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Text of Remarks on Panel: “Indigenous Peoples, Environmental Torts and Cultural Genocide”

BY RICHARD HERZ*

In my comments on the panelists’ excellent presentations, I would like to return to an issue mentioned in this morning’s session on “Litigating the Alien Tort Claims Act.” The issue is whether the rights to be free from massive environmental degradation and cultural genocide that have just been described by the panelists are sufficiently established in international law to be actionable under the Alien Tort Claims Act (“ATCA”). I believe they are.

First, I will talk about cultural rights. As Emily Yozell observed in her presentation, many of the world’s last great untapped stores of natural resources are on indigenous peoples’ lands. And as Martin Wagner’s description of the plight facing the U’wa vividly illustrates, extracting those resources will, in at least some instances, devastate the local peoples’ cultures. Therefore, cultural rights is an important topic for those concerned with multinational corporate responsibility.

The primary hurdle in seeking to apply the international norms protecting cultural rights under the ATCA is *Beanal v. Freeport McMoRan*. There, the U.S. District Court for the Eastern District of Louisiana rejected a cultural genocide claim because it found the Genocide Convention does not prohibit the destruction of a culture.¹ The U.S. Court of Appeals for the Fifth Circuit affirmed, holding that a cultural genocide claim was not actionable under the ATCA

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1. 969 F. Supp. 362, 373 (E.D. La. 1997).

because cultural rights are neither sufficiently specific nor universally accepted.² Both courts' decisions were wrong.

The district court was simply confused about the terminology. It assumed that the plaintiffs' cultural genocide claim was actually a genocide claim. As a result, it evaluated the claim under the Genocide Convention, and dismissed the claim based on its conclusion that the Convention requires the physical destruction of a people.

A cultural genocide claim, however is completely distinct from a genocide claim. A brief review of the legal history of cultural rights proves the point. The international community enacted the Genocide Convention after World War II as part of its response to the Holocaust. The Convention's drafters debated whether the Convention should ban only genocide as currently defined, or whether it should also prohibit acts "committed with the intent to destroy the language, religion or culture of a national, racial or religious group"³ There was, however, no question that the destruction of a culture violated international law. The issue was solely whether to include cultural genocide in the Genocide Convention, or to address it in later conventions. They eventually decided to wait.

The international community fulfilled its promise to protect cultural rights in the major international human rights treaties drafted subsequent to the Genocide Convention.⁴ All of these treaties recognize a right to one's own culture. Given this, the Fifth Circuit was mistaken in asserting that cultural rights have not achieved universal acceptance. This is particularly so since cultural genocide is simply a particularly egregious type of racial, religious or ethnic discrimination, and state-sponsored discrimination on these grounds is without question barred under international law.

The Fifth Circuit also erred in concluding that it is impossible to determine what conduct constitutes a violation of the right to culture. The post-Convention treaties protecting cultural rights offer far broader protections than the provision considered for inclusion in the

2. 197 F.3d 161 (5th Cir. 1999).

3. *Report of the Ad Hoc Committee on Genocide, 5 April to May 10, 1948*, U.N. ESCOR, 7th Sess., Supp. No. 6, art. III., at 6, U.N. Doc. E/794 (1948).

4. *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

Genocide Convention. Accordingly, acts that meet that definition are clearly forbidden by international law.

Now I want to turn to the topic of environmental claims under the Alien Tort Claims Act. As Martin Wagner stated in his presentation, international law recognizes a human right to a minimally adequate environment. The Fifth Circuit in *Beanal*, however, rejected an ATCA claim based upon that right, and I would like to briefly explain why I think the court was mistaken.

As it did with respect to cultural rights, *Beanal* held that the plaintiff failed to show that an environmental right is universally recognized, and that it has articulable standards. The Court, however, relied only on a limited number of sources, namely an international environmental law textbook and the Rio Declaration. *Beanal* ignores the fact that, beginning in 1972 with the Stockholm Declaration, nations have repeatedly and universally recognized that individuals have a right to an environment adequate for survival. Moreover, *Beanal* contains no analysis of the “some 350 multilateral treaties, 1,000 bilateral treaties and [the] multitude of instruments of intergovernmental organizations,” that a U.N. Special Rapporteur correctly concluded establishes the right to a minimally healthy environment under customary international law.⁵

That right is definable. Even during war, international law bans acts that “may be expected to cause [widespread, long-term and severe damage] to the natural environment and thereby to prejudice the health or survival of the population.”⁶ Since wartime rights are international minimums, international law prohibits at least those actions that may be expected to cause these same types of harms in peacetime.

Despite the fact that the Rio Declaration specifically recognizes the right to a healthy environment,⁷ *Beanal* suggested the Declaration cut against the plaintiff’s claim, because the Declaration also states

5. *Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur*, U.N. ESCOR, Comm’n on Human Rights, 46th Sess., at 8 & Annex I, princ. 2, at 75, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994).

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, art. 55(1), 1125 U.N.T.S. 3, 28, reprinted in 16 I.L.M. 1391, 1415.

7. Rio Declaration on Environment and Development, June 14, 1992, princ. 1, in *Report of the United Nations Conference on Environment and Development*, Annex I, at 8, U.N. Doc. A/CONF.151/26 (Vol. I) (1992), reprinted in 31 I.L.M. 874, 876 (1992) [hereinafter Rio Declaration].

that nations have sovereignty over their natural resources.⁸ The Court was mistaken, precisely because the right to a minimum level of environmental protection adequate for survival is a fundamental human right. State sovereignty is not a defense to a violation of an international human right. Rather, such rights limit state sovereignty. For example, how a nation administers its criminal justice system is clearly within its sovereignty. But no one seriously disputes the fact that states must obey certain limits, such as not summarily executing arrestees. By the same token, nations may choose how to use their natural resources. But they cannot use them in a way that violates the basic human rights to subsistence and survival.

The recognition that a minimally adequate environment is a fundamental human right also refutes *Beanal's* suggestion that international law prohibits only transboundary environmental harm. Human rights norms usually apply to abuses that take place within a single country. Thus, it makes no difference whether the harm crosses international boundaries. In any event, when the defendant is a multinational corporation, the harm usually is transboundary, as the challenged actions were typically planned and initiated from outside the country in which the harms occurred.

Beanal is a set-back for those who believe multinational corporations should not be permitted to inflict massive harms in developing nations with impunity. The case, however, is unlikely to be the last word on cultural and environmental rights. In fact, four other ATCA suits involving environmental claims are currently making their way through the courts, in jurisdictions outside the Fifth Circuit. Obviously, we cannot assess the ultimate impact of *Beanal* until those cases are resolved.

8. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 n.6 (5th Cir. 1999) (citing Rio Declaration, *supra* note 7, princ. 2).