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RISING SEAS AND DISAPPEARING ISLANDS: CAN ISLAND INHABITANTS SEEK REDRESS UNDER THE ALIEN TORT CLAIMS ACT?

RoseMary Reed

Abstract: Sea levels are rising as a result of increasing greenhouse gas concentrations and global warming. The rising seas threaten to submerge many Pacific Island nations within the next century. The island inhabitants have sought help from the global community, but thus far have been denied assistance. However, the island inhabitants could seek redress in U.S. District Courts against major greenhouse gas emitters under the Alien Tort Claims Act. To satisfy the ATCA’s requirement that tort claims must be in violation of international law, the islanders could claim that they are victims of environmental human rights violations and possibly genocide. While genocide is currently a recognized claim under the ATCA, an environmental human rights claim would be groundbreaking. Nevertheless, the international legal community recognizes environmental human rights. Such a claim is strengthened by the fact that some of the island inhabitants are indigenous peoples who have a special, respected status in international law. Thus, all the pieces are in place to make this claim. In order to survive the rising seas, the island inhabitants need foreign assistance, and the ATCA could be the best way to bring global attention to their plight and get the assistance they need.

I. INTRODUCTION

Greenhouse gas concentrations in the atmosphere are rising, resulting in a number of environmental consequences. One of the more pressing consequences is rising sea levels, which threaten to destroy and submerge small island states in the Pacific Ocean. The approximately 300,000 inhabitants of these islands could at the end of the century find their homes under water, but there is still time to find a solution to the problem. One option is to bring an action, in United States district courts, under the Alien Tort Claims Act (“ATCA”), seeking damages for violations of their environmental human rights and threatened genocide. The ATCA allows aliens to use United States district courts for tort actions claiming violations of international norms.

This Comment seeks 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. Part II discusses the nature of the problem facing Pacific Island nations. Part III describes the ATCA, its history, elements, and modern use. Part IV reviews the jurisprudence
surrounding environmental human rights, claims for these and related rights under the ATCA, and these rights in the context of indigenous peoples. Finally, Part V addresses potential claims for Pacific Island nations under the ATCA.

II. NATURE OF THE PROBLEM

A. Greenhouse Gases, Global Warming, and Sea Level Rise

Although debate still exists, the vast majority of scientists and experts agree that global temperatures are rising due to increased concentrations of "greenhouse gases" in the atmosphere. These gases, carbon dioxide, methane, and nitrous oxide, are the by-product of human activity, most importantly the burning of fossil fuels. As these gases build up they prevent infrared radiation from escaping the earth and temperatures subsequently increase. The build up of greenhouse gases and the rise in temperature affect the environment in numerous ways, including changing weather patterns and raising the sea level.

Sea level rise due to global warming occurs for three reasons: first, a rise in temperature of the air and sea causes thermal expansion of the water; second, the increased temperature causes polar ice caps to melt at an increased rate; and third, land based glaciers melt at a faster rate because of the elevated temperatures. Both increased air temperature and the projected increase in rainfall have been, and will continue to be, major contributors to sea level rise. The Intergovernmental Panel on Climate Change ("IPCC") estimates that sea levels will rise fifteen to fifty centimeters by 2100.

B. Rising Sea Levels and Pacific Island Nations

Pacific Island nations, with their unique geography, are particularly threatened by rising sea levels. These islands have very little dry land mass,
and what does extend above sea level is often no more than several feet above sea level. A representative example is the Marshall Islands, which is comprised of five total islands, the largest of which is Majuro, where half the population lives. It is estimated that a one-meter rise in sea level would submerge over 80% of Majuro. There is evidence of rising sea levels in the Marshall Islands. For example, World War II Japanese war bunkers dug 100 yards from the water line are now submerged in several feet of water. Additionally, the grave markers of a cemetery that once stood on dry land now barely break the surface of the water. Tuvalu, another Pacific Island nation, is in a similar predicament. Its government estimates that its 12,000 residents will be displaced as the island is submerged and eroded over the next fifty years.

In addition to the eventual loss of their homes due to submersion, these nations face more immediate threats. For example, these low-lying atolls are particularly dependant on the coral reef that surrounds their land mass. The reef serves several functions, and any change in water level or temperature will inhibit these necessary functions. First, it helps to protect the island from rough waves and subsequent erosion because much of the force of the wave is removed when it breaks over the coral reef. Second, the coral reefs are home to many marine species; in fact, coral reefs have been known as the “rainforest of the ocean.” This biodiversity helps maintain a balance that is necessary to the continued survival of those marine species. In addition to containing a great degree of biodiversity, these coral reefs are home to much of the island inhabitants’ primary protein source, fish. Thus, while nations slowly lose their livable land mass, the rising sea levels will also leave them more vulnerable to rough seas, erosion, and decreased food supply.

Another threat to Pacific Island nations is loss of freshwater supply. Many of these nations do not have an independent freshwater source, but rather rely on saltwater slowly percolating and filtering up through coral and
sand, until it reaches the surface with the salt removed. These pools of freshwater form under the island and a rise in sea level of as little as half a meter could destroy half the freshwater supply on some islands.

Last, these Pacific Island nations are particularly threatened by storms and other adverse weather conditions. Scientists believe that as greenhouse gases build up and temperatures rise, weather patterns, particularly precipitation, will change. Recent studies have predicted that tropical storms and cyclones will not only become much more frequent, but also more intense. These small islands are not well equipped to handle an increase in storms and storm intensity. They are dependant on tourism for much of their gross national product; thus a drop in tourism could have serious economic effects. Also, being small nations, they do not have large disaster relief resources, leaving them more vulnerable to storms and less able to recover from them. As a result of these threats, small island nations in the Pacific are facing very serious threats to their continued survival.

C. Local and International Awareness of Rising Sea Levels

These Pacific Island nations are not unaware of their predicament, and to that end, have made efforts to gain the attention and support of the international community. In the summer of 2001, the 31st Annual Pacific Islands Forum took place in Nauru and a major focus was the increasing threat posed to member nations by rising sea levels. The Pacific Islands Forum is made up of representatives from Australia, Cook Islands, Fiji, Kiribati, Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. In response to the increasing threat, the Pacific Islands Forum has demanded a meeting with U.S. President George W. Bush. President Bush has said the United States will back out of the Kyoto Protocol and its call for a reduction in greenhouse gas emissions because it places an unfair burden on...
the United States. The island nations want to urge President Bush to do more to reduce greenhouse gas emissions and to back the global emission cuts put forth in the Kyoto protocol. The president of Nauru, Rene Harris, contends that with so many nations threatened by rising sea levels it would be a "modern holocaust" if the world did not address the problem. The Pacific Islands Forum would also like a meeting with the United Nations General Assembly to discuss the problem and win support for their cause.

Nor has the problem of rising sea levels gone unnoticed by the global community. In the early 1990s, concern over the impact of increased greenhouse gases on the global climate prompted the adoption of the United Nations Framework Convention on Climate Change ("UNFCCC"). By September of 2000, 186 nations had ratified the treaty. The UNFCCC does not require parties to reduce greenhouse gas emissions, but it does note the particular vulnerability of low-lying atolls and their inhabitants. The first international agreement requiring parties to make a quantifiable reduction in greenhouse gas emission was the Kyoto Protocol of 1997. For example, it required some of the Annex I states that signed and ratified it to reduce emissions to an average of 5% below 1990 levels during the 2008–2012 period. While the environmental community may have found the Kyoto Protocol to be a very promising beginning, the reality of the Kyoto Protocol has been far less auspicious. Many Annex I nations, including industrialized nations like the United States, who initially agreed to cut greenhouse gas emissions, are in fact increasing emissions.

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27 Id. supra note 14.
28 Id.
29 Id.
32 UNFCCC, supra note 30, at pmbl. ("Recognizing further that low-lying and other small island countries . . . are particularly vulnerable to the adverse effects of climate change.").
34 Id. Annex I nations are called this because they are the Annex I nations to the United Nations Framework Convention on Climate Change, and are developed nations with existing or emerging market economies. See UNFCCC, supra note 30.
35 See Kyoto Protocol, supra note 33, art. 3.
In the United States, a change in administrations resulted in a change in support for the Kyoto Protocol. The United States signed the Kyoto Protocol under the Clinton Administration in 1997, but Congress failed to ratify it. President Bush campaigned in support of reducing greenhouse gases, but has since changed his stance. Many commentators cite heavy lobbying and hefty campaign contributions by the oil, gas, coal, and energy industries for this policy shift that favors big business. While the Bush Administration acknowledges that global warming is a serious problem that should be addressed, it will not risk the economy in favor of the environment. So, while there is diplomatic and political support for a reduction in greenhouse gas emissions, in reality the cuts are not occurring.

D. Options for Threatened Nations

There are only a few practical options for threatened Pacific Island nations, if the other nations of the world continue to ignore the problem and do not cut greenhouse gas emissions to a level sufficient to mitigate sea level rise. Retreating to higher ground is not a viable option. These islands simply do not have enough usable land mass that lies out of the reach of the rising sea. The ideal option for small island nations would be to have a worldwide reduction in greenhouse gas emissions. But, given the global economic dependence on fossil fuels and industrial processes that produce greenhouse gases, a dramatic reduction is very unlikely. Therefore, in order to fund relocation and mitigation strategies these nations must seek financial assistance from the international community, and more aptly from the world leader in greenhouse gas emission, the United States.

At first blush it seems there are several possible legal avenues for these nations to seek the necessary financial assistance. First, these nations could seek redress under the Kyoto Protocol. But, since the Bush administration has declined to ratify the protocol, this option is foreclosed.
Another option is to pursue a remedy under the Rio Declaration, which the United States does recognize. Principle 2 of the Rio Declaration says that each state has "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of area beyond the limits of national jurisdiction." Because the Rio Declaration itself is not binding law, an action based on a violation of the Rio Declaration would be an action for a breach of customary international law. Similarly, a tort action could be brought to remedy this harm. Any of the preceding claims would need to be brought in the appropriate court, most likely the International Court of Justice ("ICJ") or a United States district court. The United States, however, does not submit to the jurisdiction of the ICJ. Thus, the best option is to bring an action in United States district court under the Alien Tort Claims Act.

III. ALIEN TORT CLAIMS ACT

The Alien Tort Claims Act is a 200-year-old statute that grants United States district courts "original jurisdiction of any civil action by an alien for a tort only, committed in the violation of the law of nations or a treaty of the United States." The statute was little used until twenty years ago when the Filartiga v. Pena-Irala decision resurrected it as a tool for aliens to seek redress for human rights violations. Filartiga v. Pena-Irala allowed the parent of a Paraguayan torture victim to sue a former Paraguayan official for harms inflicted while the son was in police custody. Thus began the modern use of the ATCA, which has included suits for torture, summary execution, disappearances, war crimes, genocide, prolonged arbitrary detention, and in some cases cruel, inhumane, and degrading treatment.

A successful claim under the ATCA must satisfy three basic elements: (1) an alien sues (2) for a tort (3) that was committed in violation of the law of nations. Given that "alien" is defined rather clearly in United States

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47 See Rio Declaration, supra note 46, princ. 2.
48 Larson, supra note 10, at 515.
50 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
51 Id.
courts, this element has not been the subject of any litigation.\textsuperscript{54} The second element has been the subject of judicial and academic discussion as to how it should be interpreted,\textsuperscript{55} but by far the most troublesome aspect is the third element.\textsuperscript{56} Because there is no authoritative definition of everything encompassed in "international law," determining what constitutes the "law of nations" has proven to be a difficult task for the courts.\textsuperscript{57}

Because the ATCA lay dormant for much of its existence, courts still struggle with defining the sources of the law of nations or violations of this body of law.\textsuperscript{58} Additionally, the question remains open because the United States Supreme Court has yet to rule on this issue.\textsuperscript{59} \textit{Filartiga} instructed courts to look at the norms of international law to identify a norm enforceable under the ATCA in United States courts.\textsuperscript{60} A norm will fall within the law of nations if it is universal or widely accepted by the global community, definable, or specific so that the court can determine when a violation has occurred, and obligatory or binding.\textsuperscript{61} Notably, courts have rejected the idea that the law of nations is a static principle.\textsuperscript{62} Rather, courts have embraced it as dynamic and changing as the international community recognizes new rights and duties.\textsuperscript{63}

When the ATCA first began to be used in the 1970s, there was debate as to whether it could be applied only to state actors. In \textit{Filartiga}, the defendant was a former state official and thus state action was not at issue. But, the issue was squarely addressed in \textit{Kadic v. Karadzic}, where the court found that non-state actors were within the reach of the ATCA.\textsuperscript{64} Specifically, the court said:

\begin{quote}
We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item Id.
\item Id.
\item \textit{Filartiga} v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).
\item Id.
\item Id.
\item \textit{Filartiga} v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).
\item Id.
\item Id.
\item \textit{Kadic v. Karadzic}, 70 F.3d 232, 239 (2d Cir. 1995).
\end{itemize}
\end{footnotesize}
undertaken by those acting under the auspices of a state or only as private individuals.\textsuperscript{65}

The court gave torture, piracy, slave trading, genocide, war crimes, and violations of international humanitarian law as examples of such conduct for which there is individual, as opposed to state, responsibility.\textsuperscript{66} In addition, there is a well-settled principle that non-state actors acting in close concert or cooperation with a state are held to be acting as a state and therefore subject to the same standards of conduct as a state.\textsuperscript{67} In Beanal v. Freeport-McMoRan, Inc., the court set forth a four-part test to determine if a private actor is in such close concert with a government as to be considered a "state actor."\textsuperscript{68} The court found that only one of the following need be satisfied: (a) the existence of a strong nexus between the State’s and the defendant’s conduct, (b) the State and the defendant operate interdependently, (c) the defendant participated jointly with the State or its agents, or (d) the defendant performed a function traditionally carried out by the public sector.\textsuperscript{69} Thus, where international law imposes a duty upon non-state actors, causes of action for breaches of this duty can be brought under the ATCA.

It is still unclear whether the ATCA can be used to enforce violations of environmental human rights. No court has squarely addressed this issue, but if environmental human rights can be shown to be an international norm, and part of the law of nations, then such claims could be brought in United States district courts.

IV. INTERNATIONAL ENVIRONMENTAL LAW AND ENVIRONMENTAL HUMAN RIGHTS

Both environmental law and environmental human rights can be part of the law of nations. Each has its own body of international law supporting it and each may rise to a level sufficient to be recognized as part of the law of nations under the ATCA. Because 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

\begin{itemize}
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{68} See Beanal, 969 F. Supp. at 377-79.
\item \textsuperscript{69} Id.
\end{itemize}
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.

A. Environmental Jurisprudence in the Context of the ATCA

As noted above, there is very little litigation involving the ATCA and even less involving environmental claims. To date only three cases have discussed environmental claims under the ATCA, and only one of those discusses an environmental human right. While these cases leave many questions unanswered, they must be examined for the guidance they do provide.

In Amlon Metals, Inc. v. FMC Corp., the plaintiff sued FMC for fraudulently shipping hazardous materials. The court found that while this tort was mentioned in the Stockholm Declaration (Principle 21) and in the Restatement (Third) of Foreign Relations Law, the environmental claims were insufficient to establish a violation of international law. Citing Filartiga, the court found that the plaintiff failed to demonstrate universal recognition of the wrongfulness of fraudulently shipping hazardous materials. The lesson here is that mention in one international declaration (the Stockholm Declaration) and a Restatement is not sufficient to establish a violation of the law of nations.

Aguinda v. Texaco discussed international environmental law as well as the establishment of the law of nations under the ATCA. In Aguinda, the plaintiff sued a multinational corporation for significant environmental destruction, including intentional release of toxins into the environment, damage to pristine rainforests, and destruction of streams and aquifers. Specifically, the plaintiff wished to certify a class of over 30,000 Ecuadorians whose environment was damaged by the oil company’s practices in Ecuador. The court found that the defendant’s actions could amount to a violation of the ATCA if there was a sufficient magnitude of

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73 id. at 669-71.
74 id.
75 Aguinda, 1994 U.S. Dist. LEXIS 4718.
misuse of hazardous waste. Additionally, the court defined the law of nations as “customary in nature, to be defined by the usages, solemn commitments and clearly articulated principles of the international community.” Ultimately though, the court dismissed the case on jurisdictional grounds and plaintiff’s failure to join an indispensable party.

The claims made in Beanal v. Freeport-McMoRan, Inc. are most similar to those presented here. In Beanal, part of the plaintiff’s claim was an allegation of cultural genocide due to destruction of the environment of the indigenous people of Irian Jaya, Indonesia. The initial claim was dismissed without prejudice, allowing the plaintiff to more specifically plead his allegation of cultural genocide. However, after being given leave to amend his complaint, the plaintiff was unable to plead his allegations with the specificity required by the federal rules because he was pleading too conclusively, and the claim was dismissed with prejudice. Nevertheless, this ruling suggests that claims for environmental human rights violations may be brought under the ATCA if pled with sufficient specificity.

In summary, the few cases that have addressed environmental claims under the ATCA have not addressed environmental human rights violations. Thus, because human rights violations are more established under the ATCA, it could be helpful to the plaintiffs to frame their complaint in terms of environmental human rights, rather than environmental law. Therefore, this Comment will next examine ATCA cases more generally to discern what the courts consider valid sources of the law of nations and how this standard can be applied to claims for environmental human rights violations.

B. ATCA Standards for the “Law of Nations”

Courts have had difficulty defining what will satisfy the “universal, definable, and obligatory” standard for a source that would comprise the “law of nations.” Only a few cases have discussed what might satisfy this standard, but none have provided a clear definition. Courts, when trying to determine if the tort in question is a violation of the law of nations, have

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78 Id. at *24.
79 See id. at *21.
82 Id. at 372.
83 See Beanal, 969 F. Supp. at 384.
84 Beanal v. Freeport McMoRan, Inc., 197 F.3d 161, 169 (5th Cir. 1999).
85 Ososky, supra note 52, at 356.
86 Id.
looked to case law, Restatements, treatises, academic opinions, international agreements, United States law, and foreign law to determine if the violation is contrary to "universal, definable and obligatory" international norms. However, no court has stated what combination, if any, of the above sources would suffice. One court did indicate that mere mention, together with a clear definition, articulated in international agreements or conventions, case law, and the Restatement would be enough to meet the standards required by the ATCA. Given the lack of an articulated consensus by the courts, the best way to determine the law of nations is to examine the sources relied upon by the courts to establish international norms.

One place to begin to discern what constitutes the law of nations is to look at the sources used in Filartiga. Although Filartiga was the first modern case decided under the ATCA, it was similar to the recent cases discussed above in that it failed to define what sources constitute the law of nations. But Filartiga found torture to be in violation of the law of nations after analyzing a number of sources.

In Filartiga, the court first analyzed the United Nations Charter and its mandate for the "respect for, and observance of, human rights and fundamental freedoms." It noted that while this document did not specifically prohibit torture, there was no dissent from the view that it is a guaranteed human right to be free from torture. The court found this view solidified by the Universal Declaration of Human Rights ("UDHR"), which states that "no one shall be subjected to torture." The court justified its reliance on these instruments by citing scholarly works declaring the UDHR to be a source of binding international law. The court also relied on another non-binding General Assembly resolution, the Declaration on the Protection of All Persons from Being Subjected to Torture.

After the court completed its review of U.N. resolutions it looked to other international accords, regional conventions, state constitutions, and United States State Department reports to find further support for the

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88 Osofsky, supra note 52, at 356.
89 See Forti, 672 F. Supp. at 1541-43.
90 See generally Filartiga v. Pena-Irala, 630 F.2d 876 (2d. Cir. 1980).
91 Id. at 881.
92 Id. at 882.
93 Id.
94 Id. at 883.
95 Id. at 882.
existence of an international norm prohibiting torture. Indeed, the court set out to prove torture's "universal renunciation in the modern usage and practice of nations." The court made specific reference to the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights. Next, the court referenced fifty-five national constitutions that prohibit torture as additional evidence of the universal disdain for such acts. Lastly, the court referenced a United States State Department report discussing the universal abhorrence for torture noted during diplomatic contacts with foreign nations. In sum, the court in *Filartiga* found implied coverage in the U.N. Charter; mention in U.N. General Assembly resolutions, other international and regional conventions, and state constitutions; as well as presence in a declaration by the United States government to be sufficient to establish torture as a violation of the law of nations.

Although, *Filartiga* did not define a specific standard for determining whether the action complained of is covered by the law of nations, certain generalizations are possible. These generalizations are useful in determining how much usage or mention in international law is sufficient to establish international norms and the law of nations. First, while torture is not specifically mentioned in the U.N. Charter, the court still found that this general declaration on human rights implied a prohibition of torture. Further, the court found the general statement of human rights could be expanded to include a specific act, in this case torture, by finding support for the prohibition of torture in a non-binding resolution. This leads to the conclusion that the reference to human rights in the U.N. Charter is fluid and can include rights that develop over time.

Second, the court found an expression of support for the prohibition of torture persuasive even in the absence of an enforcement mechanism. This was particularly evident in the case of the Paraguayan Constitution. While the Constitution prohibited acts of torture by the government, the torture at issue in *Filartiga* was committed in Paraguay by Paraguayan

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96 Id. at 884.
97 Id. at 883.
98 Id. at 884.
99 Id.
100 Id.
101 Id. at 885.
102 Id. at 882.
103 Id. at 883.
104 Osofsky, supra note 52, at 367.
officials. Nonetheless, the court, apparently unbothered by the irony in this, cited the Paraguay Constitution as evidence of the international norm. Thus, the opinion indicates that existence of international declarations is sufficient evidence of an international norm, even if those declarations are not always enforced.

Third, while the court required that international norms be obligatory, few of the declarations cited are legally binding. Generally, the declarations cited in Filartiga made no provision for jurisdiction, methods of enforcement, statutes of limitations, or penalties. Just as treaties do not require an enforcement mechanism to be binding, it seems that under the ATCA, declarations creating international norms do not require enforcement mechanisms to be considered obligatory.

Last, the court did not require true universality to meet the standard of "universal." The declarations cited by the court did not cover all the nations of the world, and there was a noticeable lack of support for the international norm from Africa, Australia, and Asia. In fact, while the International Covenant on Civil and Political Rights has over one hundred countries as signatories, the other agreements are far more limited in scope. Thus, the Filartiga court finds that these declarations satisfy the "universal" requirement of the ATCA, yet several nations and some continents are not represented as supporters of the international norm.

Relying on Filartiga, future plaintiffs alleging a violation of the law of nations would need to show declaratory recognition of the international norm. This recognition would ideally include General Assembly resolutions, a few international or regional conventions, incorporation into many national constitutions, scholarly support, and United States governmental acknowledgement. Importantly, there should not be many dissenters from this norm. However, the international norm need not be comprehensively geographically recognized, nor include specific enforcement mechanisms. Further, states that endorse the international norm, yet violate it in practice, will not defeat the establishment of an international norm.

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105 Filartiga, 630 F.2d at 878.
106 Id. at 884.
107 Osofsky, supra note 52, at 367.
108 Id.
109 Id.
110 Id. at 368.
C. Genocide in International Law

While it may not seem obvious at first, genocide could be a result of severe environmental destruction, and thus a violation of international and environmental law. In Beanal, the plaintiff urged that destruction of one’s homeland was a form of genocide because it deprived the people of their ability to survive in their traditional way. Specifically, Beanal alleged the defendant was guilty of cultural genocide by destroying the native lands of the Amungme tribe, which resulted in their forced relocation to foreign areas. While the court found that genocide was clearly a violation of international law, it said Beanal’s claim of cultural genocide was unconvincing. But the court did grant him leave to amend his complaint to make his claims of actual or cultural genocide more clear.

D. General Environmental Human Rights

The human right to a healthy environment is supported implicitly and explicitly in numerous international, regional, and national legal works. It is important to detail these rights because it is a violation of these rights that will form the foundation of the ATCA claim.

1. International Sources

Several international human rights instruments have been interpreted as supporting environmental human rights. The UDHR contains several sections applicable to the right to a healthy environment, including sections focusing on the right to standard of living, housing, food and free development of peoples. Similarly, the International Covenant on Economic, Social and Cultural Rights recognizes the right to an adequate standard of living, right to health, including improvements to the environment, and the right to dispose of one’s natural resources.
Additionally, the International Covenant on Civil and Political Rights supports these same rights in several of its provisions.\(^{18}\)

Although the United Nations General Assembly has yet to adopt a resolution expressly recognizing the human right to a healthy environment, it has recognized the connection between environmental protection and the advancement of human rights.\(^{19}\) Most importantly, in 1990 the General Assembly recognized “that all individuals are entitled to live in an environment adequate for their health and well-being.”\(^{120}\) In the same year the U.N. commissioned a report on the preservation of the environment and the promotion of human rights. In 1994, the results of the study were reported in the Ksentini Final Report, which incorporated the Draft Principles on Human Rights and the Environment.\(^{121}\) This report includes an extensive survey of environmental human rights sources and concludes that there is “universal acceptance of the environmental rights recognized at the national, regional and international level.”\(^{122}\) The Draft Declaration incorporated into the Ksentini Report also recognizes that “all persons have the right to a secure, healthy, and ecologically sound environment.”\(^{123}\)

More recently, the Bizkaia Declaration, a product of the International Seminar of Experts on the Right to the Environment and organized by the U.N., declared the explicit right to a healthy environment.\(^{124}\) Under Article 1, “Everyone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment . . . which may be exercised before public bodies and private entities, whatever their legal status under national and international law.”\(^{125}\) These international sources are clear evidence of the acceptance of the right of all individuals to a healthy environment.

In addition to these sources supporting environmental human rights, international law recognizes a general duty not to damage the environment, particularly the environment of others. The Stockholm Declaration, adopted by the Stockholm Convention in 1972, established standards for

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\(^{22}\) Id. at 58.


\(^{25}\) Id.
environmental protection. Specifically, Principle 21 said nations have "the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction." In 1992 the Rio Declaration was adopted by 176 nations and reiterated the standards in the Stockholm Declaration. Principle 2 of the Rio Declaration adopted Principle 21 of the Stockholm Declaration and added that states have the right to pursue "their own environmental and development policies."

2. Regional and National Sources

The right to a healthy environment is also recognized by several regional and national instruments. Both the African Charter on Human and People’s Rights and the San Salvador Protocol state that people have the right to live in a healthy environment. Over seventy countries endorse these two agreements and pledge adherence to the principles set forth. Additionally, the over sixty national constitutions have specific provisions relating to the environment, and many national legislatures have enacted provisions to help people realize and enforce the right to a healthy environment.

3. Judicial Opinions

Courts have supported the right to a healthy environment in many opinions. Successful suits against private polluters have demonstrated that if the plaintiff can meet the many qualifications, United States courts are willing to recognize and remedy environmental degradation. In other countries there have been successful suits against governmental entities

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127 Id.
128 See Rio Declaration, supra note 46.
129 Id. princ. 2.
132 See Ksentini Report, supra note 121, at 58-59.
charged with protecting the environment. Of note is the opinion by the Philippines Supreme Court in *Minors Oposa v. Factoran.* In this case minors, represented by their parents, sued the Philippine Secretary of the Department of Environment and Natural Resources to compel the cancellation of timber contracts. In supporting the constitutional right to a healthy environment, the court was particularly concerned with the rights of future generations. Courts in Colombia, Chile, Ecuador, and Peru have also recognized the right to a healthy environment. Some courts have gone even further and granted environmental protections more expansive than those provided by their constitution.

There is extensive recognition of the right to a healthy environment both explicitly and implicitly at the international, regional, and national levels. This support is supplemented by the general recognition of the necessity of a healthy environment and the right of a state, or of individuals, to have such an environment. In *Filartiga,* the court found an international norm existed because the UN charter created general human rights. These rights were then expanded to include a ban on torture on the basis of non-binding UN resolutions, as well as international and regional agreements, national constitutions, and the United States State Department.

As demonstrated above, there is extensive support for recognizing environmental human rights as an international norm. First, there is the general declaration of human rights in the UN Charter. This can be expanded to include environmental human rights through other UN resolutions, namely, the UDHR and The International Covenant on Economic, Social and Civil Rights. Second, there is recognition of the right by the General Assembly in 1990, the Ksentini Report, and the Draft Principles on Human Rights and the Environment. This right has additional support in international and regional agreements, such as the African Charter and San Salvador Protocol. Lastly, environmental human

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133 Osofsky, *supra* note 52, at 376-77.
135 Id. at 7.
136 Osofsky, *supra* note 52, at 376-77.
137 Id. at 377-78.
139 *Filartiga v. Pena-Irala,* 630 F.2d 876, 881 (2d. Cir. 1980).
140 See id. at 882-84.
142 See infra Part IV.D.1.
143 Id.
144 See infra Part IV.D.2.
rights are recognized in judicial opinions from many countries and in many nations' Constitutions. In sum, the nature and quality of these sources overlap with the sources cited in *Filartiga*, and thus should be sufficient for a court to recognize the right to a healthy environment as part of the law of nations. Additionally, judging by current trends and the increasing awareness of the importance of a healthy environment, this recognition only stands to increase.\(^{143}\)

E. Environmental Human Rights in the Context of Indigenous Peoples

The greatest hurdle facing Pacific Island nations in making a claim under the ATCA is establishing a violation of international norms. As outlined above, because there is greater international recognition for human rights, an environmental human rights claim may be more successful than a strict environmental law claim.\(^{146}\) Such a claim is bolstered by the fact that not only are environmental human rights at issue, but also the rights of indigenous peoples. Indigenous peoples are broadly defined as the living descendants of pre-invasion inhabitants of a land now dominated by others.\(^{147}\) While not all of the threatened Pacific Island nations have populations that would qualify as indigenous, some do. For example, the Marshall Islands were occupied by the Spanish, Germans, and Japanese before ultimately coming under the control of the United States.\(^{148}\) The United States proceeded to use the islands to test nuclear bombs, evacuating or relocating inhabitants as necessary.\(^{149}\) While the island nation has since gained its freedom, it is still highly influenced by these invasions and is making legislative efforts to preserve its native culture and history.\(^{150}\) If the native culture is to be maintained it must be in the face of this western presence.

International recognition of the importance of preserving native culture favors making a claim under the ATCA. The following section outlines the international community's strong support for the rights of indigenous people.

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\(^{143}\) See supra Part IV D.

\(^{144}\) See infra Part IV.

\(^{145}\) S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3 (1996).


\(^{147}\) Id.

1. **International Conventions**

   The special right of indigenous peoples to a healthy environment is supported in several international conventions. The Rio Declaration not only sets forth standards to protect the environment, but also acknowledges the unique position of indigenous people. Specifically, states should support indigenous peoples and their quest for sustainable development. The 1994 Draft Declaration of Principles on Human Rights and the Environment also provides clear and explicit protection to indigenous peoples. Similarly, the Universal Declaration of Human Rights supports the human right to culture. Lastly, the International Covenant on Civil and Political Rights also implicitly supports these same rights.

2. **Regional and National Sources**

   There are many regional covenants and national constitutions that recognize the special right of an indigenous population to a healthy and sustainable environment. In the Declaration of Principles of Indigenous Rights by the Fourth General Assembly of the World Council of Indigenous Peoples, Principle 13 states that "no action or course of conduct may be undertaken which, directly or indirectly, may result in the destruction of land, air, water, sea, ice, wildlife, habitat or natural resource without the free and informed consent of the indigenous peoples affected." Under the Inter-American Declaration on the Rights of Indigenous Peoples, indigenous people are entitled to the human right of a "healthy environment." Additionally, as of 1998, fifty nations have explicitly recognized a right to a healthy environment in their constitutions, and an additional thirty-three nations have recognized a right to a healthy environment in their constitutions.

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151 See Rio Declaration supra note 46, princ. 22.
152 See id. "Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development." Id.
153 1994 Draft Declaration of Principles on Human Rights, arts. 5, 8, 20, reprinted in 3 RECIEL 259 (1994). Part II (14) states; "Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea, ice, wildlife or other resources." Id.
154 See UDHR, supra note 116, arts. 3, 22, 25, 28.
155 International Covenant on Civil and Political Rights, supra note 118, art. 1.
have recognized a duty to protect or defend the environment.\textsuperscript{158} Thus, the aggregation of international, transnational, and regional documents that support indigenous peoples' environmental human rights makes a compelling case that they are universal, definable, and obligatory, and are thus international norms within the "law of nations."

3. Judicial Opinions

In addition to the rights recognized in international conventions and agreements, indigenous peoples have found a special position in judicial opinions addressing environmental questions. This may be because humans existing in a degraded environment are exposed to such risks as diminished health, economic hardship, and loss of culture.\textsuperscript{159} These risks are particularly profound for indigenous peoples who tend to be the most directly tied to the damaged land.\textsuperscript{160}

Both international human rights tribunals and national courts have acknowledged indigenous peoples' special relationship to the land and the needs that arise out of that relationship. For example, the Inter-American Commission on Human Rights found that the rights of the Yanomami of Brazil were violated when a road was built through their territory causing extensive environmental damage.\textsuperscript{161} The Commission found their rights to life, liberty, personal security, and preservation of health and well-being were violated. Similarly in \textit{Lubicon Lake Band v. Canada},\textsuperscript{162} the U.N. Human Rights Committee found that the Lubicon Lake Band had a fundamental right to culture, and its ability to control its natural resources was directly tied to this right. The committee relied upon the International Covenant on Civil and Political Rights and its provision protecting the cultural rights of minorities.\textsuperscript{163} Lastly, several Latin American courts "have stated without reserve that the right to a healthy environment is a fundamental human right."\textsuperscript{164} Taken together, these opinions demonstrate the special status of indigenous peoples and the courts' recognition of their environmental human rights.

\textsuperscript{158} Lee, supra note 131, at 314.
\textsuperscript{159} Ofosky, supra note 52, at 388.
\textsuperscript{160} ANAYA, supra note 147, at 104-07.
\textsuperscript{161} Resolution N 12/185, Case No. 7615 (Brazil), Mar. 5, 1985.
\textsuperscript{163} Id.
4. Academic Works

Academic works are important in determining the law of nations. This reliance on academic works is not unique to the ATCA; it is also practiced by the ICJ. Article 38 of the ICJ statute says when the court is deciding disputes it shall look to "[t]eachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law." There is significant academic support for the rights of indigenous peoples with respect to their environment. S. James Anaya, a prominent international law scholar, provides an extensive discussion of indigenous peoples' rights and places some emphasis on their rights to native lands in his book, *Indigenous Peoples in International Law*. He points out that several international indigenous rights conventions have provisions recognizing indigenous peoples' rights to native lands. Additionally, Raidza Torres, in his article, "The Rights of Indigenous Peoples," published in 1991, predicted the rise of rights of indigenous people and an increased awareness and recognition of their importance. Hari Ofosky provided a more recent review of the rights of indigenous people with respect to their environment. Ofosky reviewed major sources of international law and found that indigenous people have an internationally recognized right to a healthy environment.

In summary, there is a general recognition of the right to a healthy environment, and this right is particularly profound when indigenous peoples are involved. International conventions, regional conventions, state practice, judicial opinions and scholarly works have discussed this right and how it is deserving of protection. This development and international acceptance of indigenous peoples' environmental human rights is indicative of these rights becoming part of the law of nations.

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165 See infra Part IV.B.
167 Id. § 1(d).
168 See ANAYA, supra note 147, at 187-225.
169 Id.
171 Ofosky, supra note 52, at 384-92.
172 See generally Ofosky, supra note 52.
V. ATCA AND PACIFIC ISLAND NATIONS

This section discusses an ATCA claim in the specific context of Pacific Island nations. It addresses common obstacles to ATCA claims and how to overcome them, potential plaintiffs and defendants, and how to frame a claim for the greatest chance of success.

A. Initial Issues Associated with ATCA Claims

1. State Actor Dilemma

If the nations frame their complaint as an environmental human rights violation, they may need to prove state involvement. State involvement can be shown by satisfying one of the four tests set forth in Part III.A, supra. Unlike cases like Aguinda, where the local government and Texaco were acting in concert in Equador, no such claim can be made here. The greenhouse gas emissions that are leading to rising sea levels are not being produced in island nations, nor as a result of corporate activity on the island. Rather, the largest source of greenhouse gas emissions lies far away in the United States.9 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. First, major corporations in coal, oil, gas, and energy production industries do extensive lobbying of Congress. This influence is reflected in national policies regarding emission and pollution standards set by the national government. This close relationship could be enough to satisfy the “strong nexus” test. These corporations not only influence national policy, but they are also guided by it, and this may be enough to satisfy a court that these actions are occurring under the color of state action. A prime example of corporate pressure and money influencing and shaping state policy is the Bush Administration’s reversal of campaign promises to cut greenhouse gas emissions. President Bush received millions of dollars in campaign

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173 Intergovernmental Panel on Climate Change, Climate Change 2001: Impacts, Adaptation and Vulnerability, at 17.3.4 (Feb. 2001) ("[T]he Pacific islands region as a whole accounts for 0.03% of the global emissions of CO2 from fuel combustion.") http://www.ipcc.ch/pub/tar/wg2/637.htm#1734.  
174 See UNFCCC Greenhouse Gas Inventory Database, supra note 36.  
contributions from those who do not want forced reductions in greenhouse gas emissions, specifically the oil, gas and coal industries. During his campaign, Bush promised to be a steward of the environment, but once in office, he changed his policy to favor the campaign contributors and lobbyists who helped get him elected. While courts have determined in the past that carrying out state policy alone is not enough to satisfy the “strong nexus” test, this moves one step beyond. Through their hefty campaign contributions, the oil and gas industry are essentially setting state policy. This combination of creation and implementation of state policy could potentially satisfy the state actor test.

In contrast, if the Pacific Island nations choose to frame the claim in terms of genocide, the state actor dilemma goes away. Under Kadic, genocide does not require state action when pursuing an ATCA claim. Similarly, the court in Beanal indicated that cultural genocide would not require state action under the ATCA. Therefore, while the claim of genocide may be more difficult based on the facts, it removes the potential hurdle of trying to prove state involvement.

There are advantages and disadvantages to either approach. On the one hand, while a claim for violation of environmental human rights best suits the factual scenario presented here, this is an emerging area of law, only newly recognized under international law, and United States district courts may be hesitant to see it as part of the “law of nations.” Additionally, as courts have not yet determined whether environmental human rights violations require state action, the plaintiffs would need to be prepared to make such a proffer. On the other hand, a claim for cultural genocide or traditional genocide is not as factually on point; however, genocide is clearly recognized as a violation of the law of nations and does not require a showing of state action.

2. Other Barriers to ATCA Actions

Two common barriers often occur in ATCA actions, but may not be an issue here. The first is forum non conveniens (“FNC”). Previously, ATCA actions have pursued corporations that are not sited in the United States and forcing the corporations to defend in a foreign forum. But here, if the defendants were U.S. entities, getting a dismissal based on FNC would

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176 Id.
177 Greene, supra note 39.
178 Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).
be very challenging for the defendants. Even non-U.S. entities were named as defendants, they could be pursued under the ATCA, provided they have sufficient contacts with the United States. Another issue that commonly comes up in ATCA actions, in terms of respect for sovereignty, is comity, but again because the defendants would be U.S. corporations defending in the United States, comity is not an issue.

B. Alien Suit Generally

If Pacific Island nations are to be successful with an ATCA claim seeking redress for harms inflicted upon them from global warming and rising sea levels, they will have to meet several criteria. These criteria are set forth in the text of the ATCA and by judicial interpretation of the ATCA. First, the suit must be brought by an alien. While 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. Because the money award from such an action would likely to be very large, it could be beneficial for the nations to get involved in the litigation as early as possible before the funds are depleted. Second, the claim must be in tort. Third, the tort must be a violation of the law of nations. This will be challenging because there is no precedent, but as this Comment suggests, the tools to make this claim exist. Finally, depending on how the nations frame their claims, they may have to address whether state actors are involved.

C. Tort Claim

As with all tort claims, several elements must be satisfied. The claim could allege intentional or negligent harm. While less likely to be successful if framed as an intentional harm, the plaintiffs might successfully sue for destruction of their environment on the basis of a negligence claim.

Potential defendants fall into two categories: private corporations or government. Private corporations could be sued either en masse in one action or individually. Suing the government for failing to set lower greenhouse gas emission levels, pulling out of the Kyoto Protocol, and

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181 Id.
182 Id.
183 For example, if the plaintiff made claims of genocide, this would not require proof of state action. See, e.g., Kadic v. Karadzic, 70 F.3d 232, 239 (2d. Cir.1995).
failing to force corporations to comply with the current emission standards is another option.

Under a negligence theory, the negligent act would be releasing high levels of greenhouse gases, when it is avoidable. The duty arises from international law and the many sources discussed previously, which proscribe actions having significant, negative, transboundary environmental impacts.\textsuperscript{184} There is also the issue of causation, both actual and legal. Actual causation could be shown that but for the high levels of greenhouse gases released by the defendant, there would not have been an excessive rise in global temperatures and sea levels. Proximate cause, using the foreseeability test, can also be satisfied since credible science has forecast for years that greenhouse gas emission would have significant consequences including rising sea levels.\textsuperscript{185} In addition, the Pacific Island nations' pleas for help have put the rest of the world on notice.\textsuperscript{186} The damages sought would clearly be compensatory, either for the cost of relocating to a new island, or for modifying their current home to continue to sustain life in the face of rising seas. The plaintiff nations could also seek punitive damages if the court would allow it. Finally, although the defendants are likely to raise procedural and jurisdictional defenses discussed previously,\textsuperscript{187} the defendants have few of the traditional tort defenses as available here. This is simply not a case where contributory negligence, consent, or privilege can be claimed. Thus, in terms of classic tort law analysis, the plaintiffs can establish all the necessary elements for a successful tort action.

D. In Violation of the Law of Nations

As outlined above, Pacific Island nations could frame an ATCA claim as cultural, and possibly literal, genocide or as a violation of the environmental human rights of indigenous peoples.

1. Genocide

In making a claim of genocide, cultural genocide is most plausible. While there is no specific definition for cultural genocide, statements by the United Nations are informative.\textsuperscript{188} The Draft U.N. Declaration on the Rights

\textsuperscript{184} See supra Part IV.
\textsuperscript{185} See Intergovernmental Panel on Climate Change, supra note 1.
\textsuperscript{186} Mercer, supra note 14.
\textsuperscript{187} See supra Part V.A.2.
of Indigenous Peoples claims a right for indigenous people not to be subjected to cultural genocide, including the prevention of and redress for:

(a) any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;
(b) any form of forced assimilation or integration or;
(c) dispossession of their lands, territories or resources.\(^{189}\)

Under *Kadic*, there is an international binding prohibition on genocide.\(^{190}\) Cultural genocide, while grounded in the same roots as genocide, is more of an emerging legal claim\(^ {191}\) and courts have not had an opportunity to rule dispositively on this issue.\(^ {192}\) But, as the U.N. has made clear, there is a need for both prevention of and redress for harms caused as a result of cultural genocide. Now is the time for the courts to take the next step and make a legally binding prohibition on cultural genocide, a step the *Beanal* court suggested it was ready to do.\(^ {193}\)

If the indigenous people of these Pacific Island nations are to survive they will most likely have to abandon their homelands.\(^ {194}\) This will mean leaving behind not only their traditional ways, traditional lands, cultural icons and relics, but also the environment that has sustained them for generations.

This forced immigration forms the basis of the cultural genocide claim. First, cultural genocide can be the deprivation of cultural or ethnic characteristics.\(^ {195}\) By leaving behind all their cultural icons, relics and traditional way of life, the islanders are deprived of cultural characteristics. Second, cultural genocide can be forced assimilation or integration.\(^ {196}\) By being forced to move to new lands, the Pacific islanders will most certainly experience some degree of forced integration. Third, cultural genocide can...
be dispossession of lands. This clearly is already happening and, if these islands are ultimately submerged, will result in complete dispossession of native lands. As the islands' indigenous peoples claim is grounded in all three possible definitions of cultural genocide, a claim on this basis is far from frivolous.

Claims of true genocide, the extinguishing of an entire race or culture, are more tenuous, but still not absurd. Genocide can be “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” In the absence of foreign assistance for relocation, these people will die. Their islands are like sinking ships, and it is only a matter of time before the inhabitants can no longer survive. Therefore, if they do not get assistance in the form of decreased greenhouse gas emissions and financial assistance, the island inhabitants could suffer complete physical destruction.

The true genocide claim would be quite challenging to make because of the intentionality requirements of “deliberate” and “calculated.” A court is not likely to accept that greenhouse gas emitters are intentionally trying to submerge Pacific Island nations. Nevertheless, such a claim could be strengthened by analogizing to the law of toxic torts. Specifically, if the act of excessive greenhouse gas emissions is intentional, then the consequences of the act are also intentional. Given the petitions of Pacific Island nations to the U.N and the United States, the world is aware of their plight. Because polluters cannot claim ignorance, their actions are calculated recklessness at best. Continuing production of excessive greenhouse gases with knowledge of the consequences may be enough to sway a court that a defendant acted intentionally.

2. Environmental Harms and Indigenous People

Framing a claim as an environmental human rights violation is the most appropriate to the factual scenario. The facts of this case demonstrate that these nations face both immediate and future environmental destruction that rises to the level of a human rights violation. First, as the seas rise, the

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197 Id.
199 RESTATEMENT (SECOND) OF TORTS §8A cmt. b, (1965) (“Intent is not, however, limited to consequences which are desired. If the actor knows that consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.”).
200 Mercer, supra note 14.
islands become more susceptible to erosion from the forces of the ocean.\textsuperscript{201} Second, they are in danger of losing their major protein food source—fish, which live in and depend upon the coral reefs.\textsuperscript{202} Last, their freshwater sources are threatened.\textsuperscript{203} While in cases like \textit{Aguinda}, the primary environmental harm was toxic pollution, destruction in the absence of pollution could still be an environmental harm.\textsuperscript{204} Both pollution and destruction make the environment inaccessible and unusable. Destruction of the environment, inflicted by another is a violation of the human right to a healthy environment.\textsuperscript{205} Violation of this right is even clearer in this case where not only will the indigenous people be deprived of a healthy environment, but they will eventually be deprived of an environment altogether when the islands are submerged.

VI. CONCLUSION

Pacific Island nations find themselves in a very vulnerable position and must take action if they are to have any hope of survival. This Comment suggests how these nations might pursue an action under the ATCA against the United States, the major source of greenhouse gas emissions. While such a claim would cover new ground legally, the foundation in international human rights law is sufficient to make the claim. A claim like 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.

\textsuperscript{201} See supra Part II.B.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} For example, ozone depletion and loss of species due to habitat loss are environmental problems addressed in environmental law. \textsc{David Hunter \textit{et al.}, International Environmental Law and Policy} 1-6 (1998).
\textsuperscript{205} See supra Part III.D.