Pursuing International Environmental Tort Claims Under the ATCA: Beanal v. Freeport-McMoRan

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The Fifth Circuit Court of Appeals, in Beanal v. Freeport-McMoRan, affirmed the dismissal of a suit brought under the Alien Tort Claims Act (ATCA) by an Indonesian citizen against a U.S.-based transnational corporation for environmental violations in Indonesia. The court found that the allegations of international environmental torts were not cognizable torts under the ATCA, a statute which gives federal district courts jurisdiction over civil actions brought by aliens for torts committed in violation of the law of nations. This Note examines the potential importance of the ATCA in bringing suits against international environmental violations and suggests that under the current state of law, the approach most likely to succeed in such claims is to frame environmental damages as a human rights violation.

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The increasingly global nature of environmental protection and awareness is one of the most distinctive characteristics of the modern era. Global environmental concern has grown over the past few decades in part because of increased corporate economic opportunities in emerging nations. This new system of competitive global capitalism has often resulted in a “race to the bottom” where the environment is sacrificed, primarily because social responsibility is viewed as inefficient in a free market. Transnational corporations (“TNCs”) are taking advantage of the growth potential in emerging nations, and these TNCs, some argue, have grown beyond the control of national governments, operating in a legal and moral vacuum.

In response to the environmental costs of globalization, the international community has tried to protect the environment through international declarations, agreements, protocols, and conferences. Unfortunately, these efforts at international
environmental regulation have met only limited success,\(^7\) in part because most of these international environmental regulatory instruments are "soft law," which are only precatory in nature, rather than legally binding and obligatory.\(^8\) As such, international environmental regulatory instruments lack the enforcement mechanisms their success requires.

The inability of international environmental regulation to protect developing countries from the activities of TNCs has led victims of environmental damage to seek redress in U.S. courts under the Alien Tort Claims Act ("ATCA").\(^9\) The ATCA, which the first Congress adopted in 1789, provides that federal "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."\(^10\) Plaintiffs have used the ATCA successfully in international human rights cases.\(^11\) Witnessing the success of these international human rights claims, victims of international environmental abuse have attempted to use the ATCA to bring international environmental rights cases.\(^12\)

An Indonesian citizen named Tom Beanal ("Beanal") led one such attempt. In 1997, Beanal brought an ATCA lawsuit against Freeport-McMoRan, a U.S.-based TNC that operates an open pit copper, gold, and silver mine in Beanal's community of Irian

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\(^7\) Some of the problems these instruments face include the following: (1) they typically require legislative ratification before they are enforceable; (2) once ratified, they often lack effective enforcement mechanisms; (3) they usually prescribe only general principles rather than specific guidelines; (4) countries submit to their jurisdiction only voluntarily; and (5) there are often no incentives to comply with the goals of the declarations. See generally TRENDS IN INTERNATIONAL ENVIRONMENTAL LAW (Harvard Law Review eds., 1992).

\(^8\) See generally SOURCEBOOK ON ENVIRONMENTAL LAW (Maurice Sunkin, David M. Ong & Robert Wight eds., 1988).

\(^9\) 28 U.S.C. § 1350 (1994). The act is also referred to as the Alien Tort Statute.

\(^10\) Id. The statute was originally adopted as a provision of the Judiciary Act of 1789. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789). Congress has made minor changes in the statute's codification since 1789, but the modern text reads essentially the same as the original draft.

\(^11\) The success of human rights ATCA lawsuits began with the landmark case Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (applying the ATCA to a wrongful death claim resulting from alleged human rights abuses against a Paraguayan citizen in Paraguay by another Paraguayan citizen). See infra p. 492.

\(^12\) A few courts have affirmatively recognized that the ATCA might be applicable to international environmental torts. See, e.g., Aguinda v. Texaco, Inc., 1994 WL 142006 (S.D.N.Y. 1994) (dismissed on grounds of comity, forum non conveniens and failure to join a necessary party); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (rejecting the Stockholm principles to support a cause of action under the ATCA). The plaintiff in Beanal v. Freeport-McMoRan cited both of these cases. Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 383 (E.D. La. 1997).
Beanal alleged both human rights and international environmental law violations. His lawsuit is, thus far, the only environmental tort case brought under the ATCA where the court has considered the liability of a private actor not acting in concert with local government. Had Beanal’s lawsuit been successful, it would have affirmed the validity of the ATCA as a means of seeking redress for environmental damages caused by TNCs. The United States District Court for the Eastern District of Louisiana ultimately dismissed the suit for failure to state a claim upon which relief could be granted, and the Fifth Circuit Court of Appeals affirmed. Both courts found that the allegations of human rights violations lacked specificity. More importantly, the courts found that the allegations of international environmental law violations were not cognizable torts under the ATCA.

The district court and the Fifth Circuit Court of Appeals correctly decided the case of Beanal v. Freeport-McMoran (Beanal), given the current state of international environmental law. The lawsuit is nonetheless important because it foreshadows the potential use of U.S. courts to resolve international environmental problems. In addition, examining Beanal’s experience provides guidance for future plaintiffs seeking redress under the ATCA. The district court gave Beanal

13. The district court and the Fifth Circuit in Beanal v. Freeport-McMoRan refer to the statute as the Alien Tort Statute (ATS) rather than the Alien Tort Claims Act (ATCA). Both phrases refer to the same statute and both are used with similar frequency by commentators and courts alike. For the sake of consistency, this Note refers to the statute as the ATCA.

14. 969 F. Supp. at 362. The human rights and environmental damage allegations are further discussed in Part II.

15. Beanal did assert that Freeport acted in concert with local government in violating international human rights but not for the environmental claims. Id. at 373-79, 384. In addition, there have been other cases brought under the ATCA against private actors for environmental torts that have considered the issue of private actor liability but only when acting in concert with local governments. See, e.g., Doe v. Unocal, 963 F. Supp. 880 [C.D. Cal. 1997] (involving a corporate defendant doing business with the government of Burma through an arrangement in which the government or its agents committed human rights abuses); Oceanic Islanders Use Federal Law to Sue British Mining Giant Rio Tinto for Alleged Ecocide and Human Rights Crimes, BUS. WIRE, Sept. 6, 2000 (involving a corporate defendant that engaged in a joint venture with the Papua New Guinea government to maintain a copper mine on the island).

17. 197 F.3d at 165; 969 F. Supp. at 384.
18. 197 F.3d 161; 969 F. Supp. 362.
19. For example, the district court found that Beanal failed to articulate a substantive claim and that he failed to allege any facts that would establish state action. The circuit court affirmed the district court decision and added that although
three opportunities to amend his complaint, and the court provided considerable guidance in helping him make those amendments. In doing so, the court indicated its willingness to consider the application of international environmental tort causes of actions under the ATCA.\textsuperscript{20}

\textit{Beanal} is also important because it offers a backdrop against which one can examine the ATCA's "law of nations." The "law of nations" does not have a precise definition and there is controversy over both the original and modern interpretation of the phrase. What is not controversial is the fact that these three words, placed together, have a common law nature because their meaning has evolved over time. In 1789, those words primarily encompassed legal relations between sovereign states, conflict of law rules, maritime law and law merchant.\textsuperscript{21} Today, those words embrace broad principles of international law.\textsuperscript{22} A main source of international law is customary international law (CIL).\textsuperscript{23} CIL "results from a general and consistent practice of states followed by them from a sense of legal obligation."\textsuperscript{24} While there is little in the area of international environmental law that has achieved unoubtable CIL status, the \textit{Beanal} case shows how to assess environmental standards that may constitute viable environmental ATCA claims. This Note analyzes the best approach to pursuing an international environmental tort claim in U.S. courts in light of the decision in \textit{Beanal}, and in light of the common law nature of the ATCA. In the end, this Note suggests using a human rights framework and discusses the potential pitfalls of that approach.

Part I of this Note reviews the background and history of the ATCA. Part II discusses the facts of the \textit{Beanal} case, as well as the district court and Fifth Circuit decisions. Part III examines several sources of international environmental law that arguably

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the United States has articulable standards for assessing tort claims in a domestic context, federal courts should exercise caution to ensure that U.S. environmental policies do not displace the environmental policies of other countries. 197 F.3d at 166-67; 969 F. Supp. at 384. Had Beanal identified and articulated a substantive claim and alleged state action, he might have prevailed.


\textsuperscript{22} See Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).


\textsuperscript{24} \textit{Restatement (Third) of Foreign Relations Law of the United States} § 102(2) (1987).
constitute "law of nations" under ATCA, but that do not provide a clear enough standard of liability for environmental torts to be universally accepted as international law. Part IV analyzes the alternative approach of alleging human rights violations for environmental practices under the ATCA.

I

BACKGROUND

A. The Alien Tort Claims Act

The ATCA was enacted in 1789 and provides that federal "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." In order to succeed on an ATCA claim, the following conditions must be met: (1) an alien sues, (2) for a tort, (3) that was committed in violation of the "law of nations" or a treaty of the United States. The primary source of ambiguity within the statute is identifying what constitutes the "law of nations." (As in other federal statutes where critical terms lack precise definition, the crux of the interpretation problem is how to apply the ambiguous language—in this situation, how to apply the "law of nations.")

For two centuries, the ATCA was largely ignored but it exploded into prominence when the Second Circuit affirmed the use of the Act against human rights violations in Filartiga v. Pena-Irala. This case was highly controversial because it transformed the ATCA into a potential vehicle for foreigners to gain access to U.S. courts to seek redress for torts committed outside the United States. There have only been a few ATCA victories since Filartiga, but these cases have had a far-reaching effect. Because of the very powerful effects of exposure to legal

28. 630 F.2d 876, 878-79 (2d Cir. 1980). Filartiga was a wrongful death action resulting from the alleged torture of a Paraguayan citizen in Paraguay by another Paraguayan citizen. At the time of the torture, the defendant was the Inspector General of Police in Asuncion. Paraguay and the torture was allegedly in retaliation for plaintiff's criticism of the Paraguayan regime. See supra note 11.
29. Some of these cases include Kadic, 70 F.3d at 232 (finding that the leader of the Bosnian-Serb faction could be liable for human rights abuses); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (holding a police officer liable for torture in
liability in the United States, these ATCA victories have garnered much attention.

Academics, judges, practitioners, and politicians have all debated the proper interpretation of this statute. Though the only thing these commentators seem to agree about is that the ATCA "cries out for clarification," the Supreme Court has yet to interpret it.\(^{30}\) In general, the courts have construed the ATCA narrowly. The same questions recur in ATCA lawsuits: (1) has a violation of the law of nations occurred; (2) are human rights disputes or environmental disputes violations of the law of nations; (3) does the ATCA grant a private cause of action; (4) does the ATCA impose liability upon private actors for private conduct; and (5) do doctrines such as political question, sovereign immunity, forum non conveniens, comity, and/or act of state bar the claim?\(^{31}\)

 Plaintiffs continue to invoke the ATCA even though there are many unresolved questions regarding its application, and even though there have been very few successful ATCA lawsuits since Filartiga. Over the last twenty years, most of the ATCA lawsuits have involved human rights violations, and the establishment and recognition of human rights abuses as violations of international law is well-settled.\(^{32}\) The establishment and recognition of environmental harms as violations of international law, however, is not well-settled. Therefore, plaintiffs who seek to use the ATCA for environmental lawsuits face the challenge of showing that the "law of nations" includes environmental torts. Such use of the ATCA is provocative because of the possible utilization of the statute against not only state entities, but also against individuals and multinational corporations who damage the environment. The potential use of the ATCA to pursue international environmental tort claims has encouraged activists to rally around it, and to attempt to expand its parameters.\(^{33}\)

\(^{30}\) Ethiopia). Even when an ATCA lawsuit does not result in a victory, it often sparks much attention. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (dismissing the terrorist attack lawsuit, but appending three separate concurring opinions that agreed on very little other than the holding).

\(^{31}\) Tel-Oren, 726 F.2d at 774.

\(^{32}\) Armin Rosencranz & Richard Campbell, Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts, 18 STAN. ENVTL. L.J. 145 (1999) (providing background information on the types of procedural hurdles and questions ATCA claims face).


\(^{33}\) Note, for example, that six amicus curiae briefs were submitted in the Beanal Case. See infra note 72.
The following section will examine what is meant by the "law of nations"—and how it may one day evolve to include environmental torts—by considering its historical origins, as well as how courts interpret it today.

**B. Evolution of the Law of Nations**

While the ATCA allows foreign plaintiffs to bring lawsuits in the United States for torts committed in violation of the "law of nations," the ATCA fails to explain what is meant by the term. The "law of nations" is a concept that not only applies to the ATCA, but is also found in the U.S. Constitution and in other areas of the Judiciary Act beyond the ATCA. Eighteenth century writers did not use the term to refer to a well-defined consistent subject matter; rather, the "law of nations" embodied ideas that ranged from maritime law to natural law. The attempt to establish definitively what the "law of nations" historically encompassed is widely contested, and as one court noted, "[t]he concept of 'law of nations' is an elusive one."

When Congress passed the ATCA in 1789, Blackstone's definition of the "law of nations" suggested that it encompassed only a limited universe of seriously egregious infractions.

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35. The First Congress established federal jurisdiction over criminal offenses committed by individuals in violation of the "law of nations." The ATCA is the civil counterpart to those criminal provisions. Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-77, 78-79 (1789).


38. Abiodun v. Martin Oil Serv., Inc. 475 F.2d 142, 145 (7th Cir. 1973) (dismissing a tort claim under the ATCA for failure to demonstrate a violation of the law of nations).

39. Blackstone defined the "law of nations" as:

[A] system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world: in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.
Emerich de Vattel, an influential early American jurist, did not view the "law of nations" as so limited in scope; according to Vattel, the "law of nations" was immutable and "nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it." Other early American legal scholars, however, acknowledged the evolutionary nature of the "law of nations." For instance, Justice Story noted that "every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations."

International environmental torts are outside the definition of "law of nations" as originally understood by scholars such as Blackstone and Vattel. International environmental issues hardly existed in 1789—relationships between nations were limited, global commerce was not as interwoven as it is today, and general environmental concerns were not yet critical political issues. Accepting the evolutive nature of the "law of nations," as understood by those such as Justice Story, however, suggests that international environmental violations could one day constitute the "law of nations" as it was originally understood.

Contemporary courts have, in effect, viewed the "law of nations" as embracing modern international legal understandings. In Filartiga, the court noted that "courts interpret international law not as it was in 1789 but as it has evolved and exists among the nations of the world today." In

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4 William Blackstone, Commentaries 66 (William L. Sprague ed., Collectors Pub. Co. 1984) (1769). Blackstone lists specific "law of nations" offenses such as violations of safe conduct, diplomatic rights, and piracy. Id. at 68. In addition, Blackstone notes that "recourse [for violations of the law of nations] can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice." Id.


41. Even more importantly than the opinions of legal scholars, the drafter of the ATCA acknowledged the evolutive nature of the "law of nations." "Not only did the members of the First Congress understand that the law of nations had evolved, they expected that evolution to continue—indeed, they specifically provided for it." Dodge, supra note 37, at 238.

42. United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

43. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (citing Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796)).
addition, the Beanal district court noted that "the law of nations is dynamic, rather than static." These statements imply that the ATCA has a common law quality. The ATCA's common-law nature, derived from the phrase "law of nations," suggests that the statute might someday encompass environmental law if the "social needs of the community" require such an understanding.

II

STATEMENT OF THE CASE

A. The Facts

On April 29, 1996, Tom Beanal, an Indonesian citizen, filed a lawsuit in the Eastern District of Louisiana. In the suit, Beanal alleged that U.S. corporations Freeport-McMoRan, Inc. and Freeport-McMoRan Copper & Gold, Inc. (collectively "Freeport") had conducted mining activities in Indonesia that resulted in human rights and environmental violations. Freeport operates the "Grasberg Mine," an open pit copper, gold, and silver mine encompassing approximately 26,400 square kilometers in the Jayawijaya Mountain in Irian Jaya, Indonesia. The "Grasberg Mine" is the largest copper and gold mine in the world and stretches from a 13,500-foot high mountain peak to the Arafura Sea, traversing alpine regions, mountain rainforests, and mangrove swamps.

Beanal claimed that the mining practices were destroying the environment by hollowing mountains, re-routing rivers, flooding and stripping forests, and introducing toxic and non-
toxic materials and metals into the river system.\textsuperscript{50} Beanal further alleged that Freeport mismanaged its waste management system, failed to monitor its effect on the natural resources of Irian Jaya, and "breached its international duty to protect one of the last great natural rain forests and alpine areas in the world."\textsuperscript{51} The mine tailings, Beanal emphasized, have had an extremely detrimental effect on the environment, contaminating waters and altering the topography of the area.\textsuperscript{52}

As a resident of Tamika, Irian Jaya, as well as a leader of the Amungme Tribal Counsel of Lambaga Adat Suku Amungme, Beanal filed suit individually and on behalf of all others similarly situated.\textsuperscript{53} Beanal failed to successfully certify the class, however, leaving him to stand as the lone plaintiff in this case.\textsuperscript{54} His original complaint alleged that Freeport had committed environmental torts, human rights violations, and cultural genocide.\textsuperscript{55} Beanal claimed jurisdiction based on diversity of citizenship,\textsuperscript{56} the Alien Tort Claims Statute,\textsuperscript{57} and the Torture Victim Protection Act.\textsuperscript{58}

In April 1997, the district court dismissed Beanal's first amended complaint with leave to amend.\textsuperscript{59} The court instructed Beanal to amend his complaint to state his claims more specifically.\textsuperscript{60} In August 1997, the district court struck Beanal's Second Amended Complaint with leave to amend, this time for inappropriately attempting to add third parties.\textsuperscript{61} Again, the court ordered Beanal to state his claims more specifically.\textsuperscript{62} In March 1998, the district court struck down Beanal's third amended complaint without leave to amend.\textsuperscript{63} Beanal appealed

\textsuperscript{50} 969 F. Supp. at 382-83.
\textsuperscript{51} Id. at 383.
\textsuperscript{52} See id. at 369.
\textsuperscript{53} Id. at 367.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 366.
\textsuperscript{56} 28 U.S.C. § 1332.
\textsuperscript{57} 28 U.S.C. § 1350.
\textsuperscript{59} 969 F. Supp. at 362.
\textsuperscript{60} Id.
\textsuperscript{61} 1997 WL 465283 (E.D. La. 1997).
\textsuperscript{62} Id.
\textsuperscript{63} Beanal v. Freeport-McMoRan, 197 F.3d 161, 164 (1999). The various district court decisions on pre-trial motions suggest that plaintiff's counsel's behavior and responses undermined his credibility with the court, resulting even in Rule 11 sanctions for making misrepresentations to the court. See Beanal v. Freeport-McMoRan, 1996 WL 517710 (E.D. La. 1996); Beanal v. Freeport McMoRan, 1996 WL
the district court's decision, and the Fifth Circuit affirmed the lower court's decision. 64

B. The District Court Decision

In dismissing Beanal's complaint, the court held that Beanal failed to state a claim for an environmental tort that violated the "law of nations" under the ATCA. 65 Analyzing Beanal's environmental claims, the court questioned whether any of Beanal's allegations, if true, amounted to a violation of the "law of nations." 66 The district court wanted Beanal to supply a principle of environmental protection that all nations adhered to and treated as law. The court consulted case law, the Restatement, and a treatise on international law, but it could not identify any violations of international law based on Freeport's actions, as alleged in Beanal's complaint. 67 The court was wary of equating general and vague notions of environmental responsibility with international customary legal obligations whose violations would give rise to a legal remedy against a private party. 68

In addition, the court noted that the ATCA requires that a private actor have acted under color of law and emphasized that Beanal failed to allege any facts, which if proven would have shown that Freeport acted under color of law. Rather, Freeport acted under corporate policies, which, according to the court, cannot constitute a violation of the "law of nations" regardless of how destructive the corporate actions are. 69

C. The Circuit Court Decision

The Fifth Circuit affirmed the district court's opinion, holding that treaties and agreements that do not offer clear

64. 197 F.3d at 161.
65. 969 F. Supp. at 365-66. The court also held that: (1) Beanal had standing to bring claims on his own behalf for cultural genocide, certain human rights abuses, and environmental claims, but he lacked standing for summary execution and disappearance claims on behalf of others; (2) Beanal failed to state a claim for genocide in violation of the "law of nations" under ATCA; (3) Beanal failed to allege state action because he did not allege that Freeport was acting under color of law, as required under the ATCA; (4) the TVPA does not supersede or repeal the ATCA; and (5) the TVPA does not apply to corporations. Id.
66. Id. at 383-84.
67. Id.
68. See id. at 384.
69. Id.
standards of environmental liability are inadequate to form the basis of an international environmental claim under the ATCA.\textsuperscript{70} The Fifth Circuit stated that the "law of nations" applies only to "shockingly egregious violations of universally recognized principles of international law."\textsuperscript{71} Despite several \textit{amicus curiae} briefs\textsuperscript{72} arguing that cognizable international environmental tort standards exist, the Fifth Circuit maintained that none of the treaties and agreements represented were universally accepted norms. Rather, the court maintained, these treaties and agreements only offered general notions of environmental responsibility, lacking the international acceptance necessary to have the force of international law.\textsuperscript{73}

In addition, the Fifth Circuit stated that even though the United States has articulable standards of environmental liability, as embodied in federal statutes such as the National Environmental Policy Act\textsuperscript{74} and the Endangered Species Act,\textsuperscript{75} courts should exercise "extreme caution" about imposing the United States' environmental policies upon other nations.\textsuperscript{76} In ruling this way, the court precluded the possibility of pursuing an ATCA claim in the Fifth Circuit based on violations of U.S. federal environmental statutes.

\section*{III
\textbf{ANALYSIS}}

\textit{Beanal} was correctly decided given the current state of international environmental law. Both the district court and the Fifth Circuit recognized that international environmental principles have failed to achieve the force of law. In so doing, however, both courts adopted a modern understanding of "law of nations," as opposed to the more limited and static original understanding. Thus, the courts left open the possibility that

\textsuperscript{70} \textit{Beanal v. Freeport-McMoRan}, 197 F.3d 161, 164 (1999). The circuit court also held that: (1) \textit{Beanal} failed to state a claim under ATCA and TVPA for international human rights violations and genocide; (2) agreements, conventions, and declarations which did not specifically identify acts that would constitute cultural genocide are inadequate sources of international law for the basis of a cultural genocide claim under the ATCA. \textit{Id.}

\textsuperscript{71} \textit{Id.} at 167 (quoting Zapata v. Quinn, 707 F.2d 691, 692 (2nd Cir. 1983)).

\textsuperscript{72} \textit{Amicus curiae} briefs were submitted by Earthjustice Legal Defense Fund, the Sierra Club, Earthrights International, the Center for Constitutional Rights, the Center for Justice and Accountability, and the Four Directions Council. 197 F.3d at 162-63.

\textsuperscript{73} \textit{Id.} at 167.

\textsuperscript{74} 42 U.S.C. § 4321 (1994).


\textsuperscript{76} 197 F.3d at 167.
environmental torts could be actionable under the ATCA in the future—as soon as the international community itself treats the choice to protect the environment as a legal obligation.

This section explains why Beanal was correctly decided under the district court's own definition of the "law of nations." It first analyzes sources of potential international environmental law that were examined in the opinions and then those that the courts overlooked. In the end, the analysis demonstrates that no clear consensus exists regarding the scope and force to be given to environmental protection, and that international environmental law is slim indeed.

A. Sources of International Law Pled by Beanal and Rejected by the Court

The district court's definition of an international tort that violates the law of nations has three prongs:

(1) no state condones the act in question and there is a recognizable "universal" consensus of prohibition against it;
(2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; (3) the prohibition against it is nonderogable and therefore binding at all times upon all actors.  

This definition emphasizes that the "law of nations" consists only of universal, concrete, and binding standards. Such laws put parties on notice, provide predictability, and preclude the imposition of unilateral rules. This is consistent with the standard definition of customary international law as that which "results from a general and consistent practice of states followed by them from a sense of legal obligation."  

Searching for sources of international law that would satisfy this three-pronged definition, the district court reviewed case law, the Restatement (Third) of Foreign Relations, and a recent treatise by Phillipe Sands on international environmental law to determine whether Beanal had alleged a legitimate claim against Freeport. The district court failed to explain what it concluded from its review of case law or the Restatement, but it did specifically reject a cause of action based on three international

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79. Id.
81. 969 F. Supp. at 383.
environmental law principles found in the Sands Treatise, including the Polluter Pays Principle, the Precautionary Principle, and the Proximity Principle. As the district court correctly explained, these three principles fail to meet the court's test because they are not sufficiently concrete to have the force of international law.

The Fifth Circuit added little to the district court's analysis, except to note that the United States has articulable standards addressing environmental violations domestically (such as the National Environmental Policy Act and the Endangered Species Act), but that federal courts should be careful not to impose U.S. environmental policies upon other governments. Indeed, the fact that the United States has legislated environmental principles has little bearing on whether the rest of world should subscribes to those principles.

In addition, like the district court, the Fifth Circuit rejected other possible sources of international environmental torts without explaining its reasoning. The circuit court fails to name the additional sources suggested by the amici, much less to analyze them. While, as the following section will show, the Fifth Circuit's decision was correct given the current state of international law, the circuit court's flippant treatment of other potential sources of international law is unfortunate.

B. Potential Sources of International Law Not Pledged by Beanal

One potentially binding principle of international environmental law is reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration (hereinafter "Principle 21/Principle 2"), which the United Nations adopted with the support of numerous national governments. Despite

82. The Polluter Pays Principle is the notion that the person responsible for pollution should bear the direct and consequential costs of the pollution. SANDS, supra note 80, at 213 (1995).
83. The Precautionary Principle is the notion that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." SANDS, supra note 80, at 208.
84. The Proximity Principle is the notion that recovery or disposal of waste should be close to the point of generation.
85. 969 F. Supp. at 384.
86. 42 U.S.C. § 4321.
88. Beanal v. Freeport McMoRan, 197 F.3d 161, 167 (5th Cir. 1999).
89. 197 F.3d at 162-63.
the district court's call for more specificity, Beanal did not plead these sources of international law; thus neither the district court nor the Fifth Circuit analyzed the binding effect of Principle 21/Principle 2. However, the district court did mention the principles and, without resolving their viability, pointed out that they might give rise to an international tort. This section argues that these principles would not currently constitute international law under the district court's three-pronged definition of an international tort.

The Stockholm Declaration was adopted in 1972 at the United Nations Conference on the Human Environment, and the Rio Declaration was adopted in 1992 at the United Nations Conference on Environment and Development. Both Indonesia and the United States are signatories to the Stockholm Declaration and the Rio Declaration. Both Declarations attempted to articulate and establish global standards for environmental protection. These principles proclaim that states have sovereignty over their natural resources, and that they have the responsibility not to cause environmental damage. Principle 21 of the Stockholm Declaration states that 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." Principle 2 of the Rio Declaration adds two words to Principle 21 in order to recognize the rights of states to pursue "their own environmental and developmental policies."


92. It is interesting that the district court went to the trouble of offering its three-pronged definition of an environmental tort and mentioning Principle 21/Principle 2 but then failed to analyze whether the suggested principles fall under its definition.
93. See Stockholm Declaration, supra note 90; Rio Declaration, supra note 90.
94. See Stockholm Declaration, supra note 90; Rio Declaration, supra note 90.
95. See Stockholm Declaration, supra note 90; Rio Declaration, supra note 90.
96. 969 F. Supp. at 384 (citing Sands, supra note 80). The other principles that the Sands Treatise says might have binding effect are the good-neighborliness and international cooperation principle.
97. Stockholm Declaration, supra note 90.
98. Rio Declaration, supra note 90 (emphasis added to indicate the two words added to Principle 2).
The first question under the district court's three-pronged definition of an international tort is whether Principle 21/Principle 2 have universal consensus. The Fifth Circuit in Beanal emphasized the importance of this criteria by quoting Filartiga: "It is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation in the meaning of the [ATCA]."\(^99\) Both Principal 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration are express accords that demonstrate mutual, rather than merely several, concern. The Stockholm Declaration was adopted at the 1972 United Nations Conference on the Environment, in which 113 countries participated.\(^100\) The Rio Declaration was adopted by a consensus of 176 states during the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.\(^101\) This level of participation suggests that both Principle 21 and Principle 2 have extremely broad approval.

It is unclear, however, whether all the countries that signed the declarations signed them because they intended them to have the force of law. In the case of the Rio Declaration's Principle 2, other countries may have been more willing to sign the Declaration knowing that the United States Senate was unlikely to ratify it. Thus, even though numerous countries participated in the creation of these Principles, there is not necessarily universal approval for the Principles having the force of law.

The second question under the district court's test is whether Principle 21/Principle 2 provide sufficient criteria to determine whether a given action amounts to the prohibited act.\(^102\) This prong is the most problematic for Principle 21/Principle 2 because neither Principle specifies any prohibited behavior. Rather, the two Principles simply proclaim that states are responsible for ensuring that activities within their control or jurisdiction do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.\(^103\)

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99. Beanal v. Freeport-McMoRan, 197 F.3d 161, 167 (5th Cir. 1999) (citing Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2nd Cir. 1980)).
101. Id. at 9.
103. In a footnote, the Fifth Circuit reasons that because Freeport's activities in Indonesia have not affected environmental conditions in other countries, it would not
Furthermore, the two Principles grant states the unlimited right to exploit their own resources.\textsuperscript{104} The Principles fail to offer concrete guidelines enabling an actor to ascertain whether it is violating the rules, or, as in this case, whether it is mining too much.\textsuperscript{105} It is unlikely that a U.S. court will find that the general concepts articulated in Principle 21/Principle 2 provide sufficient criteria to determine whether a given action is a prohibited act.\textsuperscript{106}

The third question is whether Principle 21/Principle 2 are nonderogable and therefore binding at all times upon all actors.\textsuperscript{107} This depends on the extent to which a state accepts the Principles as binding. The United Nations operates by organizing commissions that draft or adopt declarations expressing international norms. In theory, such declarations are \textit{opinio juris} of states and are representative of world opinion.\textsuperscript{108} Some commentators take the view, however, that a state's support of a declaration is only evidence of political intent to comply with the norms expressed, rather than a representation that the state is undertaking an actual obligation.\textsuperscript{109} These commentators argue that it is only the subsequent conduct of those states, in which they partake in actions that support their obligations, that indicates whether they consider the declarations binding.\textsuperscript{110} Thus, even though both the United States and Indonesia participated in the Stockholm Declaration and the Rio Declaration, unless their conduct indicates that they consider the declarations binding, it is doubtful that Principle 21/Principle 2 can successfully meet the third prong of the \textit{Beanal} district court's definition of an international tort. Indeed, on adoption of the Rio Declaration, the United States made an

\begin{footnotesize}
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\item[104.] See \textit{RIO DECLARATION}, supra note 90; \textit{STOCKHOLM DECLARATION}, supra note 90.
\item[105.] Of course this proposition is debatable. For example, the Principles use the phrase "damage to the environment." One could say that this phrase is especially troubling because it leaves "damage" undefined. On the other hand, one could say that this phrase is self-evident because even a layperson could assess "damage to the environment" once it has reached a certain threshold level.
\item[106.] It is especially unlikely in contrast to U.S. environmental laws and regulations, which often span the length of hundreds of detailed pages.
\item[107.] 969 F. Supp. at 370.
\item[108.] \textit{SOURCEBOOK ON ENVIRONMENTAL LAW}, supra note 8, at 6-7.
\item[109.] \textit{Id.} at 7.
\item[110.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
interpretative statement expressing reservations to several parts of the Declaration.\footnote{111}{The United States has expressed reservations to Principles 3, 7, 12, and 23. Birnie & Boyle, supra note 100, at 9.}

In sum, Principle 21/Principle 2 fall outside the Beanal district court's definition of a tort in violation of the "law of nations" because they fail to satisfy at least two, and possibly all three prongs of the district court's test. They may have universal consensus, but there is insufficient criteria to determine whether a given action amounts to a prohibited act. In addition, the principles are not currently accepted as binding at all times upon all actors.

\section*{IV
\hspace{10pt}ANALYSIS OF ALTERNATIVE APPROACHES
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\subsection*{A. Applying a Human Rights Framework to Environmental Issues
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shown that environmental claims framed as human rights claims are more likely to succeed.\footnote{113} Many international instruments also show the connection between human rights and the environment; these instruments could form the basis of such a claim under the ATCA. The Stockholm Declaration states that people have “the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and [they bear] a solemn responsibility to protect and improve the environment for present and future generations.”\footnote{114} The Rio Declaration states that humans “are entitled to a healthy and productive life in harmony with nature.”\footnote{115} Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) provides that “[e]veryone shall have the right to live in a healthy environment and . . . . The States Parties shall promote the protection, preservation and improvement of the environment.”\footnote{116} Article 24 of The African Charter on Human and Peoples’ Rights states that “all people shall have the right to a general satisfactory environment.”\footnote{117} The United Nations Draft Principles on Human Rights and the Environment states that “[a]ll persons have the right to a secure, healthy and ecologically sound environment.”\footnote{118} Finally, the Hague Declaration on the Environment notes “the right to live in dignity in a viable global environment.”\footnote{119} Of course, in applying any of the above international human rights instruments to environmental violations, courts would need to examine them to determine whether they have the binding force of law. Nevertheless, because human rights claims have had success

\footnote{113}{For example, Doe v. Unocal, a case alleging human rights violations based on environmental damages committed by a private company acting under color of law, was decided only a few weeks prior to Beanal. 963 F. Supp. 880 (C.D. Cal. 1997). Unlike Beanal, the Unocal plaintiffs were successful in overcoming the motion to dismiss. The case was later dismissed on summary judgment and is currently on appeal to the Ninth Circuit Court of Appeals.}

\footnote{114}{STOCKHOLM DECLARATION, supra note 90, Principle 1, 11 I.L.M. at 1416. 1417-18.}

\footnote{115}{RIO DECLARATION, supra note 90, Principle 1, 31 I.L.M. 874, 876.}


\footnote{117}{African Charter on Human and Peoples’ Rights, June 27, 1981, Article 24. 21 I.L.M. 58, 63.}


\footnote{119}{The Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308, 1309.}
under the ATCA, it may prove easier to find universal support for the notion that environmental degradation harms human beings, than to find support for the notion that environmental protection deserves recognition for its own sake.

B. Potential Drawbacks to the Human Rights Approach

One problem with applying a human rights framework to environmental issues is defining what environmental damages are extreme enough to constitute human rights violations. One commentator has proposed that an environmental violation becomes a human rights violation when it is the result of a specific set of state actions that leads to a degraded environment with serious health effects for a specific group of people, or when it disrupts a people's way of life.\(^{120}\) No universal acceptance of a specific standard, however, currently exists.

In addition, even if a lawsuit were pled successfully under the ATCA—relying on a cause of action based on human rights violations for environmental damages—the lawsuit would still have to overcome numerous jurisdictional, doctrinal, and practical hurdles such as: Forum Non Conveniens, Comity, Act of State, Foreign Sovereign Immunity, Political Question Doctrine, Separation of Powers issues, standing, procedural difficulties inherent in international public law litigation, and high transactional costs.\(^{121}\)

CONCLUSION

Beanal v. Freeport-McMoRan was correctly decided given the current state of international environmental law. Beanal was simply unable to plead any action by Freeport that had violated any international legal standard because the international community fails to give any international environmental agreement the force of law. While U.S. courts will not currently recognize international environmental torts for ATCA purposes, however, the common law nature of the “law of nations” might someday evolve to include standards of international environmental liability. In the meantime, plaintiffs face a better chance of prevailing on their environmental violation claims under the ATCA by framing the action as a one of human rights. Until international law evolves to encompass environmental torts or to recognize the connection between environmental damage

\(^{120}\) Lee, supra note 112, at 285.

\(^{121}\) Rosencrantz & Campbell, supra note 31, provides a discussion of many of these issues.
and human rights, the only option for aliens seeking to deter adverse environmental decisions by TNCs may be through non-legal means.¹²²

¹²² One example of such non-legal means is the use of corporate campaigns that appeal to either stockholders or consumers and attempt to affect how TNCs environmentally behave. See Robin Broad & John Cavanagh, *The Corporate Accountability Movement: Lessons & Opportunities*, 23 Fletcher F. World Aff. 151 (1999). Broad & Cavanagh offer a good overview of many of the non-legal methods to seeking corporate accountability. Trade agreements and corporate codes of conduct also endeavor to set environmental standards. Other approaches to international environmental regulation include taking part in shareholder resolutions and actions, engaging in dialogue with TNCs and attempting to influence behavior through legislative instruments. Finally, actions targeting consumers (such as boycotts, labeling schemes, ethical shopping guides, socially responsible investing, and alternative trade organizations) are another potential set of means used to pressure TNCs into environmental compliance.