavoidable inundation of many small islands and low-lying coastal areas."¹⁸

The need to rapidly draw down emissions of carbon dioxide and other greenhouse gases to below current atmospheric concentrations cannot wait until a future date if humanity is to avoid catastrophic changes.¹⁹ Indeed, the period for carbon emissions to peak and then fall dramatically to avoid these changes is rapidly closing, with less than ten years remaining to halt emissions growth to have a palpable effect on worsening climate change.²⁰ For Hansen, prompt policy changes are imperative,²¹ and the failure to act suggests to him that "decision-makers do not appreciate the gravity of the situation."²²

The United Nations Framework Convention on Climate Change ("UNFCCC" or "Framework Convention"), to which the global community committed some twenty years ago, specifically speaks to "threats of serious

¹⁵ Hansen, *supra* note 9, at 226.

¹⁶ See Solomon, *supra* note 13, at 1708.

¹⁷ *Id.* (explaining that the conservative lower limit of sea-level rise, defined by thermal expanses alone, can be expected to be associated with substantial irreversible commitments to future changes in the geography of the Earth due to many coastal and island features ultimately becoming submerged).

¹⁸ *Id.* at 1704.

¹⁹ See, e.g., Hansen, *supra* note 9, at 217 ("If the present overshoot of [350 parts per million of carbon dioxide] is not brief, there is a possibility of seeding irreversible catastrophic effects."); Solomon, *supra* note 13, at 1708-09 ("It is sometimes imagined that slow processes such as climate changes pose small risks, on the basis of the assumption that a choice can always be made to quickly reduce emissions and thereby reverse any harm within a few years or decades. We have shown that this assumption is incorrect for carbon dioxide emissions, because of the longevity of the atmospheric CO₂ perturbation and ocean warming.").

²⁰ Hansen, *supra* note 9, at 229 (explaining that continued growth of greenhouse gas emissions, for just another decade, practically eliminates the possibility of near-term return of atmospheric composition beneath the tipping level for catastrophic effects).

²¹ *Id.* at 217. Hansen argues that a limit of one degree Celsius increase in global temperature is necessary to avoid practically irreversible ice sheet and species loss. *Id.*

²² *Id.* at 229.

or irreversible damage.”²³ In addition, it pays particular attention to the plight of small island states, early seen as among the most vulnerable to climate change. If preserving a climate “similar to that on which civilization developed and to which life on Earth is adapted”²⁴ is desired, the international community must never emit the vast majority of the remaining fossil fuel carbon.²⁵ This is indeed a herculean task.²⁶ Hopes for later and rapid reductions are, however, “risky, expensive and disruptive;” and, as such, far less politically feasible.²⁷ Further, for SIDS, it may herald the “end of their history.”²⁸

B. Climate Change and Small Island Developing States

Leaders from the Pacific Islands Forum to the Secretary General of the United Nations recognize the dire consequences of climate change for SIDS, describing it as the greatest threat to livelihoods, security, and well-being.²⁹ This echoes the United Nations General Assembly’s repeated and unanimous affirmation of the seriousness of climate change and the particular vulnerability of SIDS.³⁰ Though geographically disparate,³¹

²³ Solomon, *supra* note 13, at 1704 (citing United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, at art. 3, [hereinafter *UNFCCC*], available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>).

²⁴ Hansen, *supra* note 9, at 217.

²⁵ *Id.* at 226.

²⁶ *Id.* at 229 (“The most difficult task, phase-out over the next twenty to twenty-five years of coal use that does not capture CO₂, is herculean, yet feasible when compared with the efforts that went into World War II. The stakes, for all life on the planet, surpass those of any previous crisis. The greatest danger is continued ignorance and denial, which could make tragic consequences unavoidable.”).

²⁷ Myles Allen et al., *The Exit Strategy*, 3 NATURE REPORTS: CLIMATE CHANGE 56 (2009), <http://www.nature.com/climate/2009/0905/pdf/climate.2009.38.pdf>.

²⁸ *Islands Fear ‘End of History’ Due to Climate Changes*, REUTERS (Nov. 29, 2010, 10:56 p.m.), <http://www.reuters.com/article/2010/11/30/us-climate-islands-idUSTRE6AT0KW20101130>. Antonio Monteiro Lima, a delegate of Cape Verde who is vice-chair of the forty-three member Alliance of Small Island States, identified Kiribati, Tuvalu, the Cook Islands, the Marshall Islands, and the Maldives as the most at risk. *Id.* Monteiro stated, “All these countries are at this moment struggling to survive . . . they are facing the end of history[.]” *Id.*

²⁹ *Joint Statement by Leaders of Pacific Islands Forum, UN Secretary-General, UNITED NATIONS*, SG/2191 (Oct. 10, 2012) [hereinafter *Joint Statement*], available at www.un.org/News/Press/docs/2012/sg2191.doc.htm.

³⁰ See Aaron Korman & Giselle Barcia, *Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion*, 37 YALE J. INT’L L. ONLINE 35, 36 (2012) available at <http://www.yjil.org/docs/pub/o-37-korman-barcia-rethinking-climate-change.pdf>.

³¹ See Tuiloma Neroni Slade, *The Making of International Law: The Role of Small*

SIDS share many preexisting vulnerabilities, such as limited resources and high vulnerability to external economic and geo-political shocks.³² These vulnerabilities, exacerbated by climate change and coupled with low adaptive capacity, inspired special recognition for SIDS within the Framework Convention.³³ They have also inspired “persistent and innovative” arrangements between SIDS to facilitate cooperation and regional collaboration,³⁴ which may bode well for future actions against large emitters.³⁵

Among the most striking climate change impacts is the acute coastal vulnerability of SIDS, and in some cases the almost certain uninhabitability of their ancestral homes.³⁶ In the Pacific, for example, SIDS risk many of the more globally widespread climate impacts, including coastal inundation, rising air temperatures, decreased rainfall, and rising ocean temperatures.³⁷ With these climatic changes—increased coral bleaching, increased coastal flooding, and erosion—threats to traditional lifestyles of indigenous communities and human migration will also occur.³⁸

Islanders have long been aware of these impacts. The impassioned plea in 1997 of the Prime Minister of Tuvalu, an atoll nation that faces the total loss of territory, still rings true today:

Island States, 17 TEMP. INT'L & COMP. L.J. 531 (2003) (“Small island states are located in all parts of the world, from the Mediterranean to the Pacific, in Africa, Asia, the Indian Ocean, and the Caribbean. They range from the very small (Barbados and Tuvalu) to the quite large (Jamaica and Papua New Guinea).”).

³² See generally Burkett, *supra* note 2; Slade, *supra* note 31, at 533; Alexander Gillespie, *Small Island States in the Face of Climate Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL'Y 107 (2004).

³³ UNFCCC, *supra* note 23, art. 4.

³⁴ Slade, *supra* note 31, at 533–4, 540 (citing early collaboration including the Pacific Islands Forum, the Caribbean Community (CARICOM) and the Indian Ocean Commission as well as more recent efforts embodied in the Alliance of Small Island States (AOSIS)).

³⁵ See discussion *infra* Part IV.

³⁶ See generally Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, ASIA PAC. ISSUES, no. 98, Jan. 2011, at 1. It is important to note that coastal erosion and seawater inundation will likely render atoll islets uninhabitable long before sea level overtops the surfaces. William R. Dickinson, *Pacific Atoll Living: How Long Already and Until When?*, 19 GSA TODAY, Mar. 2009, at 4.

³⁷ In its Fourth Assessment Report, the Intergovernmental Panel on Climate Change stated the changes anticipated for the small islands with “very high confidence,” including stark forecasts projecting reduced water resources in many Caribbean and Pacific islands that would be insufficient to meet demand during low rainfall periods by mid-century. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 48–49 (R.K. Pachauri & A. Reisinger eds., 2011).

³⁸ See generally NATIONAL CLIMATE ASSESSMENT REGIONAL TECHNICAL INPUT REPORT SERIES, CLIMATE CHANGE AND PACIFIC ISLANDS: INDICATORS AND IMPACTS (Victoria W. Keener, et al. eds., 2012).

There is an asserted consensus that binding significant targets to reduce greenhouse gases are essential, if the catastrophic impacts of climate change on the livelihood and existence of people are to be limited For the people of low-lying island states of the world, however, and certainly of my small island country of Tuvalu in the Pacific, this is no longer a debatable argument. The impacts of global warming on our islands are real, and are already threatening our very survival and existence.³⁹

Indeed, as His Excellency Tuiloma Neroni Slade, judge of the International Criminal Court,⁴⁰ stated ten years ago, sea-level rise “poses the most critical threat, for it touches the very life force of island communities Fundamentally, it is an issue of equity, and of survival.”⁴¹ The Joint Statement by Leaders of Pacific Islands Forum and the Secretary General echoes this sentiment in its call to the international community to identify threats—like the violation of territorial integrity and increased natural resource scarcity—and to assist these vulnerable countries.⁴² Indeed, the Joint Statement seeks “urgent international action to reduce emissions commensurate with the science and associated social, economic and security impacts, sufficient to enable the survival and viability of all [] small island developing States.”⁴³ The Joint Statement also stresses the need to address these impacts in “all relevant international forums, including but not limited to the United Nations Framework Convention on Climate Change, the General Assembly and the Security Council.”⁴⁴ It is not clear, however, that these forums will yield much progress. They have not to date.

III. CREATIVITY, FUTILITY, AND REALPOLITIK

There have been many claims and avenues for remedy posited by academics and practitioners. Pioneering individuals and communities from

³⁹ Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 104 (2005) (citation omitted).

⁴⁰ Slade, *supra* note 31, at 531. Judge Tuiloma Neroni Slade is a Judge on the International Criminal Court (“ICC”). Prior to his election to the ICC, he served as the Permanent Representative of Samoa to the United Nations and as the Samoan Ambassador to the United States. He has also held the office of Attorney-General of Samoa, was a senior legal advisor with the Commonwealth Secretariat in London, and was the Chairman of the Alliance of Small Island States (“AOSIS”) in 1997, which was the year that the Kyoto Protocol agreement on controlling greenhouse gases was adopted. *Id.*

⁴¹ Slade, *supra* note 31, at 540.

⁴² *Joint Statement*, *supra* note 29.

⁴³ *Id.*

⁴⁴ *Id.*

the most vulnerable regions of the world have pressed or attempted to pursue some of these claims in international fora, though without successful resolution. For example, the Inuit petition at the Inter-American Commission on Human Rights ("IACHR") sought to hold the United States responsible for human rights violations caused by its disproportionate contribution to historical and present greenhouse gas emissions.⁴⁵ The claim, however, never reached conclusion and a final decision is likely not forthcoming.⁴⁶ In 2002, Tuvalu also threatened to bring suit in the ICJ in response to the United States' intransigence regarding emissions reductions.⁴⁷ Of course, the ICJ's lack of jurisdiction over the United States would have been the first major jurisdictional hurdle, followed perhaps by several substantive law issues.⁴⁸

Many of the remaining claims are robust in the academic realm alone. This is the case for proposed claims under the United Nations Convention on the Law of the Sea ("UNCLOS")⁴⁹ and the U.S. Alien Torts Statute ("ATS"),⁵⁰ for example. The search for a viable means for remedy demonstrates the failure of the Framework Convention, the main international instrument on climate change, to address the absence of enforceable compliance mechanisms to date.⁵¹ There is a renewed effort to pursue avenues under the UNFCCC⁵²—and Part III surveys the other most

⁴⁵ See Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, in 272 ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William C.G. Burns & Hari M. Osofsky eds., 2009); see also discussion, Part IV.A *infra*.

⁴⁶ *Id.* at 289-90.

⁴⁷ See Jacobs, *supra* note 39, at 112.

⁴⁸ See *id.* at 105 (asserting that even if Tuvalu gains jurisdiction for a suit in the ICJ against the United States, it will face numerous substantive law issues).

⁴⁹ See *id.* at 116.

⁵⁰ See generally RoseMary Reed, Comment, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM. L. & POL'Y J. 399 (2002).

⁵¹ See, e.g., Jacobs, *supra* note 39, at 112 (arguing that Tuvalu would have difficulty asserting that the United States is bound by the Framework Convention for two reasons: First, countries may postpone such measures when they are not cost effective. The United States would likely defend its actions by pointing to the economic hazards of substantial emissions reduction. And, second, the Framework Convention is not binding, so the United States could argue that it is not required to abide by its emissions standards).

⁵² These include employing an "obscure dispute settlement provision of the U.N. Framework Convention on Climate Change (UNFCCC)," under Article 14 of the treaty. Lisa Friedman, *Island States Mull Risks and Benefits of Suing Big Emitters*, E&E REP. (Nov. 16, 2012), <http://www.eenews.net/public/climatewire/2012/11/16/1> (last visited Mar. 12, 2013); see also Jacobs, *supra* note 39, at 118.

commonly cited legal avenues. This section, however, poses fundamental geo-political questions that complicate these kinds of cases at the outset.

SIDS appear to have a viable claim at base: the unabated emissions activity of the highest emitters has resulted in altered atmospheric chemistry that in turn has created a climate extremely hostile to small island states in particular.⁵³ Further, it seems reasonable to allege that the highest emitters were aware of the consequences of their actions since at least 1992, at the drafting of the Framework Convention. A compelling case could proceed on the merits. There are, however, antecedent concerns regarding the geo-political milieu in which these cases are brought. For example, does the complaining island nation have the financial and human resources and capacity to pursue these claims against large emitters? And, on a related note, if a vulnerable nation pursues legal recourse, will the very nation-state(s) from which it seeks remedy retaliate?

There is evidence that both lack of resources and fear of retaliation have stymied efforts to hold large emitters accountable for their actions in the international arena.⁵⁴ That may color the proposed legal actions' viability. Backed by wealthy European nations, the Republic of Palau is currently leading a coalition of vulnerable states in a campaign to request an advisory opinion from the ICJ.⁵⁵ The request seeks "on an urgent basis . . . an advisory opinion from the ICJ on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States."⁵⁶ Reports indicate, however, that diplomats and attorneys are "putting on the brakes" for fear of losing billions in aid from China and the United States for non-climate needs, such as education, roads, and HIV-AIDS clinics.⁵⁷ The United States, for example, has "made its objections known," using threats of worsening "[c]ongressional inaction as a clear warning" against pursuing legal action.⁵⁸ Conversations regarding more "confrontational

⁵³ See Friedman, *supra* note 52.

⁵⁴ *Id.*

⁵⁵ See generally *id.* Palau formed Ambassadors for Responsibility on Climate Change ("ARC") to ask the General Assembly for an advisory opinion. *Id.* Germany, Ireland, and Switzerland have vowed support for Palau. *Id.* For more in depth discussion of ICJ advisory opinions, see discussion Part IV.D *infra*.

⁵⁶ Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change, U.N. Press Release (Feb. 3, 2012) [hereinafter *Advisory Opinion on Climate Change*].

⁵⁷ Friedman, *supra* note 52 ("'Some of them are afraid, since the big country doesn't like it,' said Bangladesh Ambassador to the United Nations Abdul Momen. Momen and others said the concern has not derailed nations' pursuit of an advisory opinion before the Hague-based International Court of Justice, but it has significantly slowed the momentum.'").

⁵⁸ *Id.* In addition, the United States has a unique relationship with a number of the most

alternatives" are occurring at the "margins" of the negotiations and the largest impediment for poor nations, generally, is their "near-total dependency on big emitters for development, trade and, increasingly, money to adapt to climate change."⁵⁹ Former President of Palau, Johnson Toribiong, insists, however, that the advisory opinion would "complement and not conflict" with international negotiations.⁶⁰ This action would perhaps "renew our faith in a system of law that has guided States' actions in the past and gives them legitimacy today," according to President Toribiong.⁶¹

This kind of stifled voice, as a result of capacity constraints or power differentials is not unique to climate-related circumstances, though the consequences here are perhaps most dire. In fact, similar capacity and retaliation concerns operate in the World Trade Organization's ("WTO") dispute settlement regime. Lack of resources and legal capacity as well as fear of non-WTO or extralegal retaliation by more powerful trading partners, are two of the small handful of reasons that developing nations might not invoke the relevant dispute settlement mechanisms.⁶² The

vulnerable nations, including Palau. The Federated States of Micronesia, the Republic of the Marshall Islands, and Palau are freely associated with the United States, institutionalized by respective Compacts of Free Association. *See generally* Briana Dema, Note, *Sea Level Rise and the Freely Associated States: Addressing Environmental Migration Under the Compacts of Free Association*, 37 COLUM. J. ENVTL. L. 177, 183-85 (2012). "Free association occupies the 'middle ground between integration and independence.' It is characterized by a formal association between two states in which one state cedes to the other 'a fundamental sovereign authority and responsibility for the conduct of its own affairs.'" *Id.* at 183 (citations omitted). Whereas Dema writes about the Compact in the context of climate-induced migration, at least one other commentator suggests that the Compact might be useful for limiting emissions from the "world's leading producer of greenhouse gases." *See* J. Chris Larson, Note, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT'L L. 495, 496-97 (2000) ("A treaty obligation exists between [the Republic of Marshall Islands] and the United States, which, broadly interpreted, may require the United States to defend RMI from accelerated sea-level rise."); *see also* Clement Yow Mulalap, *Islands in the Stream: Addressing Climate Change from a Small Island Developing State Perspective*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).

⁵⁹ Friedman, *supra* note 52 ("Were it not for the fact that they are so dependent on foreign aid, I think they would have brought claims ten years ago. I know this for a fact," said Matt Pawa, an attorney who represented the Alaskan village of Kivalina in a landmark global warming case.").

⁶⁰ *Advisory Opinion on Climate Change*, *supra* note 56.

⁶¹ *Id.*

⁶² *See* Phoenix X.F. Cai, *Making WTO Remedies Work for Developing Nations: The Need for Class Actions*, 25 EMORY INT'L L. REV. 151, 155-56 (2011). Developing nations may "fear the possibility of unilateral retaliation by the United States, either through a decrease in development or military aid or by revoking access to the Generalized System of

persistent capacity and power differential in the climate context, and other areas in which it influences international law, threatens to compromise confidence in international law's ability to promote and defend legal rights.⁶³ Indeed, one scholar has questioned if international law is able to provide effective legal mechanisms to protect sovereign interests when other states control the unyielding emissions that accelerate climate change.⁶⁴ If international law cannot do this for the most vulnerable, it does not bode well for SIDS for which the international legal regime is an indispensable piece of their efforts to halt dangerous climate change.

IV. SURVEY OF CLIMATE CHANGE LITIGATION CLAIMS

There have been several calls for climate-related litigation, often with a focus on claims brought by or in the interest of most vulnerable.⁶⁵ The defendant contemplated is almost always the United States, the single

Preferences, which grants them preferential trade terms as developing nations." *Id.* at 180. Cai identifies two additional reasons: (i) "lack of market share and ability to affect world markets"; and (ii) "asymmetries or unevenness in the effectiveness of remedies." *Id.* at 156 (citation omitted). *But see* Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557 (2005) (finding that although capacity constraints may limit the number of cases developing countries are able to pursue, political hurdles, such as fear of retaliation by the would-be defendant are less supported). Although the study is useful overall, Guzman and Simmons' methodology is not directly useful for the parallel I wish to draw here. Among several other reasons, Guzman and Simmons' article has limited relevance (i) because of their choice of defendants on whom they focus their study and (ii) because they do not isolate the particularly resource- and power- constrained SIDS I am concerned with here. Nevertheless, the authors admit, "Although our results fail to support the power hypothesis, we cannot rule out the possibility that power plays an important role in determining the number of cases filed." *Id.* at 571.

⁶³ On this point, see Professor Badrinarayana's trenchant argument in, Deepa Badrinarayana, *Global Warming: A Second Coming for International Law*, 85 WASH. L. REV. 253 (2010). Badrinarayana's article examines "why international law does not provide adequate redress to about eighty percent of the world's population whose lives and property are threatened by climate change, and whose governments may thus effectively be denied sovereign control over their domestic affairs." *Id.* at 254. She attributes "the inadequacy of international law in the climate context to the evolution of the international community into an economic union that has historically privileged material interests over legal rights." *Id.* at 253. Ultimately she argues that "state behavior in the context of climate change is currently consistent with historic international legal responses to rights violations generally, and thus, mitigating violations of sovereignty will require new approaches in international law." *Id.* at 255. Although she offers valuable tools to conceive of new approaches, crafting these new approaches is left largely to others.

⁶⁴ See *id.* at 254

⁶⁵ Brown, *supra* note 5.

largest historical emitter and the second greatest current emitter.⁶⁶ They also explicitly or tacitly admit the Framework Convention's failure to address failed mitigation efforts or the possibility of climate-related damage that is too great for adaptation provisions to address.⁶⁷ This section briefly describes the four most commonly recommended claims and legal avenues: (1) human rights claims and tribunals; (2) alien tort claims in United States district courts; (3) violation of the United Nations Convention on the Law of the Sea in several fora; and (4) violations of treaties, breaches of customary international law or requests for an advisory opinion in the ICJ.⁶⁸ It does not delve into some of the substantive issues, such as establishing a causal link between a nation's emissions and climate impacts, which might impede the merits phase of the action.

A. *Appealing to Human Rights*

Climate change directly and indirectly implicates well-recognized human rights obligations.⁶⁹ Consideration of these obligations is particularly useful for vulnerable populations as it connects the many dangerous climate impacts to the human rights commitments states have already undertaken. In addition, it helps to demonstrate the extent of the harm suffered as a result of the rights violation.⁷⁰ Life-threatening extreme weather events, for example, directly impact rights to life, dignity, and personal security—core

⁶⁶ Clark, *supra* note 5.

⁶⁷ See, e.g., Roda Verheyen & Peter Roderick, *Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage*, WWF-UK Climate Change Programme Discussion Paper, Nov. 2008, at 6, 13, available at http://assets.wwf.org.uk/downloads/beyond_adaptation_lowres.pdf.

⁶⁸ For a more comprehensive discussion of legal rights and remedies with respect to climate change adaptation, see Maxine Burkett, *Legal Rights and Remedies*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE: UNITED STATES AND INTERNATIONAL ASPECTS* 815 (Michael Gerrard & Katrina Kuh, eds., 2012). There are other possible international fora that scholars have considered that are not discussed here, including the World Trade Organization, the World Heritage Committee, and the Straddling Fish Stocks Agreement. See generally *ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES* (William C. G. Burns & Hari M. Osofsky eds., 2009).

⁶⁹ See generally U.N. Human Rights Council, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, A/HRC/10/24 (Nov. 17, 2008), available at <http://www.refworld.org/docid/49a5223b2.html>; see also U.N. Human Rights Council, *Human Rights and Climate Change*, A/HRC/10/L.30 (Mar. 20, 2009), available at <http://documents-dds-ny.un.org/doc/UNDOC/LTD/G09/124/08/pdf/G0912408.pdf?OpenElement>.

⁷⁰ Megan Chapman, *Climate Change and the Regional Human Rights Systems*, 10 SUSTAINABLE DEV. L. & POL'Y 37, 37 (2010) (citing U.N. Human Rights Council Resolution 7/23 (Mar. 28, 2008)).

civil and political rights.⁷¹ Decreased rainfall resulting in increasing drought and desertification threatens the ability to produce food, thus implicating the recognized right to food.⁷² Some less direct human rights obligations involve the plight of climate-induced migrants, for whom the right to privacy and family life has been compromised.⁷³ Other rights implicated include: the rights to the highest attainable standard of health, adequate housing, and self-determination as well as human rights obligations related to access to safe drinking water and sanitation.⁷⁴

Some rights are given greater deference than others. Courts tend to find civil and political rights, like the right to life and security, enforceable more so than their economic, social, and cultural counterparts.⁷⁵ In fact, many of the rights that climate change affects fall into the latter category in which the link between the right and the corresponding duty is blurred.⁷⁶ Nonetheless, these claims may still have traction, evidenced by their progress in regional human rights tribunals. Where pollution prevented people from living in their homes, for example, the European Court of Human Rights has found that the right to privacy and family life was violated.⁷⁷ Further, a more general right to a healthy environment is emerging at the international, regional, and national level.⁷⁸

⁷¹ See Amy Sinden, *An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 173, 185 (William C. G. Burns & Hari M. Osofsky eds., 2009).

⁷² Graham Frederick Dumas, *A Greener Revolution: Using the Right to Food as a Political Weapon Against Climate Change*, 43 N.Y.U. J. INT'L L. & POL. 107 (2010) (citing Article 11 (1) and (2) of the International Covenant on Economic, Social and Cultural Rights).

⁷³ Sinden, *supra* note 71, at 185 (arguing that if sea-level rise displaces people from their homes even without physical injury, the right to privacy and family life might well be violated). Sinden also suggests a violation of the right to information that is "increasingly viewed as derivative of long-standing and fundamental civil and political rights to freedom of expression." *Id.* at 187 (citation omitted).

⁷⁴ U.N. Human Rights Council, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, *supra* note 69; see also U.N. Human Rights Council, *Human Rights and Climate Change*, *supra* note 69.

⁷⁵ Sinden, *supra* note 71, at 182. See also, Wolfgang Sachs, *Climate Change and Human Rights*, 106 INTERACTIONS BETWEEN GLOBAL CHANGE AND HUM. HEALTH 349 (2006).

⁷⁶ Sachs, *supra* note 75, at 349.

⁷⁷ Sinden, *supra* note 71, at 187. See International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR]. ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . .").

⁷⁸ See Chapman, *supra* note 70; Reed, *supra* note 50, at 413-14. The African Charter on

To date, the IACHR is the only regional human rights body that has heard a claim of violation of rights because of climate change.⁷⁹ Relying on the rights laid out in the American Declaration of the Rights and Duties of Man, the Inuit peoples of Alaska and Canada brought an action against the United States in 2005.⁸⁰ Petitioners alleged adverse impacts resulting from U.S. emissions that threatened the enjoyment of numerous human rights—including the rights to preservation of life, security, means of subsistence, and to residence and inviolability of home.⁸¹ The IACHR dismissed the Petition without prejudice in 2006 finding insufficient information to determine that the alleged facts characterized a violation of rights the American Declaration protects.⁸² In 2007, however, the IACHR invited the petitioners, at their request, to a broader hearing to discuss the nexus between climate change and human rights.⁸³ A decision from the IACHR is, in all likelihood, not forthcoming. The most notable challenge to the claim was that the United States has not accepted the jurisdiction of the IACHR.

Lack of jurisdiction of human rights treaties over the most significant emitters is common. Even if there is jurisdiction, an IACHR decision declaring human rights violations resulting from the impacts of anthropogenic climate change is not enforceable.⁸⁴ Its value is in the declaration's ancillary effects. Those seeking compensation in a domestic action due to climate-related injuries, for example, could use a statement on climate change and human rights from a relevant tribunal as persuasive authority in domestic courts.

Human and Peoples' Rights, for example, explicitly recognizes right to environment. Chapman, *supra* note 73, at 37. Further, the African Commission on Human and Peoples Rights has found violations of this right. *Id.*

⁷⁹ See Burkett, *supra* note 68.

⁸⁰ See Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (submitted Dec. 7, 2005), available at http://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

⁸¹ Svitlana Kravchenko, *Right To Carbon Or Right To Life: Human Rights Approaches to Climate Change*, 9 VT. J. ENVTL. L. 513, 523, 528 (2008).

⁸² *Id.* at 535.

⁸³ For a general discussion of the procedural history and substantive claims of the Inuit Petition, see Osofsky, *supra* note 45, and Kravchenko, *supra* note 81, at 534-36.

⁸⁴ See Statute of the Inter-American Commission on Human Rights arts. 1-2, Oct. 31, 1979, O.A.S. G.A. Res. 447 (IX-o/79), available at <http://www.iachr.org/Basicos/basic15.htm> [hereinafter *ATS*]. Only the IACHR can generate enforceable decisions and it too lacks jurisdiction over the U.S. *Id.*

Although the general theories at base usually concern human rights norms, other international norms might be relevant.⁸⁵ The transboundary harm rule, which requires states to prevent or minimize the risk of damage to other states,⁸⁶ and state responsibility, which holds an offending state responsible for the cost of preventing damage and addressing “unavoided” damage,⁸⁷ are foundational for claims seeking rapid emissions reduction and compensation for loss and damage small islands suffer. SIDS might bring a claim based on the breach of this kind of customary international law in U.S. domestic courts via the Alien Tort Statute (“ATS”), or, perhaps, in the ICJ.

B. Possible Claims Under the Alien Tort Statute

The Alien Tort Statute⁸⁸ (“ATS”) was enacted in 1789 to allow foreign persons to sue defendants in U.S. courts for violations of international law.⁸⁹ The ATS states simply: “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.”⁹⁰ A claimant must meet the following requirements to bring a claim under the ATS: (i) an alien must bring suit; (ii) the claim must be in tort; and, (iii) the

⁸⁵ The Rio Declaration contains one of several articulations of the norm: “States shall . . . cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.” United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol. 1), Annex 1 (Aug. 12, 1992), reprinted in 31 I.L.M. 874 (emphasis added).

⁸⁶ For a discussion of the possible revival of transboundary harm through an advisory opinion on climate change impacts, see Korman & Barcia, *supra* note 30, at 40. For a comprehensive discussion of the transboundary harm principle and its possible role in litigation under the ATS, see Ajmel Quereshi, *The Search for an Environmental Filartiga: Trans-Boundary Harm and the Future of International Environmental Litigation*, 56 HOW. L.J. 131, 168 (2012).

⁸⁷ Verheyen & Roderick, *supra* note 67, at 6, 15-18. State responsibility as well as the polluter pays principle are ostensibly reflected in the Framework Convention, “which notes that the largest share of historical and current global emissions has originated in developed countries.” Slade, *supra* note 31, at 541.

⁸⁸ 28 U.S.C. § 1350 (2007). For a general discussion of the ATS and its relevance to climate change and other environmental claims, see Ajmel Quereshi, *supra* note 86. See also Reed, *supra* note 50.

⁸⁹ See Burkett, *supra* note 68.

⁹⁰ See ATS, *supra* note 84.

tort must be a violation of the law of nations.⁹¹ Jurisdiction extends beyond the governments of foreign nationals to include private parties.⁹²

In *Sosa v. Alvarez-Machain*,⁹³ the Supreme Court recognized the propriety of the district courts to “recognize private causes of action for certain torts in violation of the law of nations,”⁹⁴ including human rights-based litigation. The scope of claims is limited, however, by those “norms of international character accepted by the civilized world and defined with a specificity comparable to the features” at the time the ATS was originally enacted. In other words, the Court limited claims of international law violations to those recognized in the 18th century. It is not clear if courts would deem human rights claims based on anthropogenic greenhouse gas emissions as tantamount to, say, torture and genocide.⁹⁵

Some have argued that the ATS may indeed serve as a powerful tool to address environmental harms generally and climate change specifically.⁹⁶ It is important to note, however, that to date courts have generally dismissed “environmental ATS” cases due to diverse substantive and procedural issues.⁹⁷ Nonetheless, there is persuasive literature that suggests that the ATS might be an important part of a bundle of claims that claimants could bring at the international and domestic scales. Possible claims would be based on human rights actions⁹⁸ or based on the rule of no transboundary harm, with the latter obligation argued as well-established customary international law.⁹⁹ There are significant substantive limitations

⁹¹ For further discussion, see Reed, *supra* note 50, at 423.

⁹² See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and discussion by Richard O. Faulk, *The Expanding Use of the Alien Torts Act in International Human Rights Enforcement*, in CLASS ACTION LITIGATION REPORT, 10 TXLR 294 (2009) available at http://works.bepress.com/cgi/viewcontent.cgi?article=1023&context=richard_faulk.

⁹³ 542 U.S. 692 (2004).

⁹⁴ *Id.* at 744.

⁹⁵ Perhaps telling, the *Sosa* Court expressed doubt as to the utility of the ICCPR for setting actionable international law norms for the purposes of the ATS. *Id.* at 692; see also Faulk, *supra* note 92.

⁹⁶ See generally, Quereshi, *supra* note 86; Reed, *supra* note 50 (seeking to show that environmental human rights do exist and that a violation of these rights is a violation of international law, and therefore remediable under the ATCA).

⁹⁷ Quereshi, *supra* note 86, at 133, 152 (summarizing the three grounds on which courts have consistently criticized environmental norms).

⁹⁸ Reed, *supra* note 50, at 407 (arguing that “[b]ecause no case arguing a violation of international environmental law has been successful under the ATCA, the Pacific Island nations may be more successful arguing a violation of environmental human rights. As other human rights claims have been successful, tying an environment protection claim to a human rights claim might have the greatest chance of success.”) (citations omitted).

⁹⁹ See Quereshi, *supra* note 86, at 132-33. Quereshi argues: “The hesitancy of American courts to recognize a viable environmental claim under the ATS results in part

to these claims, namely that individuals are not understood as the rights bearers in the transboundary harm cases and, similarly though conversely, individual entities are not deemed the duty bearers in the human rights context.¹⁰⁰ There may be relevant legal arguments that can soften some of these limitations,¹⁰¹ however, they are beyond the scope of the current discussion.¹⁰²

A more hopeful possibility is the continued evolution of international law norms, an evolution that might soon empower small island litigants in U.S. domestic courts. Since the enactment of the ATS, jurists were concerned with whether the norm asserted by the claimant was “ripe”—in other words, whether the norm “had achieved sufficient status to be part of the ‘law of

from the failure of international litigators to file and sufficiently support a claim alleging a violation of the most viable international environmental norm—the prohibition on transboundary harm.” *Id.* at 133. Quereshi admits, however, that a major hurdle to pursuing a claim on the basis of transboundary harm is “unlike a number of norms in the human rights context, the prohibition against trans-boundary harm is generally understood as creating a duty between states, not individuals.” *Id.* at 133-34. As discussed *infra* note 102, ATS claims against states suffer a number of significant jurisdictional hurdles.

¹⁰⁰ Quereshi, *supra* note 86, at 165; see also Reed, *supra* note 50, at 421-22.

Reed explains:

Because judicial interpretation of the ATCA has not yet included human rights violations as one of the harms that does not require a state action, the nations will have to make a claim that greenhouse gas emission by corporations in the United States is done under color of state law. Such a claim is daunting, but not insurmountable . . . [M]ajor corporations in coal, oil, gas, and energy production industries do extensive lobbying of Congress. . . . [A] combination of creation and implementation of state policy could potentially satisfy the state actor test.

Id.

¹⁰¹ See discussion of the §1983’s color of law doctrine in Quereshi, *supra* note 86, at 164.

¹⁰² Whether jurisdiction extends to multinational corporations, who as a group are a significant source of global greenhouse gas emissions, is also up for determination. Recent appellate court decisions have done little to clarify this point. In *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3 111 (2d Cir. 2010), the Second Circuit held that ATS jurisdiction does not extend to claims against corporate defendants. *Id.* Coming to the polar opposite conclusion, however, the D.C. Circuit held in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) that corporations are not immune from liability under the ATS. *Id.* The circuit split leaves this question open, along with several other questions the Supreme Court’s *Sosa* decision left unresolved. In late 2011, the Supreme Court agreed to review *Kiobel* and decide whether claimants can sue oil companies and other multinationals for alleged human rights abuses overseas. Burkett, *supra* note 68, at 823. At oral arguments the Court ordered new oral arguments directing the parties to brief and argue a third question: “Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” Lyle Denniston, *Kiobel to be Expanded and Reargued*, SCOTUS BLOG (Mar. 5, 2012, 2:01 PM), <http://www.scotusblog.com/?p=140230> (quotation marks omitted).

nations.”¹⁰³ Centuries later, courts can look at the non-static norms of international law to identify the enforceable norm under the ATS.¹⁰⁴ In other words, courts have “embraced [the law of nations] as dynamic and changing as the international community recognizes new rights and duties.”¹⁰⁵ Some scholars argue, therefore, that an expanded embrace will include key environmental rights and duties, if it has not already.

If the Court resolves questions regarding possible climate-related claims and defendants in favor of a more expansive view, it is plausible that plaintiffs can pursue claims for damages relief against large emitters in federal district courts. In the near-term, however, the lack of clarity with respect to proper jurisdiction makes ATS a less favorable avenue through which to seek remedy.

C. Claims Under the Convention on the Law of the Sea

The dispute resolution mechanism under the United Nations Convention on the Law of the Sea¹⁰⁶ (“UNCLOS”) may provide a viable avenue for a binding decision in favor of the most vulnerable island nations.¹⁰⁷ Commonly referred to as “a constitution for the oceans,” UNCLOS entered into force in 1948 and currently has 165 parties.¹⁰⁸ Unsurprisingly, small island states, many with extensive ocean resources, were heavily engaged in the development of the Convention.¹⁰⁹ UNCLOS may be a promising instrument for advancing climate change litigation due to its expansive definition of pollution, the clear obligations on State parties to preserve the health of the environment, and the availability of voluntary and compulsory

¹⁰³ Quereshi, *supra* note 86, at 135.

¹⁰⁴ See Reed, *supra* note 50, at 406.

¹⁰⁵ *Id.*

¹⁰⁶ U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc.A/Conf.62/121, 21 I.L.M. 1261 [hereinafter *UNCLOS*].

¹⁰⁷ See generally William C.G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 INT’L J. SUST. DEV. L. & POL’Y, no. 1 (2006), at 27-51 (arguing that UNCLOS may prove to be one of the primary battlegrounds for climate change issues in the future); Jacobs, *supra* note 39, at 115 (2005) (arguing, inter alia, that “[d]ispute resolution under the Law of the Sea Convention may be Tuvalu’s most successful avenue for redress, especially if Tuvalu desires a binding decision by the ICJ.”).

¹⁰⁸ *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as of 23 January 2013*, U.N. DIVISION FOR OCEAN AFFAIRS & THE LAW OF THE SEA, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited April 26, 2013).

¹⁰⁹ See Slade, *supra* note 31, at 534-35 (describing, inter alia, small island states’ active participation in the work of the U.N. Seabed Committee and the Third U.N. Conference on the Law of the Sea, shaping the development of exclusive economic zones).

dispute resolution mechanisms to press claims related to environmental pollution.¹¹⁰ Notably, however, the United States is not a State party.¹¹¹

UNCLOS expansively imposes obligations on State parties regarding the prevention and reduction of pollution. It defines pollution such that an arbiter could conclude that carbon dioxide is a pollutant that State parties are obliged to limit.¹¹² In the context of climate change impacts, respondent states could be the small group of states that are both parties to UNCLOS and major emitting developed countries.¹¹³ The remedies an affected state could pursue range from an order to perform impact assessments of greenhouse gas emitting projects¹¹⁴ to monetary damages for the costs carbon pollution imposes on the coastal state, including the costs of adaptation and building defenses as well as the value of lost land area, coastal resources, and sovereignty. Additional remedies might include cooperation on the initiation of international negotiations on ocean acidification or displaced persons, for example.

UNCLOS recognizes the sovereign right of states to exploit their natural resources, but the use of their resources must be in accordance with “their duty to protect and preserve the marine environment.”¹¹⁵ Specifically, State parties are required to “prevent, reduce and control pollution of the marine environment from any source.”¹¹⁶ That obligation includes avoiding “the release of toxic, harmful or noxious substances, especially those that are persistent . . . from land-based sources, [or] from or through the atmosphere.”¹¹⁷ In addition, State parties must “take ‘all measures

¹¹⁰ See generally, Burns, *supra* note 107; see also Chris Wold, David Hunter & Melissa Powers, CLIMATE CHANGE AND THE LAW, 412-26 (2009).

¹¹¹ This may not be dispositive of related claims against the U.S., see discussion *infra* Part IV.D, and it may change shortly. See also Allison Winter, *Sen. Kerry Sees Prospects to Advance Law of the Sea*, ENVT. & ENERGY DAILY (July 20, 2011), <http://www.eenews.net/EEDaily/2011/07/20/6>. Ironically, the melting Arctic ice has inspired renewed interest in the region with its new shipping lanes and areas of potential oil and gas exploration. *Id.* To participate in the international governance regime, it would behoove the United States to ratify UNCLOS. *Id.*

¹¹² See UNCLOS, *supra* note 106, art. 1, para. 4 (“[P]ollution of the marine environment’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.”).

¹¹³ For the legal elements of an UNCLOS claim, see Burkett, *supra* note 68.

¹¹⁴ See UNCLOS, *supra* note 106, art. 206.

¹¹⁵ *Id.* art. 193.

¹¹⁶ *Id.* art. 194, para. 1.

¹¹⁷ *Id.* art. 194, para. 3(a); *Id.* art. 207 (requiring states to “adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from land-based sources,

necessary' to ensure that activities under their jurisdiction [] are so conducted as not to cause damage by pollution to other States and their environment [...]"¹¹⁸ Further, parties must take measures to "protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."¹¹⁹

UNCLOS obligations are not absolute. The "protect and preserve" mandate is not a total prohibition against pollution but has been interpreted instead as a due diligence obligation.¹²⁰ Nevertheless, UNCLOS might effectively address the adverse effects of climate change.

Particularly relevant to international obligations vis-à-vis climate change under the Framework Convention, Article 212 requires parties to take into account international mechanisms to control pollution and take into account "internationally agreed rules, standards and recommended practices and procedure."¹²¹ In addition, parties must cooperate through "competent international organization" to formulate, rules, standards, and practices to protect and preserve the marine environment, under Article 197. A State's failure to fulfill these obligations under UNCLOS triggers liability, which might include "assessment of and compensation for damage," among other things.¹²² Article 235 states that, "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law."¹²³ A State party to the UNFCCC, for example, may face liability claims pursuant to Article 235.¹²⁴ The extent of liability that

including rivers, estuaries, pipelines and outfall sources"; "take other measures as may be necessary to prevent, reduce and control such pollution"; and "endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce, and control pollution of marine environment from land-based sources, taking into account characteristic regional features, economic capacity of developing states and their need for economic development"); *Id.* art. 212, para. 1 ("States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere . . .").

¹¹⁸ Burns, *supra* note 107, at 37-38 (citation omitted); see UNCLOS, *supra* note 106, art. 194, para. 2.

¹¹⁹ UNCLOS, *supra* note 106, art. 194, para. 5.

¹²⁰ Burns, *supra* note 107, at 46.

¹²¹ UNCLOS, *supra* note 106, art. 212, para. 1.

¹²² *Id.* art. 235, para. 3. It also provides:

States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

¹²³ *Id.* art. 235, para. 1.

¹²⁴ For a comprehensive discussion of the relationship between UNCLOS and the

extends from obligations under UNFCCC is subject to interpretation.¹²⁵ Nevertheless, a party to UNCLOS could argue that a State party has not met its UNFCCC obligations and is liable for damages under Articles 235 and 197 of UNCLOS.¹²⁶

One of the major barriers to effective use of the UNCLOS dispute settlement regime is that the United States, a major historical emitter, is not a party to the Convention. Whereas the U.S. has accepted the major provisions of UNCLOS as customary international law, to which it must comply, it has not accepted the jurisdiction of the ICJ for resolving disputes over customary law violations.¹²⁷ In other words, although the U.S. is not subject to the dispute settlement mechanisms of UNCLOS, a complaining party could arguably press claims under violations of customary law due to the impact of its emissions on marine health. The complaining party could not bring that claim to the ICJ, however, as the U.S. withdrew its acceptance of the ICJ's compulsory jurisdiction.¹²⁸

D. The International Court of Justice and the Promise of an Advisory Opinion

1. The International Court of Justice and Climate Change

To press climate adaptation claims against another State, countries can bring suit in the ICJ.¹²⁹ The ICJ has two primary adjudicative functions. One is to resolve international law disputes between sovereign states.¹³⁰ The other is to issue advisory opinions on outstanding legal questions at the request of the General Assembly.¹³¹ Again, it is important to note,

UNFCCC, see Burns, *supra* note 107, at 46-49.

¹²⁵ See *id.*

¹²⁶ Parties would press their claims in one of several arenas. Part XV of UNCLOS provides states with four possible venues for dispute settlement. UNCLOS, *supra* note 106, art. 287, para. 1. An affected state can bring a claim under UNCLOS to (i) the International Tribunal for the Law of the Sea (ITLOS); (ii) the International Court of Justice (ICJ); (iii) an arbitral panel; or, (iv) a special arbitral panel. *Id.* States may declare a choice of forum. *Id.* If they have not, or where parties to the dispute have not accepted the same procedures for dispute settlement, the dispute is submitted to binding arbitration unless the parties agree otherwise. *Id.* art. 280, para. 5.

¹²⁷ See Burns, *supra* note 107, at 45.

¹²⁸ *Id.* 45.

¹²⁹ See Burkett, *supra* note 68.

¹³⁰ Statute of the International Court of Justice art. 36, http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_IV [hereinafter *ICJ Statute*]; see also Korman & Barcia, *supra* note 30, at 38.

¹³¹ *ICJ Statute*, *supra* note 130.

however, that the United States does not recognize the jurisdiction of the ICJ.¹³² Further, the jurisdiction of the ICJ is limited to State complaints against other states, and not private parties.¹³³ In addition, there is no formal mechanism to enforce judgments of the Court.¹³⁴ Nonetheless, Tuvalu threatened to sue the United States in the ICJ.¹³⁵ Moreover, Palau's call for an advisory opinion has excited many and inspired this renewed consideration of the efficacy of litigation for SIDS.¹³⁶

Low-emitting, high impact countries, like SIDS, are the most obvious applicant countries to press claims before the ICJ.¹³⁷ The ICJ can exercise jurisdiction over the parties (i) by mutual agreement; (ii) through the "coincident existence" of applicant and respondent parties who had accepted compulsory jurisdiction of the ICJ,¹³⁸ or, (iii) through an independent treaty's dispute resolution clause specifying settlement before the ICJ.¹³⁹ If the Court cannot exercise jurisdiction over one or both of the parties, a country can seek an advisory opinion from the ICJ through the General Assembly.¹⁴⁰

In reviewing substantive claims presented before it, the ICJ can look to several sources of law. The Court would look to other special treaties, such as the UNFCCC, customary international law, and general principles of

¹³² See *The United States and the ICJ*, COUNCIL ON FOREIGN RELATIONS, (Dec. 27, 2011) <http://www.cfr.org/international-criminal-courts-and-tribunals/united-states-icj/p26905>.

¹³³ See *Contentious Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> (last visited April 26, 2013).

¹³⁴ See *Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> (last visited April 26, 2013).

¹³⁵ See generally Jacobs, *supra* note 39.

¹³⁶ See *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, UN NEWS CENTER (Sept. 22, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1#.UXsosuDE0yE> [hereinafter *Palau Seeks UN World Court Opinion*].

¹³⁷ In fact, Tuvalu threatened to bring a claim against the United States before the ICJ. Andrew Strauss, *Climate Change Litigation: Opening the Door to the International Court of Justice*, in *ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES* 334 (William C. G. Burns & Hari M. Osofsky eds., 2009). For a thorough discussion on the viability of such a claim, as well as the formidable hurdles it would face, see Jacobs, *supra* note 39.

¹³⁸ See generally Strauss, *supra* note 137, at 338-348.

¹³⁹ See generally *id.* at 345. Strauss identifies additional procedural and substantive issues that might bar claims before the ICJ.

¹⁴⁰ *ICJ Statute*, *supra* note 130, art. 65. In September 2011, the Pacific Island nations of Palau and the Republic of the Marshall Islands announced plans to seek an advisory opinion on whether countries have a legal responsibility to ensure that greenhouse gas emitting activities on their territory do not pose harm to other States. *Palau seeks UN World Court Opinion*, *supra* note 136.

international law.¹⁴¹ The UNFCCC would be a logical starting point,¹⁴² as treaties are the most authoritative source of international law. Although provisions of the Framework Convention are relevant, the ICJ would not be inclined to intervene in an ongoing, international negotiations process. At best the Court would only intervene if the complaining party could demonstrate that at least some parties are not negotiating in good faith.¹⁴³ For example, a small island state might press the ICJ directly arguing the absence of good faith based on a failure to meet emissions-reduction and adaptation assistance obligations set out in the Framework Convention and Kyoto Protocol.

An applicant country might also advance claims based on customary international law and general principles of law, such as the law on state responsibility for transboundary harm discussed briefly in Part IV.A. The principle for liability based on extraterritorial harm is drawn from the most basic legal precept that arbiters should hold legal actors responsible for the harm they do to others.¹⁴⁴ There is precedent for finding State liability based on transboundary harm that might assist a complaining State suffering from the impacts of sea-level rise, for example, to seek aggressive mitigation and compensation from high-emitting states.¹⁴⁵

If the ICJ is able to adjudicate a claim, it could yield significant advantages.¹⁴⁶ For example, a favorable ruling could make for a more rigorous post-Kyoto regime, as affected states could enjoy the normative higher ground in negotiations. An adverse finding against a powerful country, however, could be quite difficult to enforce.

2. *The promise of Palau's advisory opinion*

Since September 2011, with the request by its President to the UN General Assembly, Palau has sought "on an urgent basis . . . an advisory opinion from the ICJ on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control

¹⁴¹ See generally Strauss, *supra* note 137, at 350.

¹⁴² For discussion of claims that the Republic of Marshall Islands might bring before the ICJ, see J. Chris Larson, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT'L L. 495 (2000).

¹⁴³ Joyeeta Gupta, *Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change*, 16 REV. OF EUROPEAN COMTY. & INT'L ENVTL. L., 1 76, 78 (2007), available at <http://dspace.ubvu.vu.nl/bitstream/handle/1871/31866/208178.pdf?sequence=1>.

¹⁴⁴ See Strauss, *supra* note 137, at 350-52.

¹⁴⁵ See *id.* at 352 (discussing the Trail Smelter arbitration).

¹⁴⁶ *Id.* at 339.

that emit greenhouse gases do not damage other States.”¹⁴⁷ Palau’s hope, shared by numerous commentators, is that an advisory opinion will close the “rhetorical gap” between state action and international legal responsibilities.¹⁴⁸

Consistent with the UN Charter, the ICJ can issue advisory opinions presented by the General Assembly,¹⁴⁹ regardless of its political nature or the absence of discrete parties before it.¹⁵⁰ Further, although not binding law, advisory opinions nevertheless have authority as statements of law.¹⁵¹ So, although the U.S. does not accept the jurisdiction of the ICJ, an advisory opinion may hold important symbolic weight.¹⁵² Citing impactful opinions issued in the Nuclear Weapons Cases and in the Occupied Palestinian Territory, among others, Bavishi and Barakat argue: “Although advisory opinions are not legally binding, the findings contained in them

¹⁴⁷ Raj Bavishi & Subhi Barakat, *Procedural Issues Related to the ICJ's Advisory Jurisdiction*, Briefing Paper, LEGAL RESPONSE INITIATIVE (June 11, 2012), available at [http://www.legalresponseinitiative.org/download/BP41E%20-%20Briefing%20Paper%20-%20The%20ICJ%20Advisory%20Opinion%20Procedure%20\(11%20June%202012\).pdf](http://www.legalresponseinitiative.org/download/BP41E%20-%20Briefing%20Paper%20-%20The%20ICJ%20Advisory%20Opinion%20Procedure%20(11%20June%202012).pdf).

¹⁴⁸ Korman & Barcia, *supra* note 30, at 38.

¹⁴⁹ See U.N. Charter, art. 96, para. 1 (“The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”). See *ICJ Statute*, *supra* note 130, art. 65 (“The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”); Bavishi & Barakat, *supra* note 147, at 1 (“The General Assembly, the Security Council and UN organs and agencies authorized by the General Assembly can request an advisory opinion on ‘legal questions arising within their scope of activities.’”). For a comprehensive discussion of the process and substance of ICJ advisory opinions, see Bavishi & Barakat, *supra* note 147. See also Korman & Barcia, *supra* note 30, at 38. The ICJ has issued twenty-six advisory opinions, with the 1996 Nuclear Weapons case widely deemed the most relevant to the current climate change cases. *Id.* at 39.

¹⁵⁰ See Bavishi & Barakat, *supra* note 147, at 7. Regarding the political nature of a question, Bavishi and Barakat state:

Contentions about the political nature of a question have been raised to argue against the propriety of the ICJ giving an advisory opinion. Where a question contains a political dimension, the ICJ, to date, has taken a flexible approach and taken care to identify and address only the legal elements of a question which invite it to “discharge an essentially judicial task.” A request for an advisory opinion is therefore valid and the ICJ has jurisdiction to provide an advisory opinion even in situations in which political considerations are prominent, provided that the question asked is a legal one.

Id. (citations omitted).

¹⁵¹ See MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 111 (2003), (“the [ICJ’s] opinions, in practice, have the same value as [] judgments because they are ‘pronouncements’ ruled by the Court regarding the applicable law in specific issues.”).

¹⁵² Jacobs, *supra* note 39, at 117 (explaining that the advisory opinion may be one way for the ICJ to gain jurisdiction over the U.S. to the benefit of SIDS).

carry great legal weight and moral authority. They contain the World Court's view on important issues of international law and contribute to the elucidation and development of international law."¹⁵³ Korman and Barcia go one step further and argue that an advisory opinion on climate change would not only have historic value but would "have the power to reshape positively the international approach to greenhouse gas emissions."¹⁵⁴

It could, among other things, clearly establish an international norm against transboundary harm caused by these emissions. A clear definition of states' obligations and responsibilities would come at an "opportune time," which, at the time of Korman and Barcia's publication was at the desired commencement of a new international agreement binding all countries at the most recent UNFCCC conference of the parties.¹⁵⁵ Although that moment may have unceremoniously passed, with the waning faith in and enthusiasm for the UNFCCC process, another moment may have emerged with the Obama Administration's recent statements regarding climate action.¹⁵⁶

V. WEIGHING AID AND EXTINCTION

The existence of a justice paradox in the climate change context is perhaps unsurprising when set against the backdrop of other international law dynamics. Power disparities in the international community are arguably inherent in the conception and structure of current international organization,¹⁵⁷ with the Security Council serving as a paragon of the imbalance. The paradox is most striking in this instance, however, because the stakes for SIDS are unusually high, completely unprecedented, and likely irreversible in terms of the nature and scope of the impacts.

The prognosis for atoll nations like the Maldives, Tuvalu, and Kiribati is that they will lose all of their territory, a loss that significantly dwarfs the aid numbers that some countries currently fear losing. In fact, a comparison of the annual aid dollars that the U.S. gives to the Maldives versus the cost of certain adaptations or the loss of GDP due to the total loss of territory demonstrates the uneven impacts of climate change.¹⁵⁸ Indeed, a survey of

¹⁵³ Bavishi & Barakat, *supra* note 147, at 2.

¹⁵⁴ Korman & Barcia, *supra* note 30, at 36.

¹⁵⁵ *Id.* at 38.

¹⁵⁶ See discussion *infra* Part V.C.

¹⁵⁷ See generally Badrinarayana, *supra* note 63.

¹⁵⁸ The U.S. plans to give between two to three million dollars to the Maldives. Maldives, FOREIGNASSISTANCE.GOV, http://www.foreignassistance.gov/OU.aspx?FY=2013&OUID=307&AgencyID=0&budTab=tab_Bud_Planned; see also Hassan H. Shihab, First Sec'y of the Permanent Mission of the Maldives to the U.N., Statement to the Chairperson at

aid numbers across similarly situated SIDS reveals the same imbalance.¹⁵⁹ Some countries appreciate this imbalance and are fearless in the face of it.¹⁶⁰ Palau Ambassador to the United Nations, Stuart Beck, acknowledges the United States' objections and maintains that Palau "'gives far more in strategic value' to the United States than it takes in assistance."¹⁶¹

Although the general fear of retaliation may be warranted today, the calamity that some of these nations face requires creativity and courage in pursuing the claims summarized in Part IV, and perhaps a few other legal and political approaches that might yield results.¹⁶² This section explores the possibility of pursuing second-tier defendants, identifying representative parties or class action litigation to bring claims, and the value of litigation generally in moving the legal and political needle.

the General Debate of the Second Committee, (Oct. 8, 2012), *available at* <http://www.un.org/en/ga/second/67/maldives8oct.pdf> ("Maldives is doing whatever it can to build its resilience to combat the effects of climate change. The Government of Maldives is currently spending more than 27% of its national budget for this purpose.").

¹⁵⁹ For a comparison of aid numbers, see generally AIDFLOWS, <http://www.aidflows.org> (last visited Apr. 10, 2013). The United States has a unique relationship to the freely associated island nations. Additional cash flows go to the Republic of Marshall Islands, the Federal States of Micronesia, and Palau from the United States, beyond the aid numbers given through aid agencies. See Francis X. Hezel, S.J., *Pacific Island Nations: How Viable Are Their Economies?*, 7 PAC. ISLAND POL'Y 1, 21-23 (2012), *available at* http://www.eastwestcenter.org/sites/default/files/private/pip007_0.pdf. Although this may shift the balance slightly, acting in response to the cost of climate impacts is still preferred. *Id.* at 3-4.

¹⁶⁰ See Friedman, *supra* note 52 (citing Seychelles Ambassador to the United Nations, Ronald Jumeau, referring to the United States: "'We just don't trust you anymore. And we've waited long enough. In fact, we've waited until your own country has been hit by the worst drought in [sixty] years, until your people are squealing like us. How much more can we wait?' . . . He added that parties pressing the ICJ case have been careful not to name any specific country and have willingly watered down the resolution to attract European support.").

¹⁶¹ *Id.*

¹⁶² The author does not wish to understate the difficulty of pursuing these claims for SIDS. The benefits, however, would be great if realized. Carroll Muffett, President of the Center for International Environmental Law, is confident that eventually the law will force changes where treaty negotiations have not. See *id.* He explains:

It's not easy, but once you open that door, if some clever attorney and some brave plaintiff somewhere can open that door, it changes the entire calculus . . . There are a lot of levers out there that haven't been pulled yet. When they're pulled, it's going to move the world in exciting ways. But finding a country that has the capacity and the will and the immune system for this stuff is tough.

Id.

A. Second-Tier Defendants

One way to sidestep concerns of reprisal from major economic powers¹⁶³ is to look to the actions of other significant sources of emissions from countries on which SIDS are less dependent. In this “thousand cuts” approach, SIDS can seek to limit the current unabated emissions from other high emitters that provide little if any aid, and at the same time deter other similarly situated countries from continuing or expanding its use of fossil fuel resources, for example.¹⁶⁴ The Federated States of Micronesia modeled this approach in its novel challenge to the Czech upgrade of the Prunerov power plant.¹⁶⁵

Though ultimately unsuccessful, the claim brought against the Czech Republic arguing transboundary impacts under the 1991 Espoo Convention¹⁶⁶ put governments and corporations “on notice.”¹⁶⁷ With the upgrade, the power plant is among the highest greenhouse gas emitting plants in Europe.¹⁶⁸ Micronesia requested inclusion in the transboundary environmental impact assessment prior to project commencement, a request that delayed but did not halt the upgrade.¹⁶⁹ Nonetheless, Micronesia’s approach was considered “precedent-setting.” Indeed, it provides a skeletal

¹⁶³ For example, according to Seychelles Ambassador to the United Nations Ronald Jumeau, China and the United States appear to be “terrified” that the request for an advisory opinion will move forward. *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See generally* Robert Maketo et al., *Transboundary Climate Challenge to Coal: One Small Step against Dirty Energy, One Giant Leap for Climate Justice*, in *THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE* 589 (Michael Gerrard & Gregory Wannier, eds., 2013); Eva Munk, *Czech Ministry Accepts Micronesian Input In Assessing Impact of Power Plant Upgrade*, *DAILY ENVT. RPT.* (Jan. 25, 2010).

¹⁶⁶ Convention on Environmental Impact Assessment in a Transboundary Context, Sept. 10, 1997, 1989 U.N.T.S. 309, available at <http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf>. The convention gives States that signed the right to enter impacts assessments in other member states. *Id.* arts. 3-5. Micronesia is not a signatory, whereas the Czech Republic is a party. *See Status of Ratification*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXV-II-4&chapter=27&lang=en (last visited Apr. 27, 2013).

¹⁶⁷ *Czech Ministry Accepts Micronesian Input In Assessing Impact of Power Plant Upgrade*, *supra* note 165 (Jan Rovensky of Czech branch of Greenpeace stated: “In a broader context, the current case should put governments and corporations in developed countries on notice that states vulnerable to climate change are keen to explore new avenues to challenge decision on projects that contribute to climate change.”).

¹⁶⁸ *Id.*

¹⁶⁹ *See* Gabriella Hold, *PRUNĚŘOV EXPANSION APPROVED*, *THE PRAGUE POST* (May 5, 2010), <http://www.praguepost.com/news/4331-prunerov-expansion-approved.html>.

roadmap of how to explore and employ similar provisions to pursue actions against significant yet "second-tier" emitters.

B. Representative Parties and Class Action Litigation

Another approach that utilizes existing laws in novel ways would be to rethink the plaintiffs that bring these claims. Representative parties who will suffer significant impacts and are large in number across disparate communities could make the greatest strides. Similarly, countries might act in concert to deflect some of the specific scrutiny a single country might face if it brings claims on its own. These actions might advance efforts that could aid the most vulnerable small island states.

Representative parties that suffer similar impacts from across a particular region might serve as compelling claimants in an action against large emitters or "second-tier" defendants. Representative parties might bring these claims in relevant international fora or in U.S. district courts,¹⁷⁰ depending on where plaintiffs can sustain jurisdiction over defendants. For example, the plight of Palauan women demonstrates great possibility in the legal arena.¹⁷¹ During his impassioned analysis of "diplomats dither[ing]" at the climate summits in Copenhagen and Cancun, Palau Ambassador to the United Nations Stuart Beck decried the impotence of the UNFCCC meetings while his island lost land and the capacity to grow taro.¹⁷² This acutely impacts the women of the most vulnerable pacific islands. Beck explained, "[i]f the ladies can't grow taro, and it's generally a matriarchal task, they're going to move from that island. And that's a slow-moving kind of depopulation, but it's a real one nonetheless. . . . It's death by a thousand cuts, and every time somebody leaves the island, that's another cut."¹⁷³ A claim brought by women taro growers against a variety of large emitting entities might be an effective means of pursuing litigation and galvanizing myriad smaller lawsuits to arrest growing greenhouse gas emissions.

In addition to administrative efficiency, class action suits have been an effective mechanism for pooling resources and leveling the playing field between many similarly situated plaintiffs and powerful defendants in the U.S. It is a potentially powerful mechanism in the international arena as

¹⁷⁰ Kali Borkoski, *Kiobel v. Royal Dutch Petroleum: What's at Stake, and For Whom?*, SCOTUS BLOG (Sept. 30, 2012, 9:36 PM), <http://www.scotusblog.com/2012/09/kiobel-v-royal-dutch-petroleum-whats-at-stake-and-for-whom/> (discussing whether the ATS can apply even if all the violations occurred outside the United States).

¹⁷¹ See Friedman, *supra* note 52.

¹⁷² Friedman, *supra* note 52.

¹⁷³ *Id.*

well; and has been contemplated by other scholars and practitioners. Indeed, in her analysis of the feasibility of islanders seeking redress under the ATS, RoseMary Reed suggests that “[w]hile it is possible for a single individual or nation to bring this action, it may be even more powerful if several nations band together to form a class action and litigate this issue once.”¹⁷⁴ Professor Phoenix Cai makes a similar suggestion in the context of the World Trade Organization and expands on the promise of class actions in the dispute settlement mechanism to pool benefits and risks—including very damaging retaliation or extralegal contraction of aid.¹⁷⁵

The class action regime proffered for the WTO might be instructive in the international climate litigation context. When a member of the WTO violates a rule or trade term, the affected party may bring a complaint under the WTO’s dispute settlement regime.¹⁷⁶ The process and remedy for developing nations, however, suffers from similar concerns of retaliation and parties’ uneven resources.¹⁷⁷ In response, Professor Cai proposes a class action type mechanism that would allow developing nations to pool their complaints in cases against larger or more developed nations.¹⁷⁸ Importantly, the group of nations could also use the class action strategy against emerging developing nations, such as China and India,¹⁷⁹ and would afford least-developed countries the right to join as a third party in the dispute settlement process.¹⁸⁰ Although there would be burdens and risks to such an arrangement, particularly to the “lead” developing nation plaintiff,¹⁸¹ there would be many systemic benefits to class action litigation. Some of those benefits include: the ability to engage in litigation without risking extrajudicial threats of retaliation and without the fear of lengthy and costly litigation; the ability to bring suits that advance developing

¹⁷⁴ Reed, *supra* note 50, at 423. The author made similar calls in the context of a reparations claim. See generally Burkett, *Climate Reparations*, *supra* note 2.

¹⁷⁵ See generally Cai, *supra* note 62. More than two-thirds of the 153 WTO member nations are developing nations. *Id.* at 154. Cai explains, “despite their strength in numbers, developing nations as a group rarely participate in dispute settlement, a core aspect of the WTO. This is problematic because the WTO is essentially a self-enforcing system of reciprocal trade rights that relies on proactive monitoring by all members.” *Id.*

¹⁷⁶ In fact, it is incumbent on each WTO member to “police its interests.” *Id.* at 155. According to Cai, “[w]hen developing nations fail to initiate cases, the result is both under-enforcement of key WTO norms and skewed enforcement in favor of developed nations.” *Id.*

¹⁷⁷ Other concerns operate. See *id.* at 153 (discussing the inadequacy of the “prospective” WTO remedies, namely withdrawal of the offending measure or rule).

¹⁷⁸ *Id.* at 157 (describing the proposal in a nutshell).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 184-85.

nation agendas and interests; the valuable opportunity for coalition-building; and, perhaps most important, the benefits of greater developing nation participation “in the WTO system as a whole, especially in terms of perceived legitimacy.”¹⁸²

In the climate context, class action litigation can serve similar functions as proposed in the WTO context and remain consistent with what it seeks to achieve in the larger societal context. As Cai explains:

Class actions serve important societal functions. They are often used as a tool to compensate for small losses and enforce regulations. They enable less powerful groups to act as private attorneys general. They have also been effectively employed as a means for lasting social change, as during the civil rights era. As a result of all these dynamics, class actions more deeply embed social values embodied in laws in the greater society by giving voice to the otherwise voiceless.¹⁸³

Based on the climate forecast for small islands, it is critical for them to acquire that voice rapidly.

C. Interest Convergence and the Power of Publicity

The rule of law must reflect the interests of the entire international community.

—President Johnson Toribiong, Republic of Palau¹⁸⁴

The value of all of the proposed claims is perhaps greatest in their ability to spark and sustain a conversation about the disproportionate harms suffered by small island states. Publicity, the airing of injuries, and the shaming of large emitters might spur measurable reparative developments depending on the political moment in which it occurs. Perhaps the most common refrain from practitioners, scholars, and vulnerable communities alike is that engaging in the uphill battle of climate litigation, with the accompanying losses and false starts, remains important for its story-telling capacity.¹⁸⁵ This is particularly true in the human rights context.¹⁸⁶ It

¹⁸² *Id.* at 182-83, 189.

¹⁸³ *Id.* at 196.

¹⁸⁴ Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change, United Nations, (Feb. 3, 2012) available at http://www.un.org/news/briefings/docs/2012/120203_ICJ.doc.htm [hereinafter *UN Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change*].

¹⁸⁵ See discussion in Burkett, *supra* note 68. See also *UN Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change*, *supra* note 184 (“[S]ince [twenty] years of climate-change negotiations had shown that every State saw the phenomenon differently—as an economic problem, or an issue of geopolitics. ‘For us, it’s

served that purpose for the claimants in the Inuit action brought before the IACHR.¹⁸⁷ As more stories are told perhaps they collectively will have the power to incite rapid emissions reduction and aggressive and concerted adaptation action from the largest emitters. This section explores the power of shaming and the relevance of interest convergence in pursuing claims today despite their real or perceived shortcomings.

The story-telling value of these claims becomes clear when viewed alongside stories that are not told. Publicizing injustices has the power to catalyze efforts to redress those injustices. One example is in the redress claims of the innocent victims of the No Gun Ri massacre, in which U.S. soldiers killed hundreds¹⁸⁸ of Koreans fleeing their war torn villages.¹⁸⁹ Although the massacre occurred in 1950,¹⁹⁰ it was difficult to break the “curtain of secrecy shrouding the case” until the story was finally told by the Associated Press on September 30, 1999, some four decades later.¹⁹¹ Prior to that, the Korean government did not help the surviving victims

about survival.’ The International Court of Justice process would raise awareness of that reality, in addition to providing guidance to the negotiation track.”); Sinden, *supra* note 71, at 185 (arguing that even if a lawsuit “does not ultimately result in an enforceable order ending gas flaring,” framing it as a “human rights issue still serves an important rhetorical purpose by bringing into stark relief the power imbalance at root.”); Reed, *supra* note 50, at 427 (“While such a claim would cover new ground legally, the foundation in international human rights law is sufficient to make the claim. A claim such as this would certainly gather significant media attention. Thus, even if the claim were not legally successful, it could still be a success by bringing the world’s attention to the problem.”); Jacobs, *supra* note 39, at 108 (“Tuvalu’s proposed suit against the United States in the International Court of Justice is as much about obtaining relief as it is about obtaining a more public and hopefully sympathetic arena.”).

¹⁸⁶ Eric K. Yamamoto & Ashley Kaiyo Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 *ASIAN AM. L.J.* 5, 39 (2009) (“Human rights norms remain largely aspirational.”).

¹⁸⁷ See *id.*; see also Osofsky, *supra* note 45 (stating that Inuit representatives intended the petition to educate and encourage the U.S. to join the community of nations and even if the petition could not force behavioral change in the U.S. the petition puts pressure on the U.S. to engage in dialogue about alternatives).

¹⁸⁸ See Tae-Ung Baik, *A War Crime Against an Ally’s Civilians: The No Gun Ri Massacre*, 15 *NOTRE DAME J.L., ETHICS & PUB. POL’Y* 455, 463 (2001).

¹⁸⁹ See generally Tae-Ung Baik, *The Remedies for the Victims of the Jeju April Third Incidents*, in *RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN NORTHEAST ASIA, THE KOREAN EXPERIENCE* 94 (Gi-Wook Shin et al. eds., 2006) [hereinafter *Remedies for the Victims*]. For a description of the massacre of innocent Koreans by U.S. soldiers, see Baik, *supra* note 188 at 463-65.

¹⁹⁰ The massacre continued from July 26 to July 29, 1950. Baik, *supra* note 188, at 463-65.

¹⁹¹ *Id.* at 502.

gather information regarding the massacre, arguing that claims against the U.S. might help the North Korean government.¹⁹² With the news reports, however, the Korean government finally made remedies available to the victims, including compensation, memorials, and a museum.¹⁹³ Other examples of the power of publicity tell similar stories of eventual repair and reconciliation.¹⁹⁴

An important complement to the powerful public narrative is a receptive audience, particularly if that audience is the world leader small island nations seek to influence. Further, the offending party is more likely to remedy the injustice complained of if it is in its interest. In the international context this is the geo-political parallel to Derrick Bell's interest convergence theory, which Bell employed in the context of American racial politics.¹⁹⁵ Eric Yamamoto and Ashley Obrey argue that a country's desire to achieve democratic legitimacy might occur at the same moment a community or country is seeking redress for harms suffered because of that democracy's unjust actions.¹⁹⁶ The perception of a government's validity in terms of democratic governance and its commitment to civil and human rights determines its "democratic legitimacy."¹⁹⁷ Through the lens of the interest convergence theory, therefore, a dominant power will "countenance civil and human rights advances only when those gains simultaneously serve its larger political interests."¹⁹⁸ Yamamoto and Obrey argue that this may have allowed for rights advances in the United States for groups such as Native Hawaiians when the Obama Administration's first term commenced.¹⁹⁹ Although the latter may have been an overly sanguine

¹⁹² *Id.* at 502-03.

¹⁹³ Baik, *Remedies for the Victims*, *supra* note 188, at 94.

¹⁹⁴ See, e.g., Yamamoto & Obrey, *supra* note 186 at 41 (citing international criticism of America's racist Jim Crow democracy during the Cold War and President Reagan's reversal in his prior opposition to Japanese American redress in 1988). Interest convergence was also at play in instances Yamamoto & Obrey cite. See also Burkett, *Climate Reparations*, *supra* note 2.

¹⁹⁵ See generally Derrick A. Bell, Jr. *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

¹⁹⁶ See Yamamoto & Obrey, *supra* note 186, at 41. ("For modern redress advocates, this kind of American self-interest in redress lies at the heart of Derrick Bell's theory of interest-convergence—that a dominant power will countenance civil and human rights advances only when those gains simultaneously serve its larger political interests."). *Id.*

¹⁹⁷ *Id.* at 40.

¹⁹⁸ *Id.* ("Whether a country heals persisting wounds is increasingly viewed as integral. . . globally, to claim legitimacy in the eyes of the world as a democracy truly committed to civil and human rights (which affects a country's standing to participate in matters of international security and responsible economic development).") *Id.* at 7.

¹⁹⁹ *Id.* at 41, 50. ("Although reparations claims rarely succeed in court, most politically successful reparations or reconciliation movements have been inspired and shaped at crucial

assessment of President Obama's approach to reparatory action, elements of Yamamoto and Obrey's analysis may be instructive nonetheless.

In the climate context President Obama has repeatedly articulated concern about dangerous climate impacts.²⁰⁰ The most recent statement in his 2013 inaugural address suggested a recommitment to the hard work of reigning in U.S. emissions.²⁰¹ And, some are more optimistic as a result.²⁰²

Evidence of the applicability of this theory is legion and militates in favor of a continuous drumbeat of litigation and story-telling. Litigation, according to Yamamoto and Obrey, "serves as a lightning rod for recognition and responsibility and as a bully pulpit for community organizing about the injustice and need for system-wide reconstruction and reparation."²⁰³ They further state:

Sociolegal research suggests that international human rights claims are widely publicized through court challenges, in certain political settings, and alter over time what both government policymakers and the public come to view as 'right,' 'natural,' 'just,' or 'in their interest.' This in turn can help build public pressure.²⁰⁴

That need for pressure is widely recognized. Unsympathetic to the U.S.'s protestations to Palau's request for an advisory opinion and similar actions, Bangladesh Ambassador to the United Nations Abdul Momen complained: "The U.S. is saying, 'We are trying, but this is making it harder.' But unless you pressure, things never happen."²⁰⁵ Even conservative commentators in the U.S. acknowledge the important catalyst litigation can be, remarking, "[i]f you have sensitive climate change treaty negotiations

points by litigation."'). *Id.* at 40. This is an effort that might correct for the legitimacy lost under the Bush Administration, Yamamoto and Obrey argue. *Id.* at 41 (citing Abu Ghraib, Guantanamo Bay, secret detention centers, and post-9/11 domestic civil liberties violations).

²⁰⁰ See, e.g., Jeff Mason, *At Fundraisers Obama Talks Climate, Regaining U.S. House*, REUTERS, (Apr. 4, 2013, 1:48 AM), <http://www.reuters.com/article/2013/04/04/us-usa-campaign-obama-fundraising-idUSBRE93305920130404>. Although, President Obama's prior statements have yielded little tangible progress.

²⁰¹ Richard W. Stevenson & John M. Broder, *Speech Gives Climate Goals Center Stage*, N.Y. TIMES, Jan. 21, 2013 at A1, available at http://www.nytimes.com/2013/01/22/us/politics/climate-change-prominent-in-obamas-inaugural-address.html?_r=0 ("We will respond to the threat of climate change, knowing that failure to do so would betray our children and future generations," Mr. Obama said on Monday at the start of eight sentences on the subject, more than he devoted to any other specific area.").

²⁰² For example, Bangladesh Ambassador to the United Nations Abdul Momen, said he is confident the United States is going to be more receptive under a second Obama term. Friedman, *supra* note 52.

²⁰³ Yamamoto & Obrey, *supra* note 186, at 40.

²⁰⁴ *Id.*

²⁰⁵ Friedman, *supra* note 52.

going on, you have a compliant president and there is some looming international lawsuit pending, it can't help but move the negotiations forward."²⁰⁶ Further, it appears convincing that a country's "quest for enhanced international stature can shape that country's evolving responses to redress claims."²⁰⁷ This kind of interest convergence at the international level is also understood as correcting for the "reputational costs" of an action, or failure to act.²⁰⁸ There is some skepticism regarding the efficacy of reputational costs in the climate context.²⁰⁹ Indeed, the past twenty years suggest that these costs, if sizeable, do not operate in the current circumstances.²¹⁰ It might mean, however, that the hard work of SIDS litigation is not yet done and, therefore, the costs experienced by powerful large emitters have not yet been fully meted out.

IV. CONCLUSION

The concept of a "justice paradox" has been employed before. In his article *Chaos Theory and the Justice Paradox*, Dean Robert Scott describes the recurring conflict between effecting "present justice"—"[d]oes the law accomplish justice between the parties to any particular dispute?"—and "future justice"—"[d]oes the law appropriately regulate the conduct of other parties likely to have similar disputes" and make it less likely that similar misfortune will befall others.²¹¹ As Scott demonstrates, arbiters must meet both present and future justice to achieve a just outcome.²¹² They are, however, almost always intractably opposed.²¹³ Scott suggests

²⁰⁶ *Id.* (quoting Steven Groves, a fellow at the Heritage Foundation, a conservative think tank).

²⁰⁷ Yamamoto & Obrey, *supra* note 186, at 52.

²⁰⁸ See Badrinarayana, *supra* note 63, at 282; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1827 (2002); Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 573, 574 (2000), available at <http://scholar.harvard.edu/files/bsimmons/files/LegalizationIntlMonetaryAffairs.pdf>; see also Cai, *supra* note 62, at 181 (arguing that an additional value of class action litigation at the WTO is that the reputation harms of non-compliance or foot-dragging in compliance increases with the number of complainants).

²⁰⁹ Badrinarayana, *supra* note 63, at 283-84. "For example, core nations like the United States appear unaffected by the reputation cost of not signing the Kyoto Protocol, even though without its participation, international efforts to reduce emissions—and consequently—alleviate the threat to sovereign rights of Tuvalu and Maldives will prove ineffective." *Id.* at 284.

²¹⁰ *Id.*

²¹¹ Scott, *supra* note 6.

²¹² *Id.*

²¹³ *Id.* at 329-30 ("The legal profession is searching, even struggling, to define its role in a changing society. Much of this angst comes from a feeling that the legal community

that the legal profession abandon the handwringing that this paradox produces and embrace the lessons of Chaos Theory. In essence, instead of attempting to resolve the paradox, the profession should accept its chaotic nature—contradictions, disorder, and all.²¹⁴

It is not clear that this is an acceptable posture in the face of a changing climate and the injustices at base. Indeed, one can understand the paradox as articulated in this article as an antecedent one. In others words, while the law vacillates between the demands of present and future justice, it completely—and consistently—ignores the needs of the most vulnerable at the international scale. It has in its geopolitical context failed to provide clearly viable recourse for small island litigants. The law, therefore, moves along a spectrum that continually favors the most powerful and, accordingly, excludes the most vulnerable. The most vulnerable, then, are left with the formidable task of situating their claims within the constricted band of law's current patterns. The extent to which the legal infrastructure is able to effect just outcomes is circumscribed and may continue to be so if small island states are unable to pursue the patchwork of legal avenues, a few of which this article highlights.

A promising element of Scott's elucidation of the Justice Paradox, however, is that it leaves open the possibility for improvement through evolution. Scott writes: "Do not despair because law has fundamental contradictions. It is the very tension whose resolution we seek that keeps our legal system in a dynamic state of continuous renewal and repair. It is the dynamic of the Justice Paradox that keeps our legal system alive."²¹⁵ If the current patterns that consistently exclude at present are susceptible to the dynamism Scott describes, then it is feasible that in its next iteration the law will yield swift and comprehensive solutions to one of the greatest challenges in human history.

This article has attempted to take stock of viable legal avenues posited to date and push the conversation regarding effective legal and political avenues available to small island states. It does so fully cognizant of the formidable challenges of climate litigation in the current geo-political environment. It also does so fully aware of the bleak climate forecast for islands, and the rest of the globe. On balance, therefore, it hopes to make

hasn't made much progress in resolving what I will term the 'Justice Paradox.'").

²¹⁴ *Id.* at 349 ("So what is the lesson? We can either continue to challenge the theories of previous legal movements, or we can come to accept that any new movement must recycle old doctrine, but in doing so, will ultimately fail to construct an encompassing theory of law. There is no algorithm for a just society. Chaos in law describes human life. Thus, we in law must continuously be self-conscious, self-criticizing, self-analyzing, but above all, patient and accepting of the limits of our discipline.").

²¹⁵ *Id.* at 350.

clear that pressing this litigation is the only real option available. If there was one message Jon Van Dyke sought to make clear during his own work on the matter, it was that the other option is simply unviable.